IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents,

and

CITY OF RENO,

Real Party in Interest.

Supreme Court Case No.

District Court Case No. CV18-01895

PETITIONERS' APPENDIX
VOLUME XXI

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CHRONOLOGICAL INDEX TO PETITIONERS' APPENDIX

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

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

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

ALPHABETICAL INDEX TO PETITIONERS' APPENDIX

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4/26/2019	City of Reno's Opposition to Distributor Defendants' Joint Motion to Dismiss and All Joinders	VI-VII	PA00710	PA00958
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9/13/2019	City of Reno's Supplemental Briefing in Support of Oppositions to Defendants' Motions to Dismiss	XVIII	PA02424	PA02560
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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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5/15/2018	First Amended Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00051	PA00109
3/4/2019	Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint	III	PA00227	PA00264

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

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that Petitioners' Appendix Volume XXI 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 XXI 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 XXI 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

4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE BARRY L. BRESLOW

CITY OF RENO,

Plaintiff,

vs. Case No. CV18-01895

PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC., dba THE PURDUE FREDERICK COMPANY, INC.; PURDUE PHARMACEUTICALS, LP; TEVA PHARMACEUTICALS USA, INC.; MCKESSON CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6, INC.; CARDINAL HEALTH TECHNOLOGIES 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

Department No. 8

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

Defendants.

---/

TRANSCRIPT OF PROCEEDINGS

Motions

January 8, 2020

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RENO, NEVADA, TUESDAY, AUGUST 27, 2019, 10:15 A. M.

THE COURT: Okay. We're back in session in the case of City of Reno versus Purdue Pharmaceuticals, et al.

We'll proceed in just a moment with plaintiffs' argument in opposition to the motion of distributors to dismiss.

First, though, I'd like to know, is there anybody in court today who was not here yesterday on behalf of any of the named parties?

All right. Seeing none, good morning, Mr. Eglet. You may proceed.

MR. EGLET: Good morning, Your Honor.

Thank you.

Your Honor, the distributors' joint motion to dismiss shares many of the arguments raised by the manufacturers. Where the arguments overlap, I will again try my best and focus on arguments that are unique to the distributors' motion. There is going to be some overlap, naturally, though.

THE COURT: Sure.

MR. EGLET: But, first, Your Honor, I would like to address the arguments in distributors' reply that focus on clerical errors in the opposition.

Yes, there are references in the opposition to

distributors' creation of marketing of opiates, which are errors. There are also numerous correct references to distributors' role in the creation of opiates through the opiate epidemic, through their distribution practices, in which they filed suspiciously large orders without ever reporting them as suspicious, as they were required to do.

Whether an order is suspicious is left to the distributors to determine, based upon policies and procedures they are supposed to have in place to detect suspicious orders.

Federal law generally provides that orders are suspicious when they are of, one, an unusual size; two, an unusual frequency; or, three, they deviate from a normal pattern.

But the statute has no more specifics than that, and it's the distributors' responsibility to have procedures in place to detect, stop shipment, report it to the DEA, and investigate the suspicious orders before any more opiates are shipped to that particular pharmacy, including the suspicious orders.

Distributors, all of them, historically, have constantly failed to follow these required industry standards and, in turn, caused harm to the City as alleged in the Complaint.

The documents that we provided to the Court in September by way of supplement demonstrate that distributors were aware of the dangers of opiates, knew that they were flooding communities with opiates, and knew that opiates were being diverted. Rather than do anything to stop diversion or help the communities, they accepted this reality and, in fact, internalized diversion as part of their business model. They knew this diversion was going on, but they're making so much profits from it they just turned a blind eye to it, and allowed it to continue.

They flooded communities with opiates regardless of the human cost, the cost of which distributors were aware. And without even conducting discovery, we have learned from across the country that distributors were not innocent companies simply filling orders, as they allege here.

In West Virginia, a single pharmacy in a town of 392 people received nine million opiates in a period of two years, opiates distributed by AmerisourceBergen, Cardinal Health, and McKesson, the three distributors that distribute 90 percent of the opiates across the country. This led the DEA -- this led to the DEA investigation and fines referenced in Reno's Complaint.

Similarly, a small Louisiana county received 113 prescriptions for every 100 people.

Nye County gets 135 prescriptions for every 100 people in Nevada.

And in Lincoln County, a population of 4,200 people here in Nevada, over just a several-year period, they shipped two million opiates into that town. There's one pharmacy in that county, one pharmacy, that -- Lincoln County is out in the middle of nowhere, Your Honor. It's a two-and-a-half-hour drive from Las Vegas. There is no way that town's -- that county's population could absorb -- even if every man, woman, and child was prescribed opiates -- could absorb that level of opiates. So we know that diversion is occurring there.

In Reno, in an eight-year period, 215,793,000 pills were shipped to Reno pharmacies in that period; 27.5 million pills to a single pharmacy at Long's Drug Store in a six-year period; and 21.7 million pills to a single Walgreen's during the eight-year period.

And remember, Judge, we didn't have the access to the ARCOS data telling us about these specific numbers when the Reno Complaint was filed. We now have the ARCOS data. We're now disseminating those -- or analyzing those and determining how much opiates were shipped by each of these distributors, what the pills were, what the dosage of the pills were, what the frequency was. Now in discovery we will be able to look

and see which were and were not suspicious orders that should have been blocked, investigated, reported to the DEA, and all further shipments should have been brought to the pharmacy until that investigation was complete, and it was cleared.

Distributors know the allegations against them, as they are clearly stated in the Complaint. Errors in the opposition do not negate all allegations in the Complaint, or the arguments in Reno's opposition directly pointing to distributors' wrongful conduct.

Additionally, since the filing of these briefs, we have learned the distributors did have a part in the marketing of opiates by and through the trade associations, in which the distributors and manufacturers are all members, and they worked jointly through those trade associations to develop plans to increase opiate use through misrepresentations regarding safety and to find ways around suspicious order monitoring.

THE COURT: Let me stop you there. And I'm trying to remember, because I've reviewed the Complaint here a few different times, gone through every page, paragraph, and sentence. But I'm trying to remember if the allegation in the Amended Complaint identifies that the distributors worked with or collaborated with manufacturers on marketing. Because I'm not remembering that.

MR. EGLET: Can we get back to you with that answer, Your Honor?

THE COURT: Sure.

MR. EGLET: Okay. So the standard of review for a motion to dismiss under NRC 12 (b) (5), which the Court is certainly aware of, is rigorous, and requires Your Honor to determine whether the facts alleged in the Complaint, not argued in the opposition, when taken as true, are sufficient to set forth a claim at which relief can be granted.

Reno has met that standard, and any errors in copy-and-pasting do not negate the facts set forth in the Complaint itself.

Reno's cause of action for negligent misrepresentation is sufficiently alleged to defendants. The distributors' legal arguments are very similar to those raised by manufacturers, but distributors attempted to distinguish themselves from the manufacturers by claiming they are simply innocent middlemen.

Reno alleged that distributors intentionally ignored the law, paid fines because they violated the law, and continued to unlawfully fill suspicious orders anyway. They just made it part of their business plan. Pay these DEA fines, and keep on doing business as usual. And that's what the discovery in the MDL has discovered across the country --

not specific yet to Nevada, because we have not yet started discovery on these issues yet -- but across the country. And there's no indication that anything was any different than Nevada that was being done around the rest of the country with these companies.

So Reno's negligent misrepresentation claims can be based on misrepresentations made to third parties, as I discussed yesterday.

And Reno's claim can also be based on the distributors' concealment of facts from the third party, which resulted in Reno not having notice of the distributors' potential liability and possible legal claims.

Now, distributors argue that they can't be liable to the City on negligent misrepresentation for a failure to report suspicious orders. But that failure, though, resulted in damage to the City, and was an admission, or, more accurately, numerous omissions of facts material to business transactions. Those transactions were done in the City of Reno, and directly impacted Reno.

Reno alleged that distributors' wrongful concealment of the suspicious orders they continued to fill in Reno denied the City of the ability to obtain vital information underlying its claims.

Every time the distributors filled a suspicious order

in Reno, they were involved in a business transaction, and every single one of those suspicious orders had a direct impact on Reno and its residents. Each of the suspicious orders filled in Reno was a business transaction from which distributors benefited while knowingly withholding important information from the City.

On reply, defendants argue that, under the Learned Intermediary Doctrine, the duty to warn of risk associated with prescription drugs runs from the manufacturer to the prescribing physician.

This is an inaccurate statement of Nevada law. The Court, in Clash v. Walgreen's, referenced cases in which the Learned Intermediary Doctrine was applied to a drug manufacturer, but it does not adopt the doctrine for that purpose. Instead, the Court adopts a similar rationale in the context of pharmacists or customer tort litigation because, between the doctor and the pharmacists, the Court reasoned the doctor is the best to warn the customer of a given medication risks.

A pharmacist generally cannot second-guess a prescribing doctor's judgment. The Court's adoption of the Learned Intermediary Doctrine was narrowly tailored to insulate pharmacists from liability in failure-to-warn cases.

This isn't a failure-to-warn case anyway, Judge.

There's no failure-to-warn-claim in the Complaint. These allegations in the Complaint are sufficient to satisfy the pleading standards on Reno's negligent misrepresentation claim against the distributors.

Regarding the cause of action for statutory public nuisance, distributors made the same arguments that manufacturers made regarding the nuisance statutes. Just as with the City, a city statutory public nuisance cause of action against the manufacturers, the statute implies there's a civil right of -- or public nuisance arising out of the opiate epidemic caused by the distributors.

The City is seeking to recover damages related to the abatement of the public nuisance, which are damages explicitly recoverable under the statute. Distributors also argue that the City cannot recover economic loss damages on any of the claims asserted in the Complaint, but, as discussed in response to manufacturers' motion, the Economic Loss Doctrine does not apply to bar the City from recovering damages, the damages it seeks here.

In their reply, distributors argue that the Complaint alleges a violation of NRS 202.450, (2), (3). But the Complaint does not contain such a specific allegation.

Paragraph 179 of the Complaint includes the allegation that defendants violated NRS 202. In Reno's

opposition, it cites to distributors' violation of NRS 202.450, (3), not (2), which provides in Subsection (a) that "Every act unlawfully done and every omission to perform a duty, which act or omission annoys injures or endangers the safety, health, comfort or repose of any considerable number of persons is a public nuisance."

This section does not only apply to illicit drugs, because it expressly provides that every omission to perform a duty, which injures the health of a considerable number of people, is a nuisance.

Moreover, there is no requirement under NRS 202.450 that Reno plead a nuisance occurred at a particular location.

NRS 202.450, (2), does state that -- quote -- "Every place wherein a controlled substance is unlawfully sold is a public nuisance." But Reno has not asserted allegations under that portion of the statute. There is no location requirement under NRS 202.450, (3), (a), which is the section cited by Reno in its opposition, and the section Reno relies upon in its Complaint.

These references by distributors to other sections within the statute are misleading to the Court, and are not responsive to the opposition. There certainly can be no concession where Reno did not make the allegations about which distributors argue.

Distributors include a brief argument that they must be in control of the mechanism of the nuisance in order to be found to have created the nuisance.

Distributors claim, on reply, that the purported control element is Black Letter nuisance law, but yet it is explicitly rejected in the Restatement of Torts, and has not been imposed by Nevada law.

Nevada statutes and cases mirror the Restatement, and, thus, Comment E to Section 834 of the Restatement provides essential guidance here.

The comment states that, "A person may be liable for a nuisance even if the activity has ceased, and the person is no longer in a position to abate the condition and stop the harm. The critical question is whether the defendant created or assisted in the creation of the nuisance."

Section 834 of the Restatement clearly states that a defendant may be liable for a nuisance caused by an activity not only when he carries on the activity, but also when he participates to a substantial extent in carrying it on.

There can be no question that distributors' pattern and practice of filling increasingly suspicious orders of opiates, without ever reporting those orders directly or stopping those orders or investigating those suspicious orders, directly led to the creation of a nuisance that is

ongoing even today.

The distribution is the activity that caused the nuisance because, without the distribution, the opiates would not be available for prescription, sale, use, or diversion into the illicit market.

Reno residents addicted to opiates are the result of the nuisance, not the cause. The cause is, in part, distributors' wrongdoing and flagrant violation of its duties to recognize and halt suspicious orders of opiates, resulting in a glut of opiates in every county and city in Nevada, including Reno, which inevitably results in diversion into the illicit market.

Moreover, the cases cited by distributors in support of the alleged Horn Book law requiring control for a nuisance claim are factually distinguishable and from a variety of jurisdictions, none of which are located in Nevada, or even the Ninth Circuit.

For example, Ashley County, Arkansas versus Pfizer addressed the County's allegation of public nuisance stemming from the methamphetamine crisis. Pfizer distributed pseudoephedrine, which was being chemically altered by individuals to turn it into an illicit substance. Pfizer did not distribute meth. It distributed one ingredient that was then manipulated to become something else.

This is entirely different from the opiate epidemic where the product distributors are pouring into our communities is on its own a dangerous drug that requires no manipulation to become addictive.

The case that appears to be the basis for distributors' claims that control is a necessary element of nuisance is the Lead Industry case out of Rhode Island.

The case involved allegations against paint manufacturers, some of which going back to the use of lead paint in homes, built long before the lawsuit was ever filed. In fact, the paint manufacturers had stopped utilizing lead in their products by the time the Complaint was filed.

Distributors have not stopped distributing opiates. They continue to send shipments of opiates into communities this day, including shipments that are suspicious orders. And the nuisance continues.

Yesterday, Your Honor, when discussing control in public nuisance, you asked distributors' counsel when the harm occurs. Is it when a pill is consumed, prescribed, sold, distributed, made, or at some other time?

I think this question best illustrates the problem with the strict control definition like distributors insist must apply.

Here, Your Honor, the harm occurs at several

levels: marketing, leading to prescriptions, leading to distribution, with suspicious orders, leading to use. You don't get to the harm without the distributors' actions.

They can't claim innocence simply because the opiates are not -- are no longer in their trucks or storage facilities. They aren't UPS, delivering packages. They have certain duties, they have certain industry standards under this closed system they have to abide by. And they can't utilize the three-monkey defense of see no evil, hear no evil, speak no evil, which is what their defense really is. "We're just the middleman. We don't know anything. We don't know what's going on here."

They do, too. They know when these orders are suspicious. They choose to ignore them because they're making so much money. That's what I mean by they internalize diversion into their entire business plan, across the country, including Nevada.

Distributors' conduct substantially interfered with the public health, safety, making distributors liable for creation of a common law public nuisance.

A public nuisance is an interference with a public right. The Restatement defines "public right" as "an interference with public health." By repeatedly filling suspicious opiate orders without reporting those orders,

distributors significantly interfered with the public's health in Reno.

Common law nuisance claims are not limited to interference with property rights. And Reno has adequately pled the elements of a nuisance -- of a public nuisance as it is defined in the Restatement, and is recognized by Nevada laws.

Section 821 (b) of the Restatement specifically states that, "A public nuisance may exist where there is a significant interference with the public health."

Comment E to Section 821 (b) of the Restatement provides that, "It is not necessary for an entire community to be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it."

Distributors filled suspicious orders in Reno, knowing that they would flood the community. People in the community exercising their public right came into contact with opiates that should have never been provided.

As I said yesterday, many became addicted, and many died, in the thousands and thousands, as a result. And as I previously stated, it is not just the individuals who are addicted who suffer from the opiate epidemic. It is everyone around them, the entire city.

Distributors argue that a public right might be at

stake if this was a contagious disease, preventing members of the public going about their business. Individuals rely upon the medical community to provide adequate care in medication. They do not expect to be subjected to the greed of pharmaceutical distributors who would rather put the public at risk than report suspiciously large drug orders and block those orders.

So the individual gets prescription opiates, becomes addicted to opiates. Maybe the doctor tries to wean the individual off the opiates. But it's not so easy, so simple, Your Honor.

Drug-seeking behavior begins, criminal behavior begins. Overdose and death inevitably follow in many cases. And all of those things impact the community. They impact the City of Reno. This is a public nuisance impacting the public health, and causing harm to Reno.

Reno is not proposing an unprecedented expansion of nuisance law. Distributors argue, on reply, that Reno is seeking to stretch public nuisance law to a breaking point.

The application of public nuisance law that the opiate epidemic is not going to destroy the area of public nuisance, their argument, in part, was based on their understanding that public nuisance claims are not appropriate to handle product liability cases.

But this is not a product liability case, Your Honor. This is not a failure-to-warn case. This is not a defective-labeling case. Reno's allegations relate to the scheme in which distributors intentionally flooded communities with opiates, through failure to report suspicious orders, and to fill them without question.

Distributors argue that the courts that have allowed nuisance claims in the context of opiate cases have gotten it wrong, but failed to identify why.

They point to cases against gun manufacturers and distributors wherein the courts dismissed nuisance claims. But those cases did not involve misleading marketing by manufacturers or the distributors' complete intentional violation of duties by failing to report suspicious orders. As far as I'm aware, there is not a duty to report suspiciously large gun orders.

Last year, in the Oklahoma trial that went forward against Johnson and Johnson for its role in the opioid epidemic, and the only cause of action it pursued was public nuisance. That was it in that case. The law is not stagnant. It changes, and evolves. Nuisance law is not so set in stone that it cannot evolve and adapt to the situation -- the unique situation, as the Court pointed out multiple times yesterday -- that we have here.

This is a case where the distributors caused a large number of people to suffer danger to their health and safety through its failure to abide by its duties. That is a public nuisance under common law, under the Restatement, and under Nevada's statutes.

Now, Reno's remedies recoverable in an action for public nuisance. Under NRS 202.480 (1), "A defendant may be ordered to abate a nuisance, and, thus, abatement damages are appropriately recoverable under Nevada law. Nothing prevents a court from awarding a plaintiff damages to handle abatement."

Additionally, as to the common law, the Restatement specifically contemplates the award of compensatory damages stemming from a nuisance claim. Comment i to Section 821 (b) of the Restatement provides that, "A court may award compensatory damages if it is unreasonable for the defendant to engage in the conduct without paying for the harm done; thus, simply stopping the behavior, or abating the condition by not being -- may not be sufficient under the Restatement, and compensatory damages may be awarded."

Distributors owed a duty to the City of Reno to act reasonably in its business to protect people from foreseeable harm.

In their argument, distributors told this Court that

Reno's allegations against distributors are identical to those against the manufacturers. But this is not true, especially as it relates to the negligence cause of action.

Excuse me, Your Honor.

Reno has alleged two negligence causes of action. One against the manufacturers, and one against the distributors. And in that cause of action, the fifth cause of action, Reno separately alleges distributors' duty and breach of duty.

Throughout their briefing, distributors argue that they cannot possibly owe a duty to the City. But that argument is unsupported. Just as with all persons, entities, and businesses, distributors owe a duty to act reasonably toward others.

The applicable duty of care requires a consideration of the risk of harm created by the conduct in question. Here, the conduct is the unlawful distribution of opiate medication in Reno by filling suspicious orders.

Distributors owed a duty to prevent harm that is a reasonably foreseeable result of their distribution of opiates.

Distributors argue that they don't have a common law duty to report suspicious orders because that obligation is created by federal regulation. But then they argue that they

would have a common law duty to safely store drugs in their possession; but they previously told the Court that their obligation to safely store opiates is created by federal regulation

By distributors' reasoning, some obligations created by federal law create a common law duty, but others do not. So which is it, Judge?

I would submit, Your Honor, that the duty to report suspicious orders is an industry standard which can absolutely be the basis for a common law duty. Reporting suspicious orders is a way to prevent foreseeable harm caused by opiate shipments.

Your Honor asked distributors, "Which orders should have been stopped?" And counsel did not really provide an answer.

The answer is that all suspicious orders need to be stopped and reported. Any order of unusual size, unusual frequency, or a deviation from normal patterns from that customer, a report stops the shipment, investigation is done, and then the shipment may or may not be filled, depending on the outcome of that investigation.

If that investigation reveals that this is a pattern with that pharmacy, then that distributor has an obligation to block all future opiate distribution to that pharmacy.

If a customer has too many suspicious orders, all shipments to that client are stopped, so that a visit can be paid to the client.

They have regional directors in charge, that are supposed to be in charge of this in each region. They're actually supposed to go to these pharmacies and see if there's long lines of people and see if it looks like there's pill mills going on.

When they do the investigation, the pharmacies are supposed to identify for them the reason for the increase. What is it? Is it some new customer? Some new physician in town? If necessary, they have to go to that physician's office and see: Does this look like a pill mill? Are people just lined up, where the doctor is seeing a person every 10, 15 minutes? Or the example like we had here in Reno earlier, where there was a pill mill being run out of a car dealership, for crying out loud, Your Honor.

Distributors owed a duty to the City of Reno to act reasonably in its business to protect people from foreseeable harm.

Here again, distributors point to what they acknowledge they know is a copy-and-paste error as purported support for their argument that they owed no duty to the City. But this argument is disingenuous, Your Honor. It is

absolutely foreseeable that filling suspicious orders of opiates would result in substantial bodily harm to the communities in which the opiates were shipped.

While distributors may not have created opiates, they worked with manufacturers to create an increased market through these trade organizations for opiates, and in doing so, they made the decision not to report suspicious orders, as was their responsibility

The allegations in the Complaint are sufficient to put distributors on notice of the wrongs for which they may be liable on a negligence theory.

It is the duty of distributors to maintain effective controls to prevent and guard against misuses of controlled substances and diversion of those substances.

The City of Reno has properly pled a negligence claim. Counsel for distributors claims that the City's pleadings was based on common law duty and federal law.

Distributors also argue that there was also Nevada law that established a duty -- or distributors also argue that there was no Nevada law that established the duty. This is not correct.

In addition to a common law duty, the distributors have a duty under Nevada law, and it was properly pled in the First Amended Complaint at paragraphs 138 through 148.

Specifically, paragraph 23 cites the Nevada law, the Nevada Administrative Code 453.400, Your Honor. Reno's tort claims are properly alleged against the distributors.

As with the bulk of distributors' motion to dismiss, many of their arguments to dismiss the tort claims are similar to those raised by the manufacturers. Reno's allegations demonstrate that there is proximate causation. Distributors' negligence is the proximate cause of a plaintiff's injury if the cause is part of a natural and continuous sequence, unbroken by any efficient intervening cause, and without which the jury would not -- the injury would not have occurred.

So a defendant's actions need not be the sole cause of the opiate epidemic, but must be one that is so linked and bound to the event succeeding it that all together those events become a continuous whole.

Distributors' actions were a proximate cause of Reno's injuries. They failed to monitor suspicious opiate shipments, and injuries to Reno occurred. Their actions in filling suspicious orders and inactions in failing to report those orders and block those orders led to the increased opiate use in the city, and diversion of opiates into the illicit market.

Even Nathan Hartle, the vice president of Regulatory

Affairs and Compliance, and 30 (b) (c) -- 30 (b) (6) witness for McKesson, the largest distributor in the world of narcotics, testified in the opiate MDL, and acknowledged, under oath, that McKesson, a distributor in the closed system of opiate sales and distribution, is responsible for preventing diversion.

He then testified that McKesson has at least partial responsibility for the societal costs of prescription drug abuse in America.

This is their 30 (b) (6) witness, and their head of Regulatory Affairs that admitted this under oath in his deposition in the MDL, Your Honor.

Your Honor, this deposition is --

THE COURT: I have read his testimony.

MR. EGLET: -- cited on page 6 in Reno's supplement brief filed in September.

THE COURT: I saw that.

MR. EGLET: There is no single cause of the opiate epidemic. The distribution of opiates is one part of a series of events so linked and bound that they become a continuous whole in the form of the epidemic.

On reply, distributors argue that the City's claims are akin to those brought against a bartender who over-serves an individual, who later causes injury to a third party.

Here, however, Reno is not seeking to recover damages arising from injuries to an individual. In other words, Reno is not seeking to recover damages that an injured individual would otherwise be able to seek from the defendants.

A person who suffered an overdose may seek damages for their own injuries, but would not be able to pursue damages arising out of increased law enforcement, arising out of increased law enforcement costs, child services costs, and other societal or government cost arising out of the opioid epidemic. This is a not a dram shop case. This is a case against distributors to recover damages directly suffered by Reno.

An argument unique to distributors' motion is that the Derivative Injury Rule prevents the City's recovery.

Your Honor asked yesterday about the Oklahoma Court's decision and the monetary award in that case.

The judge in Oklahoma awarded one year of abatement damage because that is all the Attorney General in Oklahoma presented in their case.

THE COURT: Then he made a mistake, too, in his calculation, didn't he?

MR. EGLET: He did.

THE COURT: That was adjusted later.

MR. EGLET: He did. He made a mistake, which was

adjusted. But they only presented evidence of one year's abatement damage. They didn't have an expert come in and extrapolate what those damages would be over the 15, 20, 25 years it's going to take to abate the problem there. So the AG did not extrapolate those damages.

And the Court made clear in his order that that was the reason he was only ordering one year's worth of abatement damages: because they didn't present the evidence of extrapolation.

And I wanted to make sure this is clear to Your Honor, because I don't want there to be a misunderstanding that the judge granted one year because of any limit on damages imposed by nuisance laws. That was the AG's mistake, quite candidly, on not presenting those extrapolation damages.

Here again, distributors asked the Court to apply a rule, the Derivative Injury Rule, that has never been applied in Nevada. The cases relied upon by distributors are all from the federal courts, and none rely on the application of Nevada's laws regarding causation.

In fact, even jurisdictions applying the Derivative Injury Rule do not require direct injury to find proximate cause.

As discussed with respect to proximate causation,

Nevada does not require a direct injury, but, rather, a reasonably close connection between the defendants' conduct and the injury.

Distributors' conduct led to an increase in opiate use throughout the city, which led to an increase in the City's spending to alleviate the damage caused by opiate use, and to prevent further damage.

There is a reasonably close connection between distributors' conduct and the City's alleged damages to support the determination that the distributors' actions and inactions were a cause of the City's injuries.

Distributors failed to point -- failed to point to any case with authoritative value in Nevada that would suggest our courts apply the Derivative Injury Rule, or that such rule would be grounds for dismissal here.

The Free Public Services Doctrine is another name for the Municipal Cost Recovery Rule. And it does not bar the City's claims against distributors here.

The Free Public Services Doctrine, as I said, is just another name for the --

THE COURT: We talked about this with respect to the manufacturers, so --

MR. EGLET: I do. I want to go into a little bit of detail here because the distributors cite to this Steelman

case, and I want to talk about that to the Court.

Nevada has not adopted the Free Public Services Doctrine, under any name. But, on reply, distributors argue that the Steelman case, in which Nevada's Supreme Court adopted the Firefighter Rule, is not based upon the theory of assumption of the risk, but, rather, on policy-based cost-spreading reasons for the Firefighters Rule.

This argument ignores the plain language in Steelman, in which the Court stated -- quote -- "Upon the facts of this case, the Firemen's Rule is applicable to bar appellant's cause of action. Steelman, fully aware of the hazard created by the defendant's negligence in the performance -- and in the performance of his duty, confronted the risk."

That's at page 427 in the opinion.

THE COURT: That's not what we have here.

MR. EGLET: It's not. Exactly. That's why I want to go into this. I want the Court to be -- understand this clearly, the Steelman case.

The Court went on to state that, "A public safety officer in Steelman's position cannot base a tort claim upon damage caused by the very risk that he is paid to encounter." Again on page 427.

And again the Court stated that public safety officers, in accepting the salaries or benefits of the job --

quote -- "assume all normal risks inherent in the employment as a matter of law, and may not recover from one who negligently creates such a risk." Page 427 through 428.

And while the Court mentioned policy considerations, its opinion was clearly based on the theory of assumption of the risk.

Distributors also ask Your Honor to look at the cases on which Steelman relied, claiming that they would provide support for the adoption of the Free Public Services Doctrine.

First, the Giorgi versus Pacific Gas and Electric Company case, out of California Appellate Court, considered whether a firefighter could recover for injuries suffered in a fire from the defendant whose alleged negligence caused the fire.

The California court stated that the rule is old, and many jurisdictions base it on assumption of the risk, which would not be applicable in California because California no longer recognized assumption of the risk.

So the Court looked to other possible justifications of the Firefighter Rule, including the spreading of the risk, recognizing that firefighters' salaries are paid by the taxpayers, and, thus, the risk of their injury has been spread among the public.

Ultimately, the Court stated that, "A paid fireman has no cause of action against one whose passive negligence caused the fire in question, caused the fire in which he was injured."

This sentence is the only portion of the Giorgi opinion referenced in Steelman.

Walters v. Sloane is another California case cited in Steelman, in the Steelman court, in support of the statement that, a public safety officer cannot base a tort claim upon damage caused by the risk he is paid to encounter.

The Walters court stated that the rule is based -- quote -- "on a principle as fundamental to our law today as it was centuries ago. One who has acknowledged and voluntarily confronted a hazard cannot recover for injuries sustained thereby." And that's on page 612 of the Walters opinion.

And the Court went on to state on that same page that -- quote -- "The principle denying recovery to those voluntarily undertaking the hazard causing injury is fundamental to a number of doctrines, including nullification of duty of care, satisfaction of the duty to warn because the hazard is known, contributory negligence, and assumption of the risk; as well as, in the Firemen's Rule, the rule finds its clearest application in situations like that before us.

A person who, fully aware of the hazard created by the defendant's negligence, voluntarily confronts the risk for compensation."

The language quoted by distributors on page 6 of their reply relates to the California Court's discussion that abolition of the rule would burden courts with the litigation from public safety officers, who receive benefits, including disability compensation, for injuries incurred on the job. So permitting litigation to move forward would amount to a double recovery by the officer. That was the basis for that rule. Steelman -- in California. Steelman is clear.

Nevada adopted the Firefighters Rule on the theory of assumption of the risk. Reno did not assume the risk. Reno did not ask to have opiates flooding its community, knowing the dangers it would cause. It has incurred increased costs in many departments because of distributors' actions.

The adoption of the Firefighters Rule in Nevada does not suggest that Nevada's court will also adopt the Free Public Services Doctrine. The Free Public Services Doctrine has not previously been utilized in Nevada, and it should not be utilized now on grounds for dismissal of Reno's Complaint.

Reno's claims are not barred by the Statewide Concern Doctrine. What distributors argue is, in essence, a lack of standing. This argument raised by distributors is the same

as manufacturers' standing argument based upon Dillon's Rule. And as with the manufacturers, Dillon's Rule should not be utilized as a basis for dismissing Reno's Complaint against the distributors.

THE COURT: Let me hit the pause button.

You know, movants try to reset the needle here, differentiating between standing and legal authority to bring a claim. It's nuanced. Well, it's different.

The plaintiff asked the Court to look at it with a certain lens; the defense asked the Court to look at it with another lens.

MR. EGLET: We think our lens is the clearer lens.

THE COURT: Which one?

MR. EGLET: We think our lens is the clearer lens, Your Honor.

THE COURT: That's the lens I'm supposed to look at.

All right. You know, that's good advocacy. When I hear one side: Yeah, that's right. I agree with that. Then I hear the other side: Better still.

But, you know, in the Court's estimation, there's a difference. There's a difference between standing and authority.

But go ahead.

MR. EGLET: We believe the City has both here, Your

Honor, both the standing and the authority under the law.

THE COURT: Okay. Fair enough.

MR. EGLET: And so a strict application of Dillon's Rule is outdated, which was recognized by Nevada's Legislature when it updated the language of NRS 268.001 to specifically create a presumption in favor of a local government's power to handle issues of local concern.

THE COURT: Well, you know, Mayor Schieve can decide on behalf of the City, in collaboration with counsel, to bring a lawsuit on behalf of the City of Reno. They've done that here.

But under the plaintiffs' view, if you're successful ultimately in this case, and the relief requested is awarded, do we draw a line around the city limits for Reno? And then, in the State action, if the State is successful, it doesn't recover any of the same types of damages, abatement damages?

MR. EGLET: Absolutely. And the State's claims are not seeking the damages that Reno's claims are asking for, or Washoe County, or Sparks, or Las Vegas, or Clark County, or any of the other counties.

THE COURT: They are seeking damages --

MR. EGLET: -- for their specific --

THE COURT: -- their agencies.

MR. EGLET: -- their agencies, et cetera, and their

abatement damages for that particular area.

THE COURT: Okay. Going back to Oklahoma for a second, the public nuisance statute that the judge relied on there, wasn't that different than Nevada's law? Didn't they have a specific provision that allowed this type of a lawsuit? Or am I misremembering that?

MR. EGLET: I don't know, Judge. I haven't looked at the nuisance statute in Oklahoma, so I can't answer that question.

THE COURT: All right. Fair enough.

Let me ask Mr. Adams.

Did you have a chance -- sorry to interrupt -- to see if the allegation is embedded in the Amended Complaint that --

MR. ADAMS: I have, Your Honor.

THE COURT: -- that the distributors collaborated or worked with, through marketing or great organization efforts, with respect to the sales of the opioids at issue here?

MR. ADAMS: Your Honor, I just gave it to Mr. Eglet.

MR. EGLET: So let me just answer your question now, Your Honor, with the obvious assistance of Mr. Adams.

The Complaint does not make any allegations that the distributors marketed opioids with the manufacturers. The Complaint alleges that manufacturers engaged in a marketing

scheme, through direct marketing, third-party marketing, key opinion leaders, front groups, and continuing medical education.

At the time that we filed the Complaint, we did not know that there were marketing agreements, and so at the time that we filed the First Amended Complaint we did not know about the associations that both the manufacturers and distributors are members of.

THE COURT: You think you've learned that since then?

MR. EGLET: We have, Your Honor. We have. From information we've gathered in the depositions, we've reviewed in the MDL, as well as some of the documents that we've been able to obtain through the MDL. We have not been able to obtain all of them, but we have been able to obtain some.

THE COURT: Okay.

MR. EGLET: So, also, we have recently received marketing agreements between distributors and some of the manufacturers, where they contract with each other to market opiates. We didn't have that when we filed the First Amended Complaint. We now have those documents, Judge, that establish that.

THE COURT: Okay.

MR. ADAMS: I'm looking at one right now, but I don't want Mr. Polsenberg to explode in the courtroom.

MR. POLSENBERG: I'm at the edge of my seat.

MR. EGLET: Having said that, we are not going to read it.

MR. POLSENBERG: Okay.

THE COURT: Well, I mean, when we hear again shortly from distributors, I guess, for the purposes of the motion to dismiss, I'd like to hear their take on whether if there is some evidence, and if the Complaint could be amended to allege that, whether that would matter.

So please put that on the list of things to address.

MR. EGLET: So, the damages -- as we just talked about, the damages suffered by Reno are unique to Reno. No other government entity, municipality, or county can be responsible for the costs incurred by Reno in addressing the harms caused by the distributors in creating the opiate epidemic.

Without distributors' actions and inactions, Reno would not have been inundated with dangerous opiates, suspiciously large orders would not have been filled. And but distributors chose not to report those orders or block those orders, and they should have stopped them. As a result, Reno saw an increase in opiate addiction, opiate deaths, and children born addicted to opiates. It saw a rise in the cost of law enforcement, healthcare services, family

services, and more. This epidemic is a matter of local concern to the City of Reno.

Distributors also cite to the State's May, 2018 Complaint against Purdue as evidence that this is a matter of statewide concern; but that case, as I pointed out yesterday, was dismissed on May 30th of last year. The State re-filed, on behalf of the State, a new case in early June, asserting claims for damages that are unique to the State, including those associated with the violation of Nevada's Deceptive Trade Practices Act, Rico violations, and Medicaid fraud. None of those claims are against the City or any of the cities and counties that we've sued in this state.

Reno has -- so they're different claims, seeking different damages on behalf of the State and the counties and the cities. Reno has the standing and the power to bring this lawsuit, and it should not be dismissed based on the application of the Statewide Concern Doctrine.

The Economic Loss Doctrine should not bar the City's causes of action. This was addressed in response to manufacturers' motion to dismiss, as well, but it bears restating that this case does not involve a contract between the distributors and the City. There are no expectancy damages that Reno may have in a contractual dispute.

The difference between expectancy damages and the

damages to make a victim of tort whole is the focus of the Economic Loss Doctrine. Such a distinction makes sense in a contractual setting, but not here.

Reno has suffered damages, some arising out of injuries to individuals, others arise out of the increased need for law enforcement and other systems in the criminal justice departments to address opiate use. These damages are not barred by the Economic Loss Doctrine.

It is necessary to address an argument raised on page 11 of distributors' reply, in which they claim that the Terracon court expressly rejected all exceptions to the Economic Loss Doctrine that were argued in Reno's opposition. But this argument is maybe partially accurate, or only partially accurate.

The Terracon discussion specifically addresses the Economic Loss Doctrine in the context of claims against design professionals.

The Court acknowledged that jurisdictions recognize an exception to the doctrine for claims of negligent misrepresentation, which can only result in financial damage. But the Court goes on to consider the particular type of claim at issue in the underlying case, which was a negligence claim against a design professional, and held, "After contemplating the competing policy reasons set forth above,

we conclude that the Economic Loss Doctrine should apply to bar the professional negligence claims at issue here, specific to that issue of professional negligence claims."

The Court continued in the context of engineers and architects. The bar created by the Economic Loss Doctrine applies to commercial activity for which contract law is better suited to resolve professional negligence claims.

That's not what we have here, Judge. This isn't a professional negligence claim against a design engineer.

And when citing to courts that have reached the same conclusion, the Court pointed to 12 cases, all -- all -- of which held that the Economic Loss Doctrine barred tort claims against design professionals, nothing else.

Here again, as seen in other portions of distributors' reply, they take a portion of language from an opinion to try to convince the Court that it supports their argument, when, in reality, the opinion is easily distinguishable from the facts of this case, or simply does not stand for the premise distributors claim.

Finally, Your Honor, Reno's unjust enrichment claim is adequately stated against distributors. As with the manufacturers, distributors were unjustly enriched by their failure to report suspicious orders and block those orders of opiates, as they were required to do. Distributors were not

burdened with paying their externalities, the cost of the harms they caused to the City when they filled suspicious orders, without any regard to the human cost of their actions. Instead, Reno has paid the societal and governmental costs associated with increased opiate use here in Reno.

Distributors claim that the White v. Smith and Wesson case, out of the Northern District of Ohio, has been overruled by the Ohio Supreme Court. But this is not true. This is not the case.

The Ohio Supreme Court case cited by distributors of Johnson v. Microsoft dealt specifically with an indirect purchaser's allegations in an anti-trust suit.

In that case, it stated that an indirect purchaser cannot assert a common law claim without establishing that a benefit had been conferred upon the defendant by the purchaser. The context of the anti-trust litigation and economic transaction was determined to be necessary. The Court did not even cite to the White v. Smith and Wesson case in that opinion.

The Eleventh Circuit disagreed with the White opinion, but the Eleventh Circuit cannot actually overrule that opinion, because Ohio is in the Sixth Circuit, which has never overruled the White case on any grounds.

Here again, the distributors claim that they do not know what externalities, because the opposition relates to marketing of opiates, rather than distributing. But they know exactly what the costs are.

Because of distributors' conduct, Reno has incurred substantial agency costs arising out of the opiate epidemic. Distributors should have paid those costs, or at least some portion, but they have not. They have intentionally violated their duties to report suspicious orders, and have benefited in the form of profits, without incurring any costs associated with the damages they caused to the City of Reno, the externalities.

Distributors appreciated that benefit conferred upon them in the form of profits, without legal ramifications. They unjustly profited from the harms caused to Reno by their unlawful business practices.

Paragraph 290 of Reno's Complaint alleges that Reno conferred a benefit upon defendants by paying for their externalities.

Paragraph 291 alleges that defendants are aware of the benefit.

Paragraph 292 alleges that the defendants made substantial profits.

And 293 alleges that they continue to receive

considerable profits from fueling the opiate epidemic.

And paragraph 295 of the Complaint alleges that it would be inequitable to allow defendants to retain the benefit or financial advantage.

And isn't so much of this going to factual determinations, Your Honor, anyway? They would have lost money. The point is they would have lost money by stopping the suspicious orders that they were required under their duty to do. But they didn't report, they didn't block the orders, and Reno paid the price.

Under a notice pleading standard, Reno sufficiently alleged a cause of action for unjust enrichment against the distributors.

In the event Your Honor believes that any of Reno's causes of action are insufficiently alleged or pled, Reno respectfully requests leave to file an Amended Complaint, which is appropriate in lieu of dismissal here.

Distributors made a choice to pursue their own greed rather than follow the rule of law, or even basic tenets of reasonable behavior, in the face of foreseeable harms, like overdose, addiction, and death.

There can be no doubt that distributors are not blameless middlemen, as they claim. They played a substantial role in the creation and continuation of the

opiate epidemic here in Reno.

Your Honor, the City of Reno respectfully requests you deny distributors' motion to dismiss in its entirety.

Thank you, Your Honor.

THE COURT: Thank you.

We're going to take five minutes, and then I'm going to hear from the distributors in reply. Depending upon how long that goes, we will probably move immediately into the third motion the Court is asked to hear.

We will be in recess for exactly five minutes.

MR. EGLET: Your Honor, if we may just address something about the order of the motions.

THE COURT: Sure.

MR. EGLET: Because I know we said we didn't care, but I think there's been some agreements reached by some of the parties on changing the order, so I just want to alert the Court to that now.

THE COURT: Well, who anticipates addressing the Court next? I'm looking at the order that --

MR. EGLET: In the Court's order, it would be -- I'll let them handle it, Judge. But the Court's order would be Mallinckrodt.

MR. CUILLO: Your Honor, Zac Cuillo, for the Allergan defendants.

Allergan is currently the last motion to go. And we agree with Teva to switch that order.

So right now I believe the order would be Mallinckrodt first, and then the Allergan defendants, and then it should be consistent from then on.

THE COURT: Okay. I'll assume that will be the order then.

We'll be in recess until 11:20.

Thank you.

(Recess.)

THE COURT: Thank you.

Please be seated.

We are back on the record.

Who would like to address the Court first?

MS. SALGADO: I would, Your Honor.

THE COURT: Thank you.

Please proceed.

MS. SALGADO: Thank you, Your Honor.

I'll be addressing some of the new points that were made in the City's arguments. Others were ones that I already addressed in my previous arguments. I'll endeavor not to repeat.

THE COURT: Thank you.

MS. SALGADO: The City's argument was largely focused

on allegations that are not in the Complaint. We're here today to talk about the sufficiency of their Complaint, and whether it adequately states causes of action against distributors.

And, plainly, the City realizes that it's not enough what they've actually alleged, and so they've talked instead about a lot of things that are outside of the Complaint, many of which are inaccurate.

And it's not our job here to dispute the many allegations that they've just made. It's our job to look at the factual allegations in the Complaint, and see if they're adequate. And, frankly, they're not.

But just to be clear, what they've alleged outside of their Complaint today is that the numbers alone, without context, say that diversion happened. They do this by giving examples in other parts of the country that are not Nevada. And that should tell you something. That's because they don't have the information to say that what happened here in Reno is sufficient for any cause of action.

And, instead, they --

THE COURT: Let me just make sure I understand that.

What I did hear was some numbers from jurisdictions that were not necessarily Reno, but Nye County and other counties, small counties in Nevada, other places around the

country. And I thought I did hear a few from Walgreen's, maybe CVS, here in Reno.

But I'm understanding from plaintiff that this is just data that has recently become available, and they'd like the Court to, I don't know, consider that, if a Complaint that had those types of allegations at this point were made, those claims would withstand dismissal at this point.

But, of course, that's not what we have here. We have the four corners of the First Amended Complaint.

MS. SALGADO: Right.

THE COURT: But I think they're asking the Court to look to the future.

MS. SALGADO: Sure. And if we're talking about the future, I think, first of all, the City could have amended its Complaint in the many months that this information has been available, and they haven't. So to come here today and say that they want to be able to amend, the Court should reject that.

But, moreover, none of the alleged facts that they claim are actually sufficient and would suffice for any claim that they bring.

They talk about the DEA fines a lot, and that's a misnomer. There are a handful of settlements that they're referring to, in which there was no finding of any violation

of law in the settlement agreements. And as you know, companies settle for a variety of reasons. And the fact that a company made a settlement is not an indication that there was any violation of law, specifically where the agreements state that there was none, or, if anything, very minor. To the extent there were findings, it was very minor stuff related to things outside of this jurisdiction, having nothing to do with Reno or Nevada.

Further, they talk about suspicious orders and the volume, but, again, we're not getting anything specific about what orders were suspicious, what should have been stopped or reported.

To be clear, distributors have very sophisticated suspicious-order-monitoring programs. And those track orders. Like we talked about, we said orders to the DEA. There are entire programs dedicated to identify suspicious orders, pursuant to the regulations that DEA says: unusual size, frequency, pattern. There's no allegation that our programs were not working.

Again, the settlements with DEA did not have findings that relate at all to this, and did not make findings of any unlawful conduct.

THE COURT: Well, again, let me make a comment on that. And I already mentioned preliminarily yesterday that

the supplemental data, supplemental briefing, that caused the -- was in part the cause for the couple-month delay here, didn't necessarily knock the Court's socks off.

On the other hand, at some point, I'm assuming, whether in this jurisdiction or another, whether before a jury, a judge, or in a legal briefing, somebody is going to have to put context to some of the more-curious pieces of data that were submitted, provable for large increases in orders in a very short couple-minute period of time.

So somebody is going to have some explaining to do with respect to those, are they not?

MS. SALGADO: I think that the examples they gave are taken out of context, and I don't think there's any information that would suffice to have a cause of action brought against distributors, which have had sophisticated, state-of-the-art systems to deal with this very issue based on the extensive regulation by DEA throughout this time. Distributors have worked hand in hand with the DEA to make sure that their systems are what the DEA expects, and over the years has improved those systems.

And I don't think there's anything in what they've cited that would cause any doubt for a court to think that there's a cause of action here.

THE COURT: Okay.

MS. SALGADO: I think -- again, today we're here to focus on the Complaint. And I think the City's reliance on all of these things outside the four corners of the Complaint shows how deficient the Complaint truly is.

As to the causes of action that they allege here, they talk about the public nuisance statute. And it's true they allege violation of multiple parts of the statute. And the argument against the one regarding controlled substances knocks out that one. But the other parts of the statutory claims are knocked out for all the reasons that we already covered, including manufacturers' arguments about no private right of action.

And, again, we've talked about the penalty -- excuse me -- the remedies that they seek not being available under the statute, which limits remedies to civil penalties not in excess of $5,000. And you've heard nothing from the City arguing anything to the contrary.

Further, moving on to public nuisance and the common law, the City talked about control. And I'd like to talk about that a little bit more.

Their argument that the Restatement is inconsistent with the control requirement is incorrect. The cases that have recognized this control argument specifically cite the Restatement for the proposition that control is a

requirement.

The City points to other parts of the Restatement that speak to causation, that speak to other elements of public nuisance, but nothing that says control is not a requirement, because that's simply not true.

In particular, they point to Section 834, which is a section that speaks to a private nuisance liability related to land.

It specifically says, "A person is subject to the liability stated in 822" -- by the way, 822 is elements of liability for invasion of interests in private use of land, private nuisance -- "for invasion of another's interest in the use and enjoyment of land caused by an activity, not only one who carries on the activity, but also who participates to a substantial extent in carrying it on." That's the language that plaintiffs cite here to tell you that there's no control requirements, and it's simply composite.

In addition, you did not hear anything from the City trying to explain why the California cases they cite should be persuasive here. As we already discussed yesterday, California specifically cited cases and distinguished those cases because the other cases relied on the Restatement, the ones that we relied on here today. As we've talked about, Nevada is a common law jurisdiction that looks to the

Restatement and common law, and those cases cite the Restatement and common law for finding that control requirement.

Further, there's no legal distinction that the City draws when it tries to distinguish the cases that we cited.

For example, Lead Industries, they say that it's distinguishable because the companies there no longer made the products. But the question, the legal question is whether the defendants had control at the time of the injury. So it's not inconsistent that a defendant that no longer has control is subject to -- excuse me -- the fact that a defendant no longer has control is legally irrelevant to whether they had control at the time of the injury.

Further -- excuse me one moment.

Unless there are any other questions on control, I'll move on to public rights.

THE COURT: I don't have any at this time.

MS. SALGADO: Okay. Thank you, Your Honor.

Again, I'd just like to point out that the City again miscites the Restatement section that talks about whether an interference is unreasonable. That section that talks about significant interference with public right, they say, again, the Restatement says a significant interference with the public right is an interference with a public right -- excuse

me -- public health is a public right. But that again only goes to the second element, and it's a consideration of when you're considering whether interference is unreasonable. And you only get to that after you determine if there's a public right that has been interfered with. So, again, it doesn't speak to the relevant question of whether there's a public right.

Similarly, as to the expansion that the plaintiffs would ask for by seeking the Court to allow these claims to proceed, again, we have cited to you the many cases that have found that it's inconsistent with the development of the common law and public nuisance law to allow a public nuisance claim for the legal distribution of a lawful product. And nothing that the plaintiffs said contradicts that.

The Nevada courts -- no Nevada appellate court has ever allowed this type of claim to go forward. And while the Clark county case and the State case did deny the motions to dismiss, those were without any legal reasoning, frankly. And we think that this Court should do its own legal reasoning.

THE COURT: Well, let me ask you this. So when Judge Gonzalez, on the State of Nevada case, confronted with the same or similar arguments on the expansion -- or request by the defense not to expand public nuisance law to allow claims

like this to go forward, did she have oral argument on the motions?

MS. SALGADO: Yes, Your Honor.

MR. POLSENBERG: She did, Your Honor.

She said, "You may argue for eight and a half minutes."

MS. SALGADO: I'll let Mr. Polsenberg elaborate, if there's anything to add.

But my understanding is, he was given eight and a half minutes to argue, and then there was a ruling from the bench soon thereafter, after the arguments.

MR. POLSENBERG: More accurately, she gave all the defendants -- the manufacturers had already argued about a month before, and she had denied their motion.

So she gave all the motions on that day, the defendants -- pharmaceutical defendants, distributors had to share 10 minutes. And being me, I took eight and a half of them.

MR. EGLET: Manufacturers, there was no -- Judge Gonzalez, generally, in her department, has a 10-minute rule on oral arguments in motions, unless she suspends the rule. She suspended the rule for the manufacturers. I believe I argued for an hour. And I'm not sure how long Mr. Hymanson and others argued for, but it was lengthy. It was the same

basic --

THE COURT: Did she rule from the bench?

MR. EGLET: She ruled from the -- she didn't rule from the bench that day. She waited until we --

Did she rule on the manufacturers that day? I can't remember.

MS. SALGADO: I believe she did.

MR. EGLET: I can't remember if she ruled from the bench that day on the manufacturers, or if she waited until --

MR. ADAMS: Yeah, she did. She ruled from the bench.

MR. EGLET: Then we had the distributors' motion a couple weeks later, and at that time -- and it surprised all of us, because I was cut off, too. I didn't realize she was invoking -- wasn't suspending the rule. And when I -- I didn't even realize it, actually, when it happened to the defendants.

When I got up and started talking, she says, "Your time is up." So she did. But, I mean, that's her rule, and everybody knows about it. I think that I assumed, because she suspended for the manufacturers, it would be suspended for the distributors. But she didn't.

MR. POLSENBERG: She had told us the week before.

You may not have heard.

MR. EGLET: I didn't realize that.

THE COURT: That the rule would not be suspended?

MR. POLSENBERG: That the 10-minute rule was in place.

Now, I thought I had 10 minutes. But then I took most of the time the other defendants had for their motions.

THE COURT: Now, in ruling from the bench, did she direct one or more parties to prepare the order?

MR. EGLET: She directed us to prepare the order; right?

MR. ADAMS: We have a pretty good working relationship. I think Mr. Hymanson did the draft, and then I looked at it. Mr. Hymanson completed it with regard to the manufacturers.

MR. POLSENBERG: The last draft I saw --

THE COURT: Hold on.

MR. ADAMS: We have a good relationship with Rosa, as well. We did the same thing that way.

MR. POLSENBERG: I think the last draft I saw simply said this cause of action, motion denied; this cause of action, motion denied; punitive damages, motion granted. And then the Rocker discovery.

MR. ADAMS: Rocker discovery.

MR. POLSENBERG: I wasn't at the manufacturers -- the reason we split it up is because I was unavailable November 5th, and the manufacturers went ahead with their motion to dismiss, and the other motion to dismiss got moved to December 2nd.

THE COURT: I think I've seen, now that I'm digging in deep here, I think I have seen one or more of the orders that she rendered denying the material motion. Not the punitive damage. That one she granted. But the form of the order was submitted by Mr. Hymanson, which I thought was unusual, because if the motion is being denied you would suspect the plaintiff.

In any event, okay. So her argument was more limited, and the analysis -- the order of her decision was fairly straightforward.

All right. Thank you for explaining that.

MS. SALGADO: And the point on this, simply, Your Honor, with all due respect for the other judges, is their order simply didn't contain legal analysis.

THE COURT: Did her questions impart to the speakers her thinking in that regard? Can you give the Court any impression of how she approached this?

MR. EGLET: She didn't --

THE COURT: Well, there's silence here. I think that

speaks volumes.

MR. EGLET: She didn't -- by the way, I just want to -- she didn't grant the punitive damages -- she didn't dismiss the punitive damages outright. She just said you can't bring a separate cause of action -- a standalone cause of action.

THE COURT: I understand. We can talk about that now or later. I mean, Nevada law seems to be pretty clear on that issue. They're not usually standalone claims for relief. Whether that's a form of remedy sought, that's a different animal. We'll get there, possibly.

MR. POLSENBERG: To answer your question, I wasn't at the November 5th hearing, but I read the transcript. And there were a few questions, I think, really having to do with the Rico claim.

And on the December 2nd hearing, on my motion to dismiss, I don't think there were any questions.

MR. EGLET: I got to ask a couple questions.

THE COURT. Thank you. Appreciate that.

MR. POLSENBERG: I don't really remember.

THE COURT: As we all understand, you know, one of the realities of a case like this is, there are 82 District Court judges in Nevada. Most of us hear civil matters, as well as criminal justice or family. And we each have to

decide for ourselves: Do we pay attention to what our colleagues do? Hopefully. And then we decide for ourselves, you know, what import, if any, to give to how they approached this. So that's not determinative. It's just more just for the Court's edification.

So with that, please proceed.

MS. SALGADO: Yes, Your Honor.

And to that point, the point I am simply making was, unfortunately, we do not have legal analysis from those courts in their denial of the motion to dismiss. And we would --

THE COURT: Do you have that from the judge in Oklahoma?

MS. SALGADO: The judge in Oklahoma, that was just a manufacturer case, to be clear. The distributors were not in that case.

And to clarify an issue that was brought up earlier about the abatement damages, I have a quote from the opinion that it makes clear that there was evidence presented on more for the abatement, but the judge found the evidence was only sufficient as to proof for one year.

THE COURT: I see.

MS. SALGADO: The judge said: Though several of the State's witnesses testified that the plan -- quote -- "will

take at least 20 years" -- end quote -- to work, the State did not present sufficient evidence of the amount of time and costs necessary beyond year one to abate the opioid crisis.

Again, that Court was not grappling with the issues of distributor liability. That was just as to one manufacturer's understanding.

THE COURT: Understood.

MS. SALGADO: So with regard to public nuisance, we've already cited what we think is the most persuasive authority, and review of public nuisance law. And as we've talked about, common law is the law of the land here, unless it's been abrogated. And it has not.

The City, lastly, points to the large number of people affected as supposed evidence that this is a public nuisance. But as we've discussed, the Restatement makes clear that that's not true. You cannot aggregate individual rights and call them a public right.

And as the Lead Industries makes clear, there they recognize a public health crisis, but found it still did not implicate a public right. It was just a collection of individual rights. So you can have something that does affect a large number of people that is not a public nuisance.

Next, turning to the remedies that the plaintiffs

seek, they talked about the damages that they seek, and how those are permitted, but they did not cite anything to the contrary that abatement is a principal remedy for a -- excuse me -- for a public nuisance claim. And damages are typically not allowed. And where they are, that's very rare.

The Restatement cites a limited exception where entities can show that it suffered damages that were different in kind, and potentially receive past damages. But there's simply no allegation here that Reno's damages were any different than anyone else who may have suffered here. And I don't think that exception applies.

Further, as the Oklahoma judge found, that judge only found abatement going forward. And that's the -- even though we disagree with the finding that there was a public nuisance claim, even that judge was only granted forward-looking perspective, not damages, but abatement. Damages are backward-looking, and not something that is typically awarded in a public nuisance claim.

Next, turning to proximate cause, the City was reciting some case law about the -- excuse me -- about the standard for proximate cause, and there was some key language in there which was unbroken by any intervening cause.

And that's the key here. As we discussed, no diversion can occur without subsequent unlawful acts after

the distributors delivered medicines to its DEA-registered pharmacies, and reporting each and every transaction to the DEA.

Again, a doctor has to write that prescription. It has to be presented to the pharmacy. The pharmacist has a corresponding responsibility to the doctor to ensure that it only dispenses for legitimate medical need. And even then, that either has to be misused or given to someone else -- a different criminal act -- and then misused by that person, or perhaps left somewhere where it can be misused later.

THE COURT: Well, hold on, please. "Hold on" is a legal term.

The plaintiff says: Judge, the distributors knew or should have known, or turned a blind eye to obvious misuse and diversion. That gets us at least through the door here. The law imparts to the distributors a duty owed to those that might be harmed by their inaction to do something. If you believe that a pharmacy is misdistributing, dispensing, or a physician is misprescribing, or that the pills are being misdirected or diverted, can the distributors rely solely on the fact that they are complying with their regulatory obligations to advise the federal agencies responsible that the amount and frequency of their filling orders and the manner in which they deliver them, or is there something more

that's required?

MS. SALGADO: Distributors have a duty to report and identify suspicious orders, and stop those shipments today. And that's what the distributors are doing. There's no allegations --

THE COURT: Then what if the allegation was that they failed to do that, and that the failure caused harm downstream to the City, or any individual person? I know that's not this case, but.

MS. SALGADO: Taking those in a couple of different ways, first of all, they didn't make that allegation. We need something more. You cannot simply say the numbers were large; therefore, they were filling suspicious orders.

The numbers were large because the DEA authorized that amount of opioids to be produced in our country because the DEA believed that that's what legitimate medical need was.

The distributors don't just dump pills into a city. They only give it to a pharmacy, if the pharmacy orders them. And the pharmacy only orders them if the doctors prescribe them. And so to hold distributors liable for a doctor using their medical judgment to say, "Yes, I'm going to prescribe opioids for chronic pain" -- which, by the way, is a large number of pills. When you're taking an opioid for chronic

pain or end-of-life care, that's a lot of pills, which explains the large volume that we saw, because when opiates were used for such a limited use before, are now used to treat so many new things, it's not suspicious that we see the numbers gradually going up over time.

THE COURT: What if your client believed that they were suspicious?

MS. SALGADO: Then we had a duty to stop and investigate. And there's no evidence -- there's no allegation that there was any suspicious order that we did not stop and investigate. All they say is the numbers went up, and we should have known.

What we can't do is, we can't simply stop serving a pharmacy, with no evidence of misconduct, because the numbers in the country are going up. You can imagine what a problem that would be if you go to your pharmacy, and they say, "Sorry. We can't give you prescription opioids because there's too many in our country." That's not our role.

In fact, there have been times where our distributors have cut off customers and been sued, and courts have enjoined them to continue servicing those pharmacies. You simply cannot just stop serving a pharmacy.

Distributors are in an impossible position where they are being sued for simply doing their jobs, and if they don't

do their jobs, then they're sued, as well. That's simply not a legally sufficient claim that you can make against a distributor. And while we serve an important role in the supply chain, it's a limited one.

And another point I wanted to discuss is, as Your Honor mentioned, you know, what about doctors misprescribing? I want to remind Your Honor that we don't interact with doctors. We don't see the prescriptions. We don't know who is prescribing one. We can't cut off a pharmacy because we think some doctor in Reno is, you know, writing bad prescriptions. That's just not information that we're allowed to see. And so a distributor certainly can't be held liable for that sort of conduct that's happening.

The other thing that the City mentioned is: What about pill mills? You know, places where people know that, if you turn in scripts there, they'll give it to you because they turn a blind eye to the law.

There's no allegation that we served any pill mills in Reno. To the extent that there were pill mills here, they may have been serviced by other distributors. There are many other distributors, some of which do not have the sophisticated systems that we do. There's no allegation that we service any sort of fake pharmacy or place that was illegally distributing drugs.

The allegations are that we legally served -- that we did our jobs and serviced the CVS, the local pharmacy, and that simply because there were too many opioids, we should be held liable. And that's simply not the law.

THE COURT: All right.

MS. SALGADO: Again, we talked about the intervening causes. And one other point I wanted to make about proximate cause is the Nevada case law about the alcohol sales context that the City brought up.

I won't repeat the arguments I already made, but I want to focus on the point that they're saying here this is distinguishable because it's not an individual seeking recovery based on a harm that happened from consumption of an intoxicating substance.

That's exactly our point. This is actually one step removed. They're seeking derivative injuries to the City for the costs, for example, of that unnecessary prescription, or the cost incurred from that person's consumption.

THE COURT: So it's even less compelling a reason to afford an opportunity to seek relief, even when one step closer has already been foreclosed.

MS. SALGADO: Exactly. And to the point about derivative injury, that's why we have the derivative injury rule, because an entity should not be able to bypass the

defenses that would be available when an individual --

THE COURT: We talked about that yesterday.

MS. SALGADO: Exactly. Again, per the Nevada case law, there was no argument by the City that that argument is unsound in any way. We simply argue it doesn't apply here. And as we talked about, we think the logic applies with more force.

Moving on to statewide concern, I think that Your Honor sort of pinned the City on what they were talking about with standing versus statewide concern and authority. And the City did concede there are two things, and that the City believes that both are met here.

THE COURT: Well, the way I generally look at it -- and this is probably at a fourth-grade level, but, you know, that's how my mind works. If there's a claim, it's because somebody -- the Legislature, the common law, administrative law, something -- has found that, if a civil wrong -- that a civil wrong for which a remedy is available exists. So that's the right to bring a claim.

Standing is whether the wrong happened to you or to -- where you have the right to assert that claim on behalf of someone or something else. So they're not the same. They might be close cousins. They're not the same.

You heard, when I asked Mr. Eglet, he said he

believes the City has both the right -- there is a claim for what happened here, and the City is the proper entity to bring the request for relief.

How do the distributors see that?

MS. SALGADO: We agree they're two separate things. I wanted to clarify that that's what was said today, since that's not what was in the papers.

Our point is that the authority was not granted; that that element has not been satisfied.

And, again, looking back --

THE COURT: We talked about yesterday that the Legislature can't think of every human interaction. They don't understand or can't crystal-ball well enough every business and entity and association and person and how they're going to interact when they go about their lives, personally and professionally.

So isn't there -- doesn't the common law have to make up the difference when things happen that have not previously happened before?

MS. SALGADO: A couple things, Your Honor.

First, which I think we talked about briefly yesterday, the Legislature could have made an exception for this type of issue, which, according to plaintiffs, was well underway by this point, and they chose not to.

Second, I think, no, frankly; that we disagree that common law should influence it. The statute controls. And even plaintiffs don't dispute that. There's no argument that the statute controls --

THE COURT: They're reading it differently than you, of course.

MS. SALGADO: Right. But the text of the statute is undisputed. And it states that it must not have a significant effect or impact on areas located in other cities or counties. The matter itself, the matter underlying the Complaint.

And it cannot concern those three things that we talked about: state interests that requires uniformity, the regulations of business activity subject to substantial regulation, or another interest that's committed to federal or state regulation that preempts local regulations.

THE COURT: This is not an argument made, of course, to Judge Gonzalez, because the State was bringing the case. But as to Judge Williams, he heard the argument on this, and he found it not persuasive.

MS. SALGADO: I think, Your Honor, all we have is the denial of the motion to dismiss. We don't have any reasoning as to why it was denied. And we would ask Your Honor to conduct your own reasoning in determining whether this

statute applies.

THE COURT: Okay.

MS. SALGADO: Again, and I want to emphasize, each of these points must be met. If any single one is violated, that's the end of the story. So if it is dysjunctive, it could almost be met, we believe that it fails on each one.

The City's response that it is only suing for its own damages, it would swallow the rule. An entity can always only sue for its own damages. That's just how it works. And so if it could be that you're only suing for your own damages, so you obeyed Dillon's Rule, that would completely nullify this very carefully constructed statute that was just passed in 2015. And that's not what it says here.

The Legislature took care to make sure that it used language that could account for any matter of local concern, but limiting it to a matter of local concern.

And, so, to Your Honor's point that they can't foresee everything, we agree, and that's why they've used that general term, "matter of local concern." But they made very specific requirements as to what it must be. And we argue that none of those are met here. And, again, the fact that they're suing for their own money does not negate this, otherwise, it would never apply.

Unless Your Honor has further questions, I'll turn it

over to my colleague.

THE COURT: Thank you.

Ms. Weil.

MS. WEIL: Good morning again, Your Honor.

THE COURT: How are you feeling today?

MS. WEIL: I'm good. Thank you very much for asking. I appreciate it.

THE COURT: Sure.

MS. WEIL: There's -- I didn't mean to interrupt your kindness. Thank you.

There's a little bit of spillover, because I think Your Honor's questions to Ms. Salgado got into a little bit of some the questions of common law duty. And I'm going to endeavor to not retread ground that's been covered, but there are some things I need to say about that, with the Court's permission.

Now, Mr. Eglet stood up here, and he, in a very compelling fashion, talked about the fact that distributors should have reported suspicious orders that they didn't report. He sometimes uses the word "responsibility," he sometimes uses the word "duty," but the bottom line is, he says: The distributors should have reported these suspicious orders, and the fact that the distributors did not report suspicious orders contributed to the development of the

opioid crisis.

Well, we talked about this yesterday, and I'm not going to spend a lot more time on it. But the obligation to report suspicious opioid orders is an obligation that was created by a federal statute and a federal regulation. It is defined by federal law. The enforcement is handled by the federal government. The remedy is defined by federal law.

There is no dispute that the City can't sue for violation of that statute, for a direct violation of the federal regulatory and statutory scheme. That has not been disputed.

And the City has not -- still not done anything to get down the road, because they can't, to identify a common law duty that the distributors have to report suspicious opioid orders to anyone, much less to -- least of all to the City of Reno.

That is not a common law duty that we have. Suspicious orders are not defined in the common law. They don't exist in the common law. And this is an obligation that exists in a federal statute, is regulated by a federal statute, and the failure to discharge, which is remedied by the federal government.

Mr. Eglet is a great speaker. Mr. Eglet can stand up here and really command attention and be very compelling and

very eloquent talking about the tragedy of the opioid crisis.

And I am not -- I have no -- I can't dispute that. The opioid crisis is tragedy of mammoth proportions. And we all acknowledge it, and nothing I say here today does anything to dispute or to undercut that.

But what Mr. Eglet is saying is irrelevant to what we're here to talk about today. We're not talking about whether there's an opioid crisis. We're talking about whether the City has pled a common law claim for negligence against the distributors; and, specifically, whether the City has identified a common law duty for the distributors to report suspicious opioid orders to the City.

They haven't. They can't. And nothing they have said today changes what we said yesterday, which is that it is nowhere on the pleadings, it's nowhere in anything that's happened in this courtroom, that there is a common law duty that requires distributors to report suspicious opioid orders to the City of Reno. That being the case, there is no negligence claim.

And all of us would love to see solutions to the opioid crisis, and the individuals affected by the opioid crisis helped in some fashion. It is not the function of a common law negligence claim against the distributors alleging that we failed to report suspicious opioid orders to achieve

that. Because in order to do that, there has to be a legal cause of action. There can't just be a problem. Nobody disputes that there's a problem. But there isn't a legal claim for negligence against the distributors based on a common law duty to report suspicious opioid orders.

Now, we have been around this several times, Your Honor, and I don't really think we need to -- I don't think we need to spend a whole lot more time on it. But that's the bottom line.

The bottom line is whether -- Mr. Eglet talks a lot about the City's engaging in wrongful conduct. Well, you know, that's not what we're here to talk about today. It's also not relevant to what we're here to talk about today.

What we're here to talk about today is whether distributors' conduct, or the pleadings about distributors' alleged conduct, creates a legal cause of action under the common law that this Court can entertain. And it doesn't.

Now, the City says, "But it's foreseeable." They harken back to foreseeability. That the injuries that the City -- of which the City complains would be caused by this conduct by the distributors.

Well, first of all, what is the injury of what the City complains? They talk about the opioid crisis, and the injuries to individuals, and people injured by opioids was

foreseeable.

First of all, that's not the injury of which the City complains. The City's injury is spending money on social services. Okay. That is, as Miss Salgado has said several times now, way down the column, and entirely derivative, and is not connected in any fashion by a legal causal chain to anything that the distributors allegedly did or did not do.

And there's nothing, there remains nothing in the Complaint that none of the allegations in the Complaint -- and, you know, the City talked a bit today about their cut-and-paste errors. There's still nothing in the Complaint. And none of the allegations they've discussed with respect to distributors make it legally foreseeable, make it foreseeable that the injury of which the City complains would occur, or connects that injury through a legal causal chain to anything the distributors did or did not do.

And, so, as we said yesterday, and as the manufacturers have said, there's a problem. There's a really big problem. There's a really big problem in Reno and Nevada and all kinds of places in the United States. That does not mean that the City, in this case, has stated a claim for common law negligence against the distributors. And they haven't. It's nowhere on the face of the Complaint, and

nothing that's been said in these arguments changes that.

Oh. Just briefly, Your Honor, they talked about -- first of all, I said something yesterday to the effect that we had a duty to keep things safe in our warehouses.

THE COURT: You don't?

MS. WEIL: Well, I mean, we certainly have a responsibility. But that's also a federally-regulated responsibility.

Our common law duty of reasonable care, we certainly have a duty of reasonable care to conduct our business dealings with our pharmacies in a careful manner. There is no allegation that we didn't.

The City points to Section 453.400. That's a section of the Nevada Controlled Substances Act that requires us to keep our warehouses safe from theft of product. And there's no allegation that product was stolen from our warehouses, so it doesn't -- it has no place here.

Unless the Court has questions, I'll move on just briefly to the negligent misrepresentation argument.

First of all, the City stood up here and talked about the fact that, yeah, they did make mistakes in sticking distributors' names in when it wasn't an argument that related specifically to the distributors, in their opposition papers, and that that shouldn't be dispositive.

Well, I want to just direct the Court back to paragraphs 131 to 137 of the First Amended Complaint, entitled, "Defendants' misrepresentations." Defendants'. That's on the face of the Complaint. It's not a cut-and-paste error in a brief. Defendants' misrepresentations in those eight paragraphs -- and I think there's some subparagraphs -- relate entirely to things the manufacturers allegedly represented -- misrepresented, or omitted, or whatever.

Once again, there is no misrepresentation by the distributors in the course of any business transaction that is alleged in the Complaint, and nothing that the City has said changes that.

There's still no -- now, the City still has this theory that, by failing to report suspicious opioid orders, that is an omission that supports a negligent misrepresentation claim.

Once again, the Court need only look at the elements of the claim to understand the fact that there is no authority for that, there is no support for that, and it's flat out not true under the law.

A negligent misrepresentation claim, even if it -- and we still don't have authority for that, that they can support the claim with misrepresentations to third parties.

But in any event, it needs to be a misrepresentation or an omission in the course of a business transaction on which the City relied.

There's no authority for this notion that failing to report things to federal authorities can constitute that kind of an omission, or that, in any event, the City relied or could have relied on that, because once again, Your Honor, that information is strictly confidential, and they had no access to it.

And so, you know, we went through this yesterday, and I don't want to retread this ground any further, but they haven't satisfied the elements of this claim.

They briefly mentioned the comment that we made in our reply brief about the Learned Intermediary Doctrine.

Just for the record, the Learned Intermediary Doctrine has never been applied, certainly in Nevada -- and I believe I'm safe saying anywhere -- to impose a duty to warn of the dangers of a prescription drug on a prescription drug distributor, on a drug distributor. That's just for the record, because the City mentioned that, as well.

THE COURT: Well, let me just play devil's advocate here.

The plaintiff might say: We've never had a situation like the one we're facing now. And so new times, new

challenges.

MS. WEIL: Your Honor, the Learned Intermediary Doctrine is very specific. I do a lot of product liability-type work. The Learned Intermediary Doctrine is very specific. What it means is that, in the context of a doctor-patient relationship, the prescription drug manufacturer has a duty to warn only the physician, not the patient. That's the Learned Intermediary Doctrine.

It has nothing to do with this. And it's not -- it doesn't belong in this case. But to the extent that they are alleging that distributors had a duty to warn anyone, it has nothing to do with that.

THE COURT: Well, that would be -- it would be a stretch.

MS. WEIL: It would. It absolutely would. And they couldn't possibly -- they can't possibly find law anywhere -- I feel very safe saying this -- that imposes a duty to warn on prescription drug distributors.

THE COURT: Okay.

MS. WEIL: And my colleague just handed me a note. She's correct.

That Nevada courts have found that even pharmacies don't have a duty to warn patients filling prescription drugs.

I want to turn really briefly to the Free Public Services Doctrine, Your Honor, or the Municipal Cost Recovery Rule.

THE COURT: Well, let me comment on that, just because we've gone over it. And, you know, some things are going to take quite a bit of the Court's time and attention. To be candid, if this case is dismissed, it's not likely to be dismissed on that doctrine. It's just -- that's not what I consider to be mission-critical here to whether this case goes forward. It doesn't rise, in this Court's estimation, to the level of some of the other issues that the defense has argued.

MS. WEIL: Oh -- I'm sorry.

THE COURT: Go ahead.

MS. WEIL: I didn't mean to interrupt.

We agree, Your Honor. The only reason we mentioned it in our reply is that something in the opposition suggested that distributors neglected to warn someone of the dangers of prescription drugs. And that's not an obligation that anything in the law or in any regulation by the FDA or anyone else imposed on distributors. We agree. It's not material to this dispute.

THE COURT: Okay. Let me move to something else.

It escapes me. If I think of it again, I'll ask it.

Go ahead. Please proceed.

MS. WEIL: All right. I just want to spend a minute, Your Honor, on the Free Public Services Doctrine, also called the Municipal Cost Recovery Rule. That was covered very thoroughly by the manufacturers. It doesn't need to be covered in any great detail again today.

The City stood up here today and talked about the fact that, in Nevada, we shouldn't take -- we shouldn't take any comfort from Nevada's adoption of the Firemen's Rule to suggest that it would also embrace the Free Public Services Doctrine, which has not been explicitly adopted.

And they say that the Firemen's Rule was adopted based entirely on assumption of the risk principles. And that's not true.

If the Court reads Steelman, both Steelman and the cases on which it relies consider policy considerations for the Firemen's Rule, such as spreading the risk, efficient judicial administration. It is not based entirely on assumption of the risk principles.

Now, the City, in its opposition brief, suggested that the default position is that there's something of a default position to allow recovery of municipal expenditures on social services from tortfeasors. And that's backwards.

As Miss Salgado has said, in other contexts, the Free

Public Services Doctrine, which is a doctrine that provides that, when a municipality or government entity provides services to its public, they are not recoverable from tortfeasors, that's a creature of the common law. And unless it has been explicitly abrogated, it exists in the common law. It has not been explicitly abrogated. It has not been abrogated at all in Nevada.

And the only evidence we have is the Firemen's Rule, which suggests that the Nevada courts acknowledge that the notion that services are provided freely -- provided without cost to residents of municipalities and the State is something that exists in the law, and those costs are not recoverable from tortfeasors. And that's all we have. There's no evidence to the contrary. And I think the manufacturers covered this very thoroughly yesterday, but I just wanted to bring that up.

Also really briefly, Your Honor, I don't think we even talked about the Economic Loss Doctrine yesterday, but the City brings it back up, and they talk about the Terracon case. And what they're trying to do is to confine the Terracon case to the context in which it was decided.

Well, a case isn't -- unless it explicitly does this, it's not confined to the context in which it was decided. Every case has a context; right? This case was decided in

the context of a design professional, of damages for something for a tort related to a design professional.

So the City says: No, no, no. The Court can find -- it doesn't. What Terracon said -- and I've got some quotes from Terracon here -- Terracon said, "Guided instead by the doctrine's purpose to shield defendants from unlimited liability of all of the economic consequence of a negligent act, particularly in a commercial or professional setting, and, thus, to keep the risk of liability reasonably calculable, declined to make such an exception."

And so it didn't make an exception in that case. But the reason it didn't make the exception was the general principle that you can't allow tort recovery for purely economic damages.

It went on to say -- the Court went on to emphasize that, "Except for traditionally recognized exceptions for certain classes of claims" -- this is not one of them -- "traditionally recognized exceptions for certain classes of claims, the Economic Loss Doctrine cuts off tort liability when no personal injury or property damage occurred."

Once again, what the City is alleging very explicitly here is that it spent a whole lot of money. It doesn't allege that its property was damaged, nor could it. It doesn't allege a personal injury claim on its own behalf,

because it can't. What it alleges is money damages. And under Nevada law, there is very clear -- there is very clear language from the Nevada Supreme Court that they can't recover those damages in a civil tort suit.

And I just wanted to bring that up for Your Honor's attention because I believe that that case was mischaracterized.

I think this leaves us with unjust enrichment, and I think we covered this very thoroughly yesterday. The Court asked some questions about it.

Just once again, just to reiterate, there is still no support for this externalities argument anywhere, except in the White case.

Now, they argue that the White case wasn't explicitly overruled. Well, first of all, it doesn't have to be. And even if it were, it's an Ohio case. So its existence or nonexistence doesn't bind this Court.

But it's the only thing they can find that says that, without the City having conferred a direct benefit on the distributors, they can somehow recover under unjust enrichment for this -- on this externalities theory.

And courts have soundly criticized that case. The Eleventh Circuit, no, the Eleventh Circuit can't overrule White. But the Eleventh Circuit has soundly criticized it.

The Johnson case soundly criticizes it.

In any event, there is nothing else anywhere on the books, and they have cited nothing, that gives them the authority in this court to recover under a theory of unjust enrichment on this very creative -- I mean, I think it's kind of a cool theory, but it doesn't have anything to do with the law. There's no law that permits them to recover under a theory of unjust enrichment from distributors when they acknowledge that they have not conferred any direct benefit on distributors, but that what they want to do is have distributors pay them back for money they spent because of conduct the distributors -- in which the distributors allegedly engaged. Not supported by the law. Doesn't satisfy the elements of the claim. And once again, Your Honor, we think this is perhaps the easiest one Your Honor has heard in two days. And we submit.

THE COURT: White is a bit of an outlier. I'll grant you that.

MS. WEIL: It's entirely an outlier, Your Honor.

And unless the Court has any questions, I think that completes my reply to the City, and I'll sit down.

THE COURT: Thank you.

MR. EGLET: Your Honor, I do ask a question about the other courts, and I'm not sure there's anything in the order,

but there are in the transcripts. And in the County's case there was not only the hearing on the motion, there was a motion for reconsideration filed by the defendants, an extensive hearing on that. Those transcripts are available.

THE COURT: Okay. Thank you for letting the Court know.

Here's what I think we'll do, because we have some ground to cover, and just the rest of the afternoon to do it. So unless there's strong objection, I propose we break now for a modest lunch break, and we resume promptly at 1:00 o'clock to get with the next motion.

Does anybody have a pressing need for more time than that over -- all right. Then that will be the order of the Court. We'll break now, and we'll resume at 1:00 o'clock.

I would ask for something else, unrelated to this case. I do need to speak to Mr. Wenzel about something else, again, unrelated to this case, just for a moment. But just to make sure that the defense has an opportunity to meet in my office at the same time with Mr. Wenzel, Mr. Guinn, if you wouldn't mind, come on back just for two minutes so that you're the witness to what I'm going to discuss with Mr. Wenzel.

We will be in recess until 1:00 o'clock.

(Recess.)

RENO, NEVADA, WEDNESDAY, JANUARY 8, 2019, 1:00 P.M.

THE COURT: Just to button up for the record, the distributors' motion to dismiss will be deemed submitted to the Court for final decision 15 days from today, without further action of any party. No one has to file a formal request for submission.

But the distributors may supplement the record by responding to the surreply by plaintiffs.

All right. Next up we have the motion of -- if I'm saying this right -- Mallinckrodt, to dismiss.

Who will be arguing on behalf of that claim?

MR. GUINN: Steve Guinn, Your Honor.

THE COURT: Thank you very much.

You may proceed.

MR. GUINN: Your Honor, if the Court doesn't have a preference, I'll move the podium up a little bit so Mr. Eglet has a better view. Is that okay?

THE COURT: No preference. You're free to do that.

MR. GUINN: Good. Thank you, Your Honor.

This is the point in the proceedings where everybody is getting a little weary of hearing the same thing over and over again, so I'm going to try not to be redundant. But I think this also signals kind of a shift in the arguments now away from sort of the general broad-brush arguments that were

either entirely case dispositive or entirely claim dispositive as to whole groups of defendants to more individual defendant-specific arguments, a little more than nuts and bolts on the individual defendants and how they're situated in this case.

THE COURT: So how does Mallinckrodt's situation differ than from any of the others?

MR. GUINN: Well, I can't speak to how it differs from each individual defendant, Your Honor. I think they're much more knowledgeable about their own involvement in this.

Obviously, Mallinckrodt is a manufacturer. What I'm hoping to do with the time I do have is walk the Court through sort of Mallinckrodt's prism on this case, which I hope will not only educate the Court as to my client's specific position in this case, but also provide sort of an example as to how all these broader legal concepts and factual allegations fit as it applies to a specific individual defendant.

THE COURT: Okay.

MR. GUINN: I will try not to be redundant. I know "redundant" is the word of the day in these types of arguments. But invariably there might be some redundancy just because of contextual reasons that I'll have to instill to make my arguments make sense.

Let me start out by saying that my client, Mallinckrodt, did not and could not sell opioids to any human being in the State of Nevada. We went through the supply chain yesterday in some detail, and the Court is well-versed in that by now. But it goes manufacturer, distributor, pharmacy, doctor, patient.

No patient, doctor, or pharmacy, or individual could have obtained opioids from Mallinckrodt, even if they wanted to and tried to.

The plaintiff, therefore -- and I think that's undisputed, given our discussion about the supply chain yesterday. As such, the plaintiffs' argument in this case as it pertains to my client must be one of two things: either that Mallinckrodt increased the supply of opioids in Nevada, or that Mallinckrodt increased the prescriptions made by doctors of opioids in Nevada. So let me just address both of those.

Neither of those theories, so to speak, is alleged specifically in the Complaint, but, logically, they're unavoidable.

As to the increased supply argument, we've gone through the supply chain extensively. Let me just touch on it very briefly. And then it's all tightly regulated by the federal government. I agree with Mr. Eglet when he says it's

a closed system. This is a highly-regulated industry. So everybody, all the defendants in this case, are highly regulated. We start with that premise.

The raw materials needed to make opioids are strictly controlled by a quota. The federal government dictates their supply.

Mallinckrodt only delivers opioids to distributors via the DEA-regulated, closed system that Mr. Eglet and I discussed yesterday. Opioids are not sent to a store, they're not sent to a patient, they're not sent to a doctor, but to a warehouse with a nationwide distribution range.

The distributors, in turn, have discretion to decide where and how to sell to its customers; in this case, the pharmacies. The pharmacies cannot dispense without a doctor's prescription. As such, Mallinckrodt couldn't flood the market -- which is a term of art used by the plaintiffs throughout this case -- because the DEA is the final decision-maker regarding the finite opioid supply that Mallinckrodt is allowed to manufacture.

Another point specific to Mallinckrodt is that they are largely a generic manufacturer of drugs, non-brand-name opioids. Mallinckrodt, as such, cannot indiscriminately increase the number of its customers, distributors, given the DEA quota and the market competition.

THE COURT: Well, can you say that again?

MR. GUINN: Mallinckrodt is a generic manufacturer.

THE COURT: "Cannot indiscriminately," which means on their own.

MR. GUINN: Correct.

THE COURT: They have to get somebody's permission.

MR. GUINN: Right.

THE COURT: The allegation, as the Court understands it, is that the manufacturers, like Mallinckrodt, did things to influence the perceived need, influence the influencers, influence the prescribers, influence the suppliers of the public perception of the availability, need and efficacy of these drugs.

Is that not close enough for purposes of a motion to dismiss?

MR. GUINN: Whether that fact is true or not, Your Honor, I don't think it's relevant to the Court's analysis at the pleading stage in this case.

THE COURT: But hold on. The allegation is that a public nuisance, either common law or by statute, occurred by actions like those that I've just stated, that the Court understands plaintiff is alleging here. So why would that not be informative?

MR. GUINN: Because of the overlying regulatory

framework that's already in place. If there was -- or there was or is proved that there was some deviation from that framework, there's some complicity by another entity, or even the federal government itself, I think we'd be talking about a much different case.

The premise we're starting with, though, is the conduct of my client -- and I think most of the defendants in this case -- was lawful, and was in the confines of federal law.

If there was other extra-legal conduct alleged by plaintiffs, we will get to that in a minute. But I would expect that to be alleged much more specifically in the Complaint. And that's part of the problem here, is we just don't know what that might be. We're back to the general notion of these are bad actors, without any specific examples of what the bad acts are.

THE COURT: Okay.

MR. GUINN: The other issue in this case -- I mean, there's a sense that there might be diversion of legal opioids to criminals, improper, truly criminal conduct with the end-users of opioids. There's no allegation in the Complaint that any diversion occurred from the manufacturers' facilities to the customers.

Simply put, Mallinckrodt cannot predict if there is

going to be diversion, any future criminal conduct of any third parties.

With respect to the demand claim -- I talked about the supply claim -- first of all, there is no specific allegations in the First Amended Complaint that address the notion that Mallinckrodt increased the demand of the opioids.

There has been argument, there's been quite a bit of argument on that, but we're talking about the four corners of the Complaint at this point.

THE COURT: Wait. Sorry to interrupt again.

There are no allegations in the 280-some-odd paragraphs of the First Amended Complaint that allege that the manufacturers were participants in a program or a modus operandi to, again, increase availability, perception, suggest the positive effects, deny the negative effects, the consequences. Aren't there allegations that suggest that they somehow nefariously took steps to increase demand?

Because either I read that in the Amended Complaint, or I read that in the brief. But I thought it was in the Amended Complaint.

MR. GUINN: I think what that comes back to yesterday is the chart that Mr. Eglet came up with the advertising. Did they advertise? Did they use various different means to market and sell the products?

THE COURT: He said front groups, influencers, promoters, other words that I'm not really familiar with, but things like that.

MR. GUINN: Of course. Those allegations are in the Complaint. And the Court is correct about that. And that claim is out there. That advertising does not run to the end-user. It runs to the intermediaries, to the pharmacies, maybe to the doctor, maybe even the distributors.

THE COURT: Well, it's on television; right? I mean, aren't people going to ask their physician about that, like, "Hey, I saw that. Maybe that would be good for me."

MR. GUINN: Drugs are advertised on television, and that's -- again, I hate to keep coming back to the same point, but if there's a television commercial out there that Mallinckrodt put out that influenced an end-user, and there was a misstatement or anything improper about that, I would expect to read about that also in the First Amended Complaint, Your Honor. That's the vagueness and the ambiguity we are dealing with throughout this case.

THE COURT: It needs to be that detail. And that level of detail happens to be omitted from the allegations of the First Amended Complaint.

MR. GUINN: It does. And we don't need to go over NRCP 9 again. I know the Court is well-versed in that now.

But that is the allegation.

If all this advertising, all this communication is so pervasive, if there are key opinion leaders, if there are front groups out there advocating for something the plaintiffs feel is improper, I would expect to see a list in the Complaint of those statements, and a statement as to how and why they are false. That's the nature of a fraud claim.

And carefully pleading around that by not asserting the blatant cause of action for fraud is improper. It's what the claim is rooted in, not what somebody typed at the head of a paragraph.

And I think we've been over that. I'm happy to address that further, if the Court would like.

THE COURT: No. We have been over it. I thought I -- well, I tried to indicate the Court's -- send a signal here that, if the Court finds that the allegations are essentially rooted in fraudulent and deceitful conduct, and if the Complaint otherwise survives dismissal on other issues, then it's very likely the Court would direct an amendment, if the facts are there, to plead these types of wrongs with greater specificity.

MR. GUINN: I think that's a good place to shift gears a bit. I will, Your Honor, address in a little more detail your question about demand.

The demand is, ultimately, the end-user is a doctor writing prescriptions. He's the gatekeeper. If he doesn't write opioid prescriptions, this problem doesn't happen.

The manufacturers -- and Mallinckrodt, specifically -- don't have any control. They are not doctors. They are not medical -- do not have a relationship with the end-users. They're not in a position to decide what end-users should be prescribed. That's a doctor issue.

Mallinckrodt, during the relevant time in the First Amended Complaint, had no sales force, and did not visit doctors.

I want to talk briefly about the two specific allegations in the First Amended Complaint that pertain to my client's products, because they are specific, and I think it's important to address them.

Two different drugs are referenced in the First Amended Complaint that are Mallinckrodt's drugs. The first is Xartemis. It starts with an X. With respect to Xartemis, Mallinckrodt had a sales force in force for one year. It turns out there was not much of a market for the drug, and it was removed from the market in a very short period of time. Most people haven't heard of Xartemis for that reason.

To suggest that Xartemis caused the opioid abuse crisis plaintiffs are complaining of now just plain doesn't

makes sense.

The second drug is called Exalgo. And for Exalgo, Mallinckrodt did have a sales force in place for about four years. And it's a unique kind of opioid that is not the first-tier opioid most doctors prescribe. It's for more advanced problems or issues.

There are no false statements alleged in the First Amended Complaint pertaining to either of those two drugs. It's the only ones that Mallinckrodt manufactured and sold in Nevada.

The Complaint -- the First Amended Complaint is replete with allegations of websites, sales representatives, literature, advertising, salesmen. Clearly, that is pled.

What is not pled is any specific statement anywhere -- not even an example, a just-for-instance. That is not in the First Amended Complaint.

At a minimum, the First Amended Complaint should identify a false statement, and it should supply the who, what, when, and how. This is all in the case law in the briefs, Your Honor.

We need to know what the doctors read, how the doctors relied on what they read, and how and why they wrote a false prescription.

We need to know how that happened in order to

determine what happened to an individual patient to determine how he overdosed or otherwise abused the medication, in order to evaluate whether it was our drug he took, and whether our drug is the one that contributed, at least, to the opioid abuse crisis.

Finally, we need to know -- to understand how that caused the plaintiff, the City of Reno, to be damaged in this case one more link removed in the causal chain.

Much has been said about the pleading deficiencies, the fraud, and so forth. But, obviously, what I'm talking about, and the underlying theme throughout, is pleading fraud with particularity, Rule 9, NRCP 9.

The second issue that was touched on, but maybe not expanded on too much, is the notion of group pleading. We've got a lot of defendants lumped in together in these causes of action. So there seems to be a perception sometimes, when a case like this reaches this far in a court of law, that these defendants all work together, they're all on the same team, and they're all virtually one entity. It's a single monolith.

It isn't. These are competitors. These are manufacturers. They compete with each other on a daily basis. They're running a business. They're not in the business of defending litigation. They don't have a joint

strategy, so to speak, for that type of thing.

So when we have a blanket allegation against the manufacturers, that means very little to any one individual manufacturer. We could all put our heads together, and, as lawyers, can talk about it, try to figure out what it means. But we need differentiation between the defendants. And that includes the distributors, that includes the pharmacies, that includes the doctors, or anyone else who is a defendant in this case. We need to know who did what, and why we're being sued.

THE COURT: So not to be flip here, but Mallinckrodt is essentially a generic manufacturer of opioids. And some might say that the plaintiffs' Complaint here is a bit generic in the manner in which it's alleged harm and wrongdoing. That doesn't cut it.

MR. EGLET: They're not just a generic, Your Honor.

MR. GUINN: I'll bite, Your Honor. And I'm sure Mr. Eglet will disagree with me when he has a chance to speak.

For present purposes, we are, more or less, almost an entirely generic manufacturer. And the complaints are too generic. That's a good buzz line for this case.

With respect to Mallinckrodt's specific complaints in the context of specific pleading and group pleading, there is a claim in the First Amended Complaint that Mallinckrodt had

deceptive advertising. We'll take that at face value.

The First Amended Complaint does not I.D. any specific statement by Mallinckrodt, any marketing language, any website contact, or plead at all what the statement is, or how it is false. That's Horn Book law in the pleading of fraud.

There is a specific reference to Mallinckrodt in paragraph 106, an entity called CARES -- C-A-R-E-S -- all caps -- Alliance. They're identified as using the slogan, "Defeat chronic pain now."

This is alleged to be a front group of some sort for Mallinckrodt that's putting out so-called propaganda by Mallinckrodt to increase sales, a form of advertising promotion for sales.

There's nothing pled in the First Amended Complaint that indicates that Mallinckrodt had any control over the message or the content of that entity, and there are no details regarding the alleged misrepresentations made by that.

Even if Mallinckrodt had control over it, the idea that -- there is an allegation that there was funding by Mallinckrodt to some of these entities, but that's insufficient to establish the level of control or the level of specificity we need here to understand what this entity

allegedly did on behalf of Mallinckrodt that rose to the level of actionable legal conduct.

Sort of in summary, the First Amended Complaint does not allege that any Reno physician saw, read, or relied on a statement made by Mallinckrodt, or were thereby misled to improperly describe opioids to any Clark County -- excuse me; I misspoke -- I'm in a room full of Las Vegas attorneys -- to any Washoe County, in this case, City of Reno resident.

On that basis, Your Honor, I started out my discussion yesterday by mentioning notice pleading. I'll end where I started. We're back to notice pleading. We're entitled to notice. And the notice in the State of Nevada cannot be little more than, "We think you engaged in a lot of fraudulent, deceptive conduct, and we're going to sue you." We require more specificity than that.

A fair reading of Rule 9 makes that explicit, and that is what is lacking in the First Amended Complaint, both with respect to all of the manufacturers and with respect to Mallinckrodt. For that reason, we ask that our substantive joinder and joint motion to dismiss filed by the manufacturers be granted.

THE COURT: Thank you.

Mr. Eglet.

MR. EGLET: Thank you, Your Honor.

So Mallinckrodt's joinder and motion is based on the same law as the manufacturers' joint motion, and I will incorporate Reno's arguments raised in the opposition to manufacturers' motion, and address those arguments raised primarily by Mallinckrodt.

First of all, let me clear up something. Mallinckrodt is a brand and a general manufacturer, not just a generic manufacturer. And it is also a distributor. It's all three, this particular company.

Reno's allegations against Mallinckrodt are sufficiently pled under NRCP 8. Nevada is a notice pleading state. You've heard me say that at least a dozen times over the last two days.

THE COURT: It's starting to sink in.

MR. EGLET: The purported bar on group pleading Mallinckrodt relies on in its motion arises out of a securities litigation, in which a plaintiff attempts to hold the corporate officers liable for statements of their corporations. That is not what Reno alleges here.

Under Nevada's rules and related cases, pleadings are construed liberally. Reno's Complaint need only set forth sufficient facts to establish all necessary elements of a claim for relief to put the defendants on adequate notice of the nature of the claim and the relief sought.

Fraud is not an essential element of any of Reno's causes of action, and, thus, pleading beyond NRCP 8's requirements is not necessary.

THE COURT: Well, we've been through that a few times.

MR. EGLET: We have.

THE COURT: But if I disagreed with that, then it's likely I would --

MR. EGLET: Then allowing us to amend would be --

THE COURT: -- move to amend, amend with specificity. If I agreed with that, then I may find that it meets the notice pleading standard.

MR. EGLET: Additionally, Reno alleged that Mallinckrodt acted recklessly or negligently in its marketing of Exalgo, Roxicodone, and Xartemis XR in Reno.

Additionally, the Complaint contains allegations that Mallinckrodt intentionally concealed the dangers of opiate use, including addictions.

What Mr. Guinn is really arguing are issues of fact, Your Honor, that are contested here, and that -- and the Court must accept the City's allegations as true at this stage of the case.

Reno has not alleged any fraud-based causes of action. It is not required to meet the standards of Rule 9.

Even if it is required to meet Rule 9's heightened pleading standard, it has sufficiently identified Mallinckrodt's alleged misconduct in the Complaint. The allegations can be found in a number of paragraphs throughout Reno's Complaint, which were identified in Reno's opposition to this motion. These allegations are made against all manufacturers, including Mallinckrodt.

Additionally, Reno included specific allegations as to Mallinckrodt's wrongdoing. Reno identified the opiates manufactured, marketed, and sold by Mallinckrodt. The Complaint includes the allegation that Mallinckrodt marketed its opiates as specially formulated to reduce abuse, and published information on its website minimizing addiction risk, as well as advocating access to opiates. And none of their opiates reduce the abuse of -- as formulated, reduced abuse at all.

Reno identified Mallinckrodt's collaboration in unbranded marketing techniques, including the CARES Alliance book, "Defeat Chronic Pain Now," which minimizes addiction risk, and emphasizes opiate therapy for regular use of moderate chronic pain.

Your Honor, there are numerous allegations in the Complaint about manufacturers' actions that led to increased sales.

Paragraph 131 states that the defendants utilized these techniques to convince prescribing physicians that opiates are safe, when they're not.

And Your Honor can look to paragraphs 80 to 130 of the Complaint to see the various ways the manufacturers engaged in the marketing scheme.

Moreover, the Complaint cites to a 35-million-dollar settlement between Mallinckrodt and the DEA in 2017, which was related to the improper diversion of opiates.

And so it's not undisputed -- that seemed to be a theme running through all the defense lawyers throughout these arguments, "I'm sure the City, I'm sure Mr. Eglet will agree with that."

Well, we don't agree. Unless you hear me stand up and say "I agree," we don't agree with anything they're saying.

It's not undisputed because both the distributors and the manufacturers internalized the diversion of opiates into their business plan. Both the manufacturers and distributors knew there was significant diversion going on in Reno and the rest of the state and the rest of the country, but ignored it because they were -- they were and are making billions of dollars in profits for manufacturing and distributing much more opiates than could be reasonably absorbed for legitimate

reasons.

The diversion doesn't have to come directly from their facility for them to know that diversion is going on, and they are profiting from it.

In the event Your Honor believes more specifics are necessary, Reno requests the opportunity to engage in early discovery pursuant to the Rocker case.

Rocker discovery is appropriate where the facts are necessary to meet a heightened pleading standard, are within the possession of the defendant.

Here the bulk of the information pertaining to Mallinckrodt's marketing and sales of its opiate products are within Mallinckrodt's possession, unless unavailable to Reno at the time the Complaint was filed and served.

What Mr. Guinn is talking about are his client's defenses. We don't have to plead facts at this stage to defeat their defenses.

The particularity of exactly what, who, where, how, and when is not necessary under the claims the City has brought. And if it is necessary, then we are not in possession of the facts to be able to do this until we have engaged in -- if the Court finds it is necessary, we have to be able to engage in discovery to discover those facts.

Accordingly, Your Honor, with the manufacturers -- so

though we don't believe that any further pleading is required, such discovery would be more appropriate than dismissal.

Along those lines, if Your Honor believes that there are deficiencies in the Complaint, we would request leave to amend in lieu of dismissal.

Accordingly, Your Honor, as with the manufacturers' joint motion to dismiss, Reno respectfully requests that you deny Mallinckrodt's individual motion, as well as its substantive joinder.

Thank you.

THE COURT: Before I hear again from Mr. Guinn, let me ask this. Who can remind the Court? Judge Gonzalez in --

MR. EGLET: The State case.

THE COURT: Yeah, in the State case, in either granting a motion, but with leave to amend after some discovery, or not granting the motion, just directing --

MR. EGLET: That was only on one claim, Your Honor.

THE COURT: All right. One claim. And she said Rocker-type discovery would be allowed. Did she say within 180 days? 120 days? Supplemental briefing? How did she leave it?

MR. EGLET: She just immediately opened discovery on that issue, and allowed us to start engaging in discovery on

that issue. She ruled right from the bench on it. She said "Discovery is now open, so that you can start doing discovery." She didn't put a time --

THE COURT: She didn't say, "I'll entertain a re-submitted motion to dismiss at a later time"?

MR. EGLET: She didn't say she would preclude that. She just said -- she didn't give a time limit on how long the discovery would take.

THE COURT: "Let's get going."

MR. EGLET: She just said, "Let's get going." And that's all that occurred with respect to -- and the only claim that that was on was the deceptive -- no, no -- the False Claims Act, which, of course, isn't even in this case yet.

THE COURT: Understood. Thank you.

MR. EGLET: Thank you, Your Honor.

THE COURT: Mr. Guinn, final thoughts, please.

MR. GUINN: Thank you, Your Honor.

A couple of quick points on a couple things Mr. Eglet said.

There was never a single FDA warning letter regarding any improper marketing of Mallinckrodt's opioids. And marketing of opioids is obviously highly regulated.

Most of the numbers cited by Mr. Eglet are subject to

a legal duty of sameness, applicable to generic prescription medications. The generic medications have to be the same as the brand-name medications.

THE COURT: Same medicine.

MR. GUINN: Correct. And at any rate, there is an absence or a pleading absence of any connection to Reno doctors. Which, again, this is a -- whether this is a nationwide crisis or not, we're not here to address that. We're here to address the City of Reno's case, and how it applies to the City of Reno.

Mr. Eglet was critical of some of the defense attorneys for arguing the facts of the case, which is a little bit ironic, because I think he's argued the facts of the case more than anyone else in the room today.

But the purpose of my argument, so the Court is clear, was to change the lens so that the Court could see the situation through the eyes of a single defendant, and instead of this broad-brush idea that defendants did all of these things.

THE COURT: For the Court to accept this argument -- again, let's -- for purposes of this discussion, I'm going to put aside all the other issues the defense has raised, all the other response claims that have been made, and focus just on Mallinckrodt.

And the question the Court rhetorically asked itself is: If this is not a fraud claim or sounding in fraud or with an overlay of fraud, is there enough, as currently pled, for your client to understand the nature of the claims against it, and properly defend itself? Or if I decide it really, as I used the analogy yesterday, quacks like a duck, walks like a duck, waddles like a duck, it's really a fraud claim masquerading as other court claims; and, if so, should the plaintiff be allowed the opportunity to amend its Complaint and/or amend its Complaint only after a reasonable amount of time to investigate and discover additional information that it may not currently have access to? And then to give your client an opportunity to properly understand the claims against it, and an opportunity to properly defend itself. That's the rhetorical question.

So I've already indicated to you that, if I come to the conclusion that this really is based in fraud, it's very likely that, if it withstands other challenges, the ability of the case to go forward anyway, then it's very likely the Court would find deficient the manner in which the allegations that essentially sounded in fraud have been presented.

On the other hand, if the Court finds that it does not, and it's really -- there are some elements of this which

involved misleading, deceptive, failure to disclose that which the law requires, then the question is: Does the pleading now give your client a fair notice of what is being in the Complaint?

So you're telling the Court: No, it doesn't, because it's lumped together with other defendants, because of the nature of the work they do, and the manner in which the specific allegations have been pled, and they're missing some key elements of the claim; right? That's what I'm taking away so far.

MR. GUINN: That's precisely correct, Your Honor.

I think what you're hearing from Mr. Eglet is a sort of: We have a fraud claim, but we don't have enough facts yet to tell you what that fraud claim is, which reverses the order of events in this case.

We are expected to defend against some type of allegation of wrongdoing. And fraud is a serious charge, obviously. It is a notch above --

THE COURT: That's why the burden of proof is higher; right?

MR. GUINN: Absolutely. And it should be. That's why the pleadings standard is higher. Because if you're going to accuse somebody of essentially lying, then the accused is entitled to some pretty specific information as to

what underlies that accusation, what the circumstances were of that accusation, and how the plaintiff intends to pursue this in court. That's necessary in order to conduct discovery.

I'm trying to envision, when I listened to Mr. Eglet's argument about, you know, that only the defendants have the facts showing what fraud they've committed, how discovery is going to work in this case.

Do we send interrogatories to the plaintiffs and say, "What did we do wrong?" or, "Give us all the instances of fraud we committed"? All of that should be in the First Amended Complaint.

We have to -- there is a lower level of proof at the pleadings stage. No question. We're not talking about what evidence is going to be in front of the judge or the jury at trial. I understand that.

But there is a bar, and the bar is higher for a fraud claim. And if those claims which permeate the entire First Amended Complaint -- as the Court knows from having read it, this isn't an obscure cause of action thrown in at the end. It permeates the entire First Amended Complaint. If that claim is going to be made, no matter how creatively it may be styled, or whether there's a specific cause of action called "fraud," the simple fact is that pleading requirements in

Nevada require the plaintiffs to identify what they're talking about in order for us to properly have notice in order to properly defend ourselves in this case.

THE COURT: Well, that's, again, going back to comments I made that if the Court ultimately determines that this case really is about allegations of a unified course of fraudulent conduct, as opposed to other conduct that the plaintiff believes is actionable.

Okay. Thank you for responding to the Court's questions.

This matter -- unless there's something else you want to bring to the Court's attention.

MR. GUINN: No, Your Honor.

THE COURT: Thank you.

Then this matter will be deemed submitted, taken under consideration by the Court.

MR. GUINN: Thank you.

THE COURT: Thank you.

MR. POLSENBERG: Your Honor, Dan Polsenberg.

I had one little part on the Rocker discovery issue.

If I recall Judge Gonzalez's order correctly, she was anticipating that there would be an amendment at the conclusion of that discovery.

THE COURT: Well, that's presumably why she allowed

the discovery to go forward at this stage under Rocker.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: Thank you.

All right. We're going to move to the next motion to dismiss.

Who will be presenting it, on behalf of which client, please?

MR. CUILLO: Your Honor, Zac Cuillo, from Kirkland and Ellis, here for the Allergan defendants.

THE COURT: Thank you very much.

MR. CUILLO: As a quick housekeeping matter, I just want to make clear who our clients are.

We represent Allergan, USA, Inc., and Allergan Finance, LLC. Now, it's a little confusing in the Complaint because there's Actavis entities, there's Watson entities.

Allergan Finance, LLC was formerly known as Actavis, Inc., which was formerly known as Watson Pharmaceuticals, Inc. Several of those entities were sold to Teva in 2016. They still exist today. They are represented in this court today. So I'm just here for the defendants of the Allergan defendant family.

I'd like to actually start off by -- am I blocking you? I'm sorry.

MR. EGLET: No, you're fine.

MS. CUILLO: I'd like to start off with the last thing you said. Let's put aside 9 (b) for a second. Let's just focus on notice pleading.

If we just focus on that, the City has alleged no facts that, if true, would establish liability against the Allergan defendants. In fact, the word "Allergan" appears in only two paragraphs of the entire Complaint.

Paragraph 55 says that -- it provides the Allergan entities' principal place of business and place of incorporation.

Paragraph 60 says that Allergan entities sold opioids in Washoe County, and that's it.

Throughout the entire Amended Complaint, there are literally no other Allergan-specific allegations.

Now, as we've heard, the City asserts that the group allegations apply to everyone; that the allegations in its Complaint, the manufacturers as a whole, made misrepresentations, marketed through seemingly neutral third parties, front groups, key opinion leaders, et cetera.

What's interesting, though, Your Honor, is that the City's all-encompassing manufacturer allegations also contain several examples of the defendants' specific conduct.

The City actually invokes this point in its effort to defeat our arguments regarding group pleading.

Specifically, on page 18 of its opposition, the City states that, "FAC also provides particularized allegations in multiple examples of specific misrepresentations attributed to each manufacturer."

THE COURT: You're saying that's not true as to your clients.

MR. CUILLO: That is not true.

If you look at paragraphs 48, 50, and 57, the City specifically names manufacturers who allegedly detailed to Reno prescribers. It doesn't name Allergan.

Paragraphs 96, 106, 134, the City calls out specific misrepresentations -- alleged misrepresentations made by named manufacturers, not Allergan.

Paragraph 149, the City specifically says which entities, distributors, and manufacturers failed to maintain effective control against diversion, citing fines and various things like that. Not Allergan.

In paragraphs 48, 57, 59, the City specifically lists opioid manufacturers -- medicines that the manufacturers sold. And not a single Allergan opioid is named.

I could go on, but the point remains that we're just not in the Complaint, except for our principal place of business and place of incorporation, and the fact that we were alleged to have sold opioids here.

Now, the City claims that it doesn't have to get that level of particularity under 9 (b). And I submit that it does.

In the numerous opioid cases across the country, we've seen kind of a spectrum of different levels of allegations. They rely on the MDL, and they say, you know, that that Complaint survived, and this Complaint survived. But the Complaints are all different.

Now, the MDL Complaints were deficient in their own right, in our opinion. But those contained a thousand paragraphs that were replete with defendants' specific allegations going into that. We knew exactly what conduct the plaintiffs said we were -- they were going to focus on for us. We had notice of what we were going to be on the hook for: front groups, KOLs. And we could assess that and say: Okay. There's nothing pled there, so, you, know we don't -- they're not coming after us for that.

That's not the case here. This is more similar to the Complaint we have seen in Arkansas. In Arkansas, about 20 defendants, which the Court coined "one-paragraph defendants," same position as us here. You had their place of incorporation, principal place of business, and an allegation that they sold opioids in Arkansas. And they were all dismissed on notice pleading grounds for that reason,

because they're just --

THE COURT: Without leave to amend?

MR. CUILLO: There was leave to amend granted there. They have not amended.

THE COURT: Okay.

MR. CUILLO: So we think that the Court here should reach the same result. I mean, otherwise, you can take literally any single pharmaceutical manufacturer in the world, plug them into the caption, and then they would have to incur millions of dollars' worth of discovery in order to show that they didn't do anything wrong.

There's nothing in the Complaint about us. We don't belong here. And we respectfully request that the Court dismiss our clients. And we request it with prejudice, but the Court is going --

THE COURT: -- going to do what it's going to do.

MR. CUILLO: Do what it's going to do.

THE COURT: Thank you very much.

MR. CUILLO: Thank you, Your Honor.

THE COURT: Mr. Eglet, response. I mean, based on what I've just heard, at least it seems to the Court that perhaps the allegations as to Allergan are a bit thin.

MR. EGLET: No, they're not, Your Honor. What he's talking about with the MDL Complaint is, they basically took

the same allegations we did against all the manufacturers jointly, and individually -- that's why it's over a thousand paragraphs -- because individually they listed the manufacturer, they repeated the same allegations against each one. It doesn't --

THE COURT: Without any additional detail.

MR. EGLET: No, it doesn't change the nature of the Complaint. Reno has sufficiently alleged facts against Allergan, and, thus, the motion should be denied, Your Honor.

You're aware of the pleading standards. I don't need to go over that again. Allergan is identified as a manufacturer defendant, and it's included in the allegation about the manufacturers' wrongdoing. Similarly, Reno sufficiently alleged that Allergan, as a manufacturer, caused their damages, was one of the -- a cause, you know, it's obviously part of a big group. They're all a cause together.

Moreover, Reno provided allegations identifying the damages Reno incurred. All of these paragraphs are identified in Reno's opposition to Allergan's motion.

Allergan also raises the argument raised by the manufacturers that Reno is required to meet the heightened pleading standards in NRCP Rule 9, which we've addressed over and over again. The fraud is not an essential element of our claims in this case, Your Honor. And, therefore, the motion

should be denied.

Thank you.

THE COURT: Okay. Response.

MR. CUILLO: Yes, Your Honor.

There's just one point I want to raise.

THE COURT: You'll tell me the one point is that he's wrong.

MR. CUILLO: You're correct, Your Honor.

They didn't just repeat the same allegations in the MDL. They called out specific marketing materials. They called out warning letters that we received. They had allegations about prescriber guides, things like that.

Now, a lot of this was remnants from a prior entity that owned the drug that we manufacture, and we didn't actually do any of that stuff, and we cleared that up, and that was fine.

THE COURT: But you stood in their shoes -- right?" -- if you took over for them.

MR. CUILLO: We won't get into that right now, but that's -- it's very different. And I am happy to submit both the Summit Complaint, which is the MDL Complaint, and the Arkansas Complaint --

THE COURT: Well, I don't think you need to. This Complaint will stand on its own.

MR. CUILLO: Fair enough.

THE COURT: All right. That's the one point you wanted to make: that your recollection of the MDL allegations are different than the plaintiffs' counsel's recollection.

MR. CUILLO: Absolutely. And I don't believe our client should be subjected to anything further with what we have so far, which is nothing.

THE COURT: All right. Thank you very much.

MR. CUILLO: Thank you. Your Honor.

THE COURT: All right. The Court -- then that will be submitted, deemed submitted.

Next the Court will hear argument on behalf of Watson Laboratories and the other entities that brought a motion for dismissal on Watson.

Who will be arguing on behalf of that?

MR. LOMBARDO: Your Honor, I think what the agreement actually was was that Allergan and Watson would swap.

THE COURT: Watson will go last.

MR. LOMBARDO: I'm here to address item 5 on the Court's schedule, the Endo motions, if that's acceptable to the Court to go in that order.

THE COURT: Yeah. Give me just a minute, please.

MR. LOMBARDO: Of course.

THE COURT: Okay. On behalf of Endo Health, please state your appearance again for the record.

MR. LOMBARDO: Thank you, Your Honor.

Again, John Lombardo, on behalf of the Endo defendants.

I think that I can conclude this discussion within 10 minutes.

With the Court's indulgence --

THE COURT: Well, hold on. That reminds me of something I saw recently, where the person got up to make their argument and essentially said, "And in conclusion," and that's how they started out. So I thought you were going to say that just now.

MR. LOMBARDO: You were hoping; right?

THE COURT: Well, I wouldn't say I was hoping. I want you to get into the record and before the Court that which you think is important. So please proceed.

MR. LOMBARDO: Thank you, Your Honor.

With the Court's indulgence, what I would ask is that, the Court had some questions yesterday afternoon and this morning on a topic near and dear to my heart, which is the City authority to maintain this lawsuit issue.

The Court was trying to bring clarity to a couple of points. And I didn't have an opportunity yesterday to try to

answer the Court's questions myself on those points, because they came after my presentation. So if I could take two minutes to try to bring some clarity to those specific questions --

THE COURT: Well, is it part of Endo Health's motion?

MR. EGLET: They're not, Your Honor, so I would object.

THE COURT: All right. Go ahead.

MR. LOMBARDO: Thank you Your Honor.

THE COURT: Well, go ahead and answer my question. Are they part of Endo Health's specific motion to dismiss Endo Health and also Endo Pharmaceuticals?

MR. LOMBARDO: They are not in the Endo-specific motion. They are questions that I could see that, as the Court is pondering the issues, came to the Court's mind while the distributors were arguing, the matter of local concern or Dillon's Rule issue, I think the Court was trying to bring clarity to those, so --

THE COURT: Okay. I understand the ask. I'm going to respectfully decline. Not because of what you have to say might not be at a level of information for the Court's benefit, but I really -- I think the submission of argument and the briefing and the authorities should be closed on that. I really -- it's crystallized somewhat in the Court's

mind, and I really don't need further argument. So no disrespect intended.

I would ask you to please make argument on behalf of Endo as to those issues that are raised in its moving papers.

MR. LOMBARDO: Very well, Your Honor.

THE COURT: One more comment.

I recognize fully that there was a surreply filed untimely, without leave of Court, on another matter, but I've addressed that. And I've given the distributors an opportunity to meet and respond to those specific issues in 15 days. So I'm trying to be fair to all sides here, understanding the somewhat fluid nature of this particular case, in light of all the other work attorneys in this matter have been handling, likely, in many other cases nationwide.

Having said that, that's the Court's ruling.

Please proceed on behalf of Endo.

MR. LOMBARDO: Thank you, Your Honor.

This will be very brief then, much shorter than 10 minutes, because this motion, this Endo-specific motion, has very narrow focus.

We filed this on behalf of the Endo defendants because the First Amended Complaint is so woefully inadequate in alleging facts related to us. In fact, there were only three paragraphs of the First Amended Complaint that mention

Endo in particular, either by name or by reference to a product that Endo manufactures. Those paragraphs are paragraph 9, paragraph 54, and paragraph 60.

Paragraph 9 mentions prescription medications that the companies manufacture. It mentions Percoset, a product that is an Endo product.

Paragraph 54 identifies the Endo entities as Delaware corporations, headquartered in Pennsylvania.

Paragraph 60 lays venue for this action in Reno by alleging that all of the manufacturer defendants do business in Reno.

That's it. I'm not going to walk the Court through the pleading standards again. We've done that. But under any standard, Rule 9 (b) or Rule 8 (a), those allegations fail to state a claim upon which relief can be granted as to Endo.

Now, defendants' answer has been and will be: But we have lots of --

THE COURT: Plaintiffs' answer.

MR. LOMBARDO: Thank you. Plaintiffs' answer has been and will be: We have lots of paragraphs in the Complaint that refer to all defendants, where they refer to all manufacturing defendants. And, respectfully, that's no answer, and that's not sufficient.

Group pleading of that kind does not give Endo fair notice of the specific conduct that it is being accused of and being called upon to defend.

I would refer the Court to the McHenry and the Volcano Developers cases that are in our motion. A Complaint must meaningfully distinguish between the parties in their factual allegations, so that the defendants don't have to guess which facts apply to which parties.

Now, lastly, I want to just comment briefly about the point the Court has made that if it finds -- if it moves back -- moves beyond the threshold preliminary issues, and if it finds that the allegations are not sufficiently pled, it may grant plaintiff leave to amend the Complaint, or it may grant plaintiff leave to do Rocker discovery.

On the question of Rocker discovery, Rocker itself makes very clear that the Complaint in that case met two very important requirements. They sufficiently raised a strong inference of fraud by pleading the specific statements, and when they were made by the defendant; and they alleged facts demonstrating that the defendants in that case exclusively had possession of the facts that would be needed to plead a fraud claim.

The Complaint in this case doesn't meet that standard. And there is, in fact, a post-Rocker decision,

Snyder versus U.S. Bank -- it's in the papers -- that further acknowledges those limitations of Rocker.

THE COURT: Well, it's not meant to be a fishing license; right?

MR. LOMBARDO: Right.

THE COURT: That's the way I have heard it stated before. It's for a district judge to balance the need for information that is more likely than not in the possession of third parties, that it's unable to obtain absent some pre-pleading, pre-further discovery, or pre-ultimate ruling on the dispositive motion-type discovery. But it's not a fishing license; right?

MR. LOMBARDO: That's right. And that is a critical limitation of Rocker.

Filing a Complaint is not a ticket to go on a fishing expedition. The Complaint itself must establish the conditions that would create the opportunity to do the Rocker discovery.

THE COURT: And you submit that this Complaint does not do that?

MR. LOMBARDO: This Complaint does not do that. It doesn't meet the Rocker requirements. It doesn't do what the allegations in Rocker did. And the Court in Snyder versus U.S. Bank acknowledged that, and did not grant Rocker

discovery. And the reason it did not grant Rocker discovery is because the plaintiffs in that case alleged that the fraud occurred in conversations with the bank on negotiating a loan-forgiveness agreement, and yet they didn't have the allegations of the fraud in the Complaint. That information would have been available to the plaintiff, would have been known to the plaintiff.

THE COURT: At the time they first pled.

MR. LOMBARDO: At the time they first pled.

And, again, the Complaint here doesn't allege that that's not the case.

So one more point. The Court asked the question: Did Judge Gonzalez in the State case say that the State could re-plead after the Rocker discovery? Right? And her order does say that. Her order says, the claim is inadequately pled, they may take Rocker discovery, and then they may attempt to re-plead the claim. Rocker itself says that, after Rocker discovered --

THE COURT: So did she hold in abeyance the motion to dismiss on that claim?

MR. LOMBARDO: No. She found that the claim was insufficiently alleged.

THE COURT: Did she grant the motion?

MR. LOMBARDO: You know, you would think the word

"grant" would be in the order. "But as to that claim, the Court finds that it is insufficiently alleged at this time, plaintiffs may take Rocker discovery, and attempt to re-plead the claim later."

That sounds to me like a grant. But, yes. Where the word "grant" is I'm not sure.

May I have just a few seconds, Your Honor?

THE COURT: Sure.

MR. LOMBARDO: Unless the Court has other questions, I have nothing further at this time.

THE COURT: Hold on. I might have one more. Just give me a moment, please.

Best not to open this Pandora's Box. I don't have any questions.

Thank you.

Mr. Eglet.

MR. LOMBARDO: Thank you, Your Honor.

THE COURT: You're welcome.

Response, please.

MR. EGLET: Your Honor, as with the other manufacturer defendants, Endo argues that Reno's Complaint should be dismissed because Reno has not pled the required elements of fraud causation, or cognizable injury.

Reno has alleged sufficient facts against Endo to put

them on notice of their potential liability. This is the same group pleading argument that we've already heard multiple times.

Reno has alleged that all the manufacturers, including Endo, engaged in a pattern of deceptive marketing intended to disseminate false and deceptive statements about the risk and benefits of long-term opiate use.

Reno identified the paragraphs in the Complaint regarding manufacturers' wrongdoings on pages 3 and 4 of our opposition to their motion.

Again, Nevada is a notice pleading state, Your Honor. Ignoring the factual allegations against manufacturers and Endo, Endo argues Reno cannot plead wrongdoing by alleging the same conduct against Endo that it has alleged against all the other manufacturers.

Defendants, to support this argument, relies on two cases that were not cited in the manufacturers' joint motions.

First of all, the Volcano Developers case. Volcano is distinguishable because it involves several contractual agreements upon which the plaintiffs base their claims.

But the plaintiffs failed to attach copies of the contracts and failed to describe the parties to each contract --

THE COURT: That's not the case here.

MR. EGLET: That's not the case here. The Court's decision in Volcano was based on reasoning that breach of contract claims are unique to the parties involved in the District Court's contracts.

In contrast, Reno claims are not contractual; rather, tort-based.

This Court does not have to guess which facts apply to which parties. The allegations against the manufacturer defendants, including Endo, are clearly described in the Complaint.

Second, the Ninth Circuit case of McHenry is distinguishable as it related to a federal civil rights claim against several police officers, public officials, courts, and the City of San Francisco. The plaintiff alleged that their constitutional rights were intentionally violated, but did not identify which defendant was responsible --

THE COURT: Who did what.

MR. EGLET: -- for which alleged violation.

THE COURT: Yes.

MR. EGLET: So due to -- you know, so the Court understands the contrast, this case does not involve vastly diverse defendants unaware of the claims against them. They are manufacturers and distributors of opiates, who have

conducted themselves in a similar fashion.

As has been stated in argument opposing the manufacturers' motion to dismiss, Reno is not subject to the heightened pleading rule requirements of Rule 9 as it relates to Endo.

And they rely in their brief on many of the same arguments raised by manufacturers in the joint motion to dismiss regarding the purported need for Reno to meet the heightened pleading standard.

Endo also cites to the Davenport case, which involved fraud claims. And the Ninth Circuit's opinion was based on the fact that the plaintiff had not alleged any wrongdoing by the moving defendant.

As with the other arguments, if Your Honor believes Reno is required to meet the heightened pleading standard, Reno requests the opportunity to conduct discovery -- Rocker discovery here.

Should Your Honor believe that there are any deficiencies in the Complaint as it relates to Endo, Reno respectfully requests leave to amend in lieu of dismissal.

Reno requests that Endo's motion be denied, with all the reasons in the moving paper, as well as in the argument.

THE COURT: Thank you.

MR. ADAMS: Court's indulgence for one minute, Your

Honor.

THE COURT: Yes.

MR. EGLET: I want to be clear, Your Honor --

THE COURT: Hold on one second.

Go right ahead.

MR. EGLET: I want to be clear here, Your Honor, that the Rocker discovery that Judge Gonzalez ordered was for the violations of the False Claim Act, which is not a claim here.

She denied their motions with respect to all the other claims -- the public nuisance, the violation of deceptive trade practices, violation of Nevada's racketeering, negligence, negligence per se -- and she granted the separate cause of action for punitive damages. She didn't dismiss the remedy of punitive damages from the Complaint. So that claim is not alleged in the City of Reno's case.

And paragraph 4 in her order specifically states -- paragraph 4 in the -- in the paragraph just before the last page of the order, where it starts, "It is hereby ordered, adjudged and decreed," paragraph 4 says, "Violation of the Nevada False Claims Act. The Court finds that the allegations are insufficient at this time, and orders the plaintiff to conduct discovery pursuant to Rocker v. KMPG, LLP," cites the case, "and to amend the cause of action upon

conclusion of the discovery."

So she did not dismiss the claim. She's allowing Rocker discovery to occur. And then, when the discovery is over with, and she is now -- I think she set a scheduling order in the case, that discovery ends sometime late this year. I can't remember when. But set the trial for January a year from now, January 4th, to begin the case.

So she is allowing the discovery to go on that claim, but she denied it with respect to everything else.

THE COURT: The way this Court has done it is, in a situation like that, is motion granted, claim dismissed, but with leave to amend within a certain period of time, and whether or not additional discovery is allowed.

MR. EGLET: Well, I guess my only point is, if the claim is dismissed, how do we conduct discovery? They don't have to respond to anything. They're not a party in the case.

THE COURT: Mr. Lombardo, please reply.

MR. LOMBARDO: Thank you, Your Honor.

Mr. Eglet and I said the same thing about what Judge Gonzalez did with respect to the Nevada False Claims Act.

The claim is insufficient at this time, and the plaintiff has leave to amend the cause of action upon the conclusion of the discovery.

So there is no validly alleged claim in that case at this point. That's clear.

I heard an attempt to distinguish the McHenry case. I didn't understand the distinction.

In McHenry, the plaintiff didn't say who did what among the defendants. Sued a bunch of defendants, alleged that defendants did bad things, didn't say who did what. That's this Complaint; that's this case.

And with respect to Endo, Your Honor, paragraphs 9, 54, and 60. I didn't hear any other paragraph mentioned by Mr. Eglet that concerns --

THE COURT: Well, that's one more paragraph than against Allergan.

MR. LOMBARDO: That's right. I'll accept that, Your Honor.

THE COURT: I mean, for purposes of the Court's decision, it's very likely how the Court deals with Allergan's separate motion, it would be how the Court deals with Endo, as well. You're coming at it from the same vector.

MR. LOMBARDO: Fair enough.

THE COURT: Then that will be submitted.

MR. LOMBARDO: Thank you, Your Honor.

THE COURT: Before we hear from -- is it Cephalon?

Who will be arguing for Cephalon?

MR. EGLET: Cephalon, I think it's Mr. Hymanson.

MR. HYMANSON: I will be arguing the rest.

THE COURT: Very good.

We're going to take 10 minutes just to stretch our legs and come back, and conclude the hearing this afternoon.

Court will be in recess.

(Recess.)

THE COURT: Court is in session.

Let me clarify something I said a little while ago.

In my experience with Rocker discovery orders, there's a motion to dismiss based on the inadequacy of the pleadings. What I've seen and experienced is, motion granted, but with leave to amend; or motion held in abeyance, Rocker discovery ordered, motion to be resubmitted after a certain amount of time has run, allowing the party who is directed and offered the opportunity to do discovery to supplement the pleadings.

But Mr. Eglet is correct. It would be unusual, in this Court's experience, to grant the motion per se, then leave to do discovery, because -- anyway, I hope that clarifies the way this Court has approached it. I'm not suggesting that's informative on how this Court intends to rule on any particular motion here, but that's the way I've

seen it.

Okay. Let's move on.

As to Cephalon Industries and Teva Pharmaceuticals' motions to dismiss, Mr. Hymanson.

MR. GUINN: I thought we were doing Watson Actavis.

MR. EGLET: Watson Actavis.

THE COURT: Now we're doing Watson. Okay. Beg your pardon. Please proceed.

MR. HYMANSON: Your Honor, so the point of order, perhaps we can make this very short, although I'm not sure. Counsel mentioned yesterday in his remarks of what companies were not in this case. And he mentioned Actavis as not being in this case. But based on the pleadings, I'm guessing that was a misstatement.

MR. ADAMS: There are several subsidiaries of Actavis. And I can get the note, Your Honor, and put it back in the record. It wasn't Actavis, LLC.

MR. HYMANSON: It was, or was not?

MR. ADAMS: It was not.

MR. HYMANSON: I just didn't want a month from now someone in the basements of Philadelphia or Washington coming across that statement and saying: Why did we argue this motion?

THE COURT: Got it.

MR. HYMANSON: So I'll start with: In conclusion.

Your Honor, Phil Hymanson, on behalf of Watson Laboratories, Actavis, LLC, and Actavis Pharma, all generic manufacturers, and selling generic medication.

The City claims that they marketed and promoted opioids in a manner that was false and misleading, and, therefore, fraudulent. As a generic -- Your Honor, you've spent two days, and I know you've been very engaged, and I think you have a very good understanding of what has been said in this courtroom.

Generics are very limited in what they can do. They're not involved with the development and the research. They're not involved with the marketing of the brand product. They're not involved with the salespeople that go out to the doctors. They're not involved with the marketing or anything that plaintiffs have said that all these companies are involved in, because they're generic.

And based on the rules and regulations within the generic setting, they come into the environment as the brand runs its course.

And the first one in --

THE COURT: Well, wait. While the patent --

MR. HYMANSON: While the patent, yes. They still -- the brand is still out there. But what happens is, Your

Honor, the way a generic is marketed, sometimes the doctor -- because they don't really have contact with the generics, won't even know that the generic is out there and already in the marketplace. So they'll do a prescription for the brand name.

You then go to the pharmacy, and you stand in that line, with nine of the sickest people you've ever seen, and you wouldn't want to be there, and you get up to the front, and they say, "You can have the brand for $200, or there's a new generic, and you can have it for ten dollars."

The way the law is, that generic is identical. It's not sort of like the brand. It's identical. And with all those sneezing, coughing people behind you, you might like to ask those questions. But when they say, "Brand, 200; generic, 10," people take the ten-dollar -- more often than not, the ten-dollar generic.

And that's their marketing scheme. They don't promote with the doctors. They don't have people in their sales force that go out. They come in when the patent is run, they set up as a generic, and they go forward.

And they're very limited. If while the generic is out there, something happens such that a state says you need to either stop selling, or you need to modify the warning, or you need to do something like this, they can't do that,

because they're preempted. The federal law is very, very specific. And you simply cannot do that.

And so when state and federal conflict with the generic, the states lose, because the regulations -- if a generic were to alter the label, if they were to send out a "Dear Dr." letter, if they were to do something other than what the actual brand is, they would no longer be a generic. They would be off the market because they would be in violation of federal regulations.

So when you have a case such as this where you have a group pleading, and everybody is gathered in -- the manufacturers, the distributors, the pharmacies, the doctors, and you have the generics -- the generics, there's not one thing listed where they say: You've misused this drug.

There's not one claim in this Complaint that says what the generic companies did, because the generic companies did nothing more than sell their product. They weren't part of this alleged mass scheme. They weren't a part of any marketing. They weren't a part of discussions with doctors. They had the rules and regulations of the federal government. They complied, they followed, and they did not deviate.

If they did, they would no longer be a generic manufacturer.

THE COURT: So is this a summary judgment motion? I

mean, for purposes of today, don't I have to assume that your clients did that which the plaintiff alleges that they did? And if you later said, "Judge, we didn't do it. Look, I can show you we didn't do it, and here's a stack of information that tells you why we not only didn't, but couldn't," don't you win at that point?

MR. HYMANSON: Well, yes. But why wait? The fact is, we can't answer. There isn't sufficient information for us to answer this Complaint.

They talk about the City can't show one opioid prescription that was written because of a false, misleading statement by Actavis generic entities. If there's no promotion, Your Honor, there cannot be any false promotion. If there's no false promotion, there's no false marketing theory. Everything they claim can't happen because of the rules and regulations of the generic set-up and the standard.

So this motion to dismiss should apply to the -- all the generics involved with Watson and Actavis. They simply can't go forward.

There is one thing, and I agree with you, Your Honor. You've outlined your University of Oregon theory, which is, if it looks like a duck, quacks like a duck, it's a duck. They can't bring out claims in state court and say: We're not doing -- it doesn't impact preemption because we're doing

these state claims. And they couch it in deceit, in fraud. If it looks like fraud, it is fraud. And so that means --

THE COURT: Well, I guess what -- the way I would amend what you just said to say that, if I'm convinced that these allegations sound in fraud, they should be pled like fraud. That's how I would say it.

MR. HYMANSON: With the specificity so that there could be an answer. But the way it's set up, there isn't anything that the generics can do with additional discovery that isn't already established.

They can't -- they couldn't have marketed before they were a generic. They wouldn't have talked to a doctor. They weren't involved with the pharmacies. They weren't paying any third --

THE COURT: But you're telling me what the evidence will show.

MR. HYMANSON: Right.

THE COURT: You're not telling me -- again, back to my original question: Wouldn't this be best for a later motion?

I mean, look, if you believe we have no business being in this case for, among other reasons, there's nothing that the parade of horrors that the plaintiff alleges that the other defendants could not be alleged against us, they

have been alleged. They have been alleged. And if I find that they meet the pleading threshold, or, alternatively, if I give the plaintiffs the opportunity to amend to meet the threshold, that's a different standard than there's no evidence whatsoever to support it. That's a later determination, isn't it?

MR. HYMANSON: I agree that's the case. But we have to be able to at least respond. You can't simply -- if you throw the generics in that group pleading --

THE COURT: Which they have.

MR. HYMANSON: Which they have -- there's no way for us to give any responses because we are not a participant in any of the alleged allegations that they have made.

THE COURT: Well, the response is, you deny it or -- I don't know what else to tell you. You deny it, say: It doesn't apply to us. We didn't do that. And then later, with the evidence, you attempt to convince the Court, if the case goes forward --

MR. HYMANSON: Sure.

THE COURT: -- that you ought not be tasked with the burden of trial because there's no scenario where a reasonable jury or a half-competent judge could ever find liability against your client. That's the way I would say it.

MR. HYMANSON: Well, I think that's true. And I think that the more competent the judge, the more they would have the ability to say, "Enough is enough," and dismiss it, because there is no merit to it.

THE COURT: Okay. But you're adopting, essentially, in addition to these Watson and Actavis-specific arguments, the arguments made by Allergan and Endo, as well, that is lumped in to the group pleading doesn't give enough specificity to even know that which you may be accused of.

MR. HYMANSON: Yes.

THE COURT: All right. Thank you very much.

Mr. Eglet.

MR. EGLET: Your Honor, I think -- Mr. Hymanson and I are old friends, by the way, just like Mr. -- a lot of us here.

MR. HYMANSON: Except for those five years with Mr. Polsenberg.

MR. EGLET: I don't know what five years you guys are talking about. I cant remember that.

THE COURT: Let me go off the record for one second.

(Discussion off the record.)

THE COURT: We'll go back on the record.

MR. EGLET: I think Mr. Hymanson has forgotten -- do we have the white noise on?

THE COURT: Sorry.

MR. EGLET: I think Mr. Hymanson has forgotten that Actavis marketed Kadian, which is a brand opiate product, not a generic.

In fact, I have a press release from Actavis here, December 30th, 2008, where they specifically talk about -- the headline is, "Actavis acquires Kadian, extends specialty drug portfolio in U.S."

"Kadian, which is an extended-release morphine sulfate product" -- it's an opiate -- "is the first brand product to be marketed by Actavis U.S. The company anticipates marketing Kadian. The acquisition of Kadian is the latest step in Actavis' strategy to expand our specialty drug portfolio, as well as align with our emphasis on bringing complex controlled-release products to the marketplace, said Actavis U.S. CEO, Doug Booth."

So while they may be a generic, they also marketed and had a brand-name opiate.

THE COURT: Well, how did you plead it in the First Amended Complaint? Do you recall?

MR. EGLET: Well, we pled -- I mean, this is the same -- and I don't want to belabor this point -- this is the same group pleading argument that they made. We said that they're a manufacturer and that they were part of this whole

engagement, which Kadian is part of that, as well.

And the Court has it right. What he's arguing, respectfully, Mr. Hymanson's arguing issues of fact that aren't -- you know, that -- who knows what is going to turn out in discovery? No one can predict that with a crystal ball. But these are issues of fact that he's arguing that we contest in this case.

So I don't want to spend a lot of time, unless the Court wants to hear me argue more about Rule 8 and Rule 9 and the fraud allegations, and that they are -- our claims are not dependent on that.

I want to go right to this -- the primary substance of Mr. Hymanson's argument is this. Basically it's a federal preemption argument.

The causes of action against Actavis are not preempted by federal law. In order to find that federal preemption as it relates to Actavis would require Your Honor to ignore the causes of action and facts alleged by Reno in our Complaint. Specifically, it would require Your Honor to read in a product liability cause of action, which Reno has not alleged. Reno expressly stated it is not alleging any product liability claims.

Actavis' preemption argument relies on the existence of a product liability cause of action, and, thus, the

argument should be rejected.

Actavis only raised an impossibility preemption. You heard Mr. Hymanson repeat that, you know, that we can't -- we can't -- we'd have to copy the label. We can't change that. FDA regulates the label. They do not regulate the marketing, like they seem to keep saying. They can't say things that are specifically contrary to what is in the label. But they can engage -- the FDA doesn't regulate the kind of marketing that they did in this case, the deceptive marketing they used with the physicians and the public.

And so they raise this -- he raises this impossibility preemption argument, but as stated in our opposition, the manufacturers -- to their joint motion, impossibility preemption is a demanding defense. A defendant claiming impossibility bears the burden of proving the basis for a preemption defense. Reno is not required to show that it was possible for Actavis to comply with federal law. Rather, Actavis would have to prove that it was impossible to both comply with Nevada law and still comply with federal law. The burden is on them to do that.

The cases on which Actavis relies all involve failure-to-warn claims and product liability claims, which Reno has not alleged here.

Reno has alleged cognizable claims that do not rest

upon the failure-to-warn argument. They relate to a deceptive scheme to increase opiate use, no matter what any label said.

To further distinguish this case from the failure-to-warn cases, Reno is not seeking to change the product's labels -- the products, labels, or the warnings. Reno challenges Actavis' false and misleading promotion of these drugs.

A significant difference in what is required in a warning label and how they actually promote the drug or market the drug.

Actavis seeks to avoid liability by claiming generic manufacturers do not promote medications, but these assertions of fact are outside of the alleged -- those alleged in the Complaint, and improper for consideration at this stage, as I think you've already pointed out.

THE COURT: Well, I asked Mr. Hymanson about that.

MR. EGLET: So if Your Honor believes that there are any deficiencies in the Complaint, Reno requests leave to amend in lieu of dismissal. But we have alleged sufficient facts under Nevada's pleading standards, and, thus, Actavis' motion should be denied.

Thank you.

THE COURT: Thank you.

MR. HYMANSON: Briefly, Your Honor.

The drug that counsel mentions is not listed in the Complaint anywhere. And I think, if you look at the -- get into the history of some of these companies, you would see a rather twisted trail of who owns what and when.

And I can't address the medication that he mentioned that wasn't in the Complaint, so I -- it may be and it may have been when Allergan or somebody else was owning the company.

So as to that --

THE COURT: Well, I would presume you wouldn't knowingly tell me that your client only makes and produces generics, knowing that they marketed a brand opiate and made it. I'm assuming that either it was unknown to you, or it was something that happened before the current ownership structure that brings you before the Court.

MR. HYMANSON: I think I would stipulate to that, Your Honor.

THE COURT: Thank you very much.

That matter will be under submission, as well.

I think we have one matter left.

MR. HYMANSON: We do, Your Honor.

THE COURT: And just for the record, so we can make sure the transcript is clear, again, please state your name,

and who this motion is on behalf of.

MR. HYMANSON: Yes, Your Honor.

Phil Hymanson, on behalf of Cephalon and Teva Pharmaceutical.

THE COURT: Thank you.

Please proceed.

MR. HYMANSON: This is a Complaint dealing with specific medication. There are -- the plaintiffs don't even mention the type of medication, but the only two medications that are out there, one is a generic, and one is not.

And they are for breakthrough pain medication that is used with cancer patients who are already tolerant of opioid use. And it's used for when the cancer patients -- I don't know if you're familiar. When someone, as a cancer patient, is under opioid use, and has what they call breakthrough pain, it's short-term, but it's very, very painful, and they give this specific medication for that. It's usually in a lozenge form. And it's not something that is usually out to be used by the general public. Because to use this medication, if you're not already using opioids, is very detrimental. It's a shock to the system, and can be life-threatening. So it's used only for this specific use.

The theme of plaintiffs' case is that this is a worldwide or nationwide plan to overrun the country with

opioid use.

These medications by Cephalon are not in that marketplace. Those are not the drugs that are being prescribed by doctors or at the pharmacies. It's a very, very specific use. It's very, very controlled. So much control that, with all of the regulations within federal -- the FDA, these have an even higher schedule and a higher requirement for reporting.

So they watch us very carefully, because it's only supposed to be used for very, very specific. And so they are also thrown into this pool of manufacturers, pharmacy, et cetera, et cetera. And the theory is, you know, they're part of the plan and the scheme to put opioids out.

And it's not even an opioid that is used in that capacity. They're not saying that cancer, using opioids is part of anything in this case. And that is all this company does.

And so, as such, Your Honor, I would ask that you dismiss Cephalon.

THE COURT: When you say "this company," you mean one of these companies makes the generic version, and the other makes the brand version?

MR. HYMANSON: Well, once again, Cephalon is one of those companies that has been owned by a lot of different

entities.

THE COURT: I see.

MR. HYMANSON: Teva now opens Cephalon. So Teva is primarily a generic company. They have a generic -- they've purchased Cephalon. They're still a non-generic. But they're coming into the company Teva. And so the presumption -- I can't represent as an officer of the court that this will happen, but I think the presumption is, if it's part of the Teva family, it will become a generic.

THE COURT: Same medicine, though.

MR. HYMANSON: I'm sorry?

THE COURT: Same medicine, though, for either very serious breakthrough pain, or maybe end-of-life pain?

MR. HYMANSON: No. No. It's simply -- it's -- I think that's when they go into morphine and those types of things.

This is a very short-term to get them through what's called breakthrough pain.

THE COURT: Short-term intensity.

MR. HYMANSON: Very short-term, very intense. And it can only be used if you already have opioids in your system. And that's why it's regulated as highly as it is.

So it doesn't fit into the group hug, the group pleading. As such, I don't think it should be part of the

case. We'd ask that you dismiss it.

THE COURT: Thank you very much.

MR. EGLET: It fits squarely within the group pleading. This is a breakthrough medication, but this breakthrough medication was promoted by these manufacturers, including Teva and Cephalon, for chronic pain use, to doctors who were treating chronic pain patients. Not just to oncologists treating end-of-life patients for cancer. That's the whole issue.

They took this drug that, yes, was designed and should have been given just to end-of-life-care patients for breakthrough pain, and they downplayed the addictive nature.

In fact, they came up with this term that they just made up, "pseudo-addiction," and they convinced the doctors: No, no. As long as your patient is actually having pain, they can't become addicted to these opiates, including these breakthrough pain opiates; and, therefore, as long as they're having pain, you can just keep giving it to them.

In fact, what they told them was that, if the pain isn't being relieved by the medication, just increase the dosage, or -- or -- give them these breakthrough medications, which are even more highly addictive than the standard opiates.

So they marketed this through CMEs, through key

opinion leaders, through -- that they sponsored, and other direct marketing to doctors, who are just treating everyday, normal chronic pain.

So that is nonsense that they didn't -- that they didn't market this breakthrough pain for chronic pain use. They did. They did, and we know they did.

And so we've alleged sufficient facts in the Complaint. They're part of the group pleading. This is part of the deceptive marketing, specifically what I just said, that they did with respect to this breakthrough medication.

And they just made up this term "pseudo-addiction" which never -- no one ever heard of it before. And they named it, and disseminated that throughout the legal community through these key opinion leaders, CMEs, everything else, to say: No. Hey, your client may be showing signs of drug-seeking behavior, the patient may be showing signs of drug-seeking behavior, and you may think they're addicted, but they are not really addicted, they are just in pain, and you're not giving them enough of the medication to control the pain, so give them more, give them more. Or give them these breakthrough medications. That's what they did, Judge. That's what they did, all of them did in this case.

And so this argument that, oh, this was only for breakthrough pain, yeah, that's what it was designed for, but

that's not what they marketed it for. That's the whole point. And that's why they're defendants in this case, Your Honor, and they're appropriately defendants.

I'm not going to go through the fraud -- the claims that this is fraud. They're not. Our Complaint doesn't depend on fraud. Not going to go through the pleading. I just want to focus on what Mr. Hymanson focused on.

But that's the truth about these breakthrough pain medications, Your Honor.

THE COURT: Thank you.

Mr. Hymanson.

Again, we're just at the pleading stage, as opposed to hear the evidence to suggest what we did or didn't do stage.

How do you respond, please, Mr. Hymanson?

MR. HYMANSON: Well, I think it's fascinating that they have all that information. And if they had that information, they could have pled that information. We could have had some specifics. They didn't even mention the name of the medications. They didn't even give any indication of who it was prescribed to, or was prescribed too poorly, or was the result of the prescription led to a bad result. They haven't claimed any of that in their Complaint. It's just a generic who's who. Let's all get together. And you know

you've done something wrong, and we will prove it down the road.

What I heard here is, apparently, they have a lot of information, and they could have pled it with a lot more specificity, and then we could have had a response. We could have addressed those issues. But as such, we're not in a position to address them.

Your Honor, I think you had reference yesterday to the Connecticut decision, and Judge Moskawser. And he had said that -- he wrote, "Without any basis for allocating the plaintiffs' fault or plaintiffs' recovery, entertaining these municipalities' claims would take the Court out of the business of reasoned judgment, and into the business of irrational speculation. Social problems are poor candidates for civil damage awards."

And I think that -- in the two days you have been in this court, I think you've struggled and wrestled with some of those issues, and you've listened clearly and closely.

And what I would ask Your Honor is that you make use of that 60-year-old gavel and rule on behalf of Cephalon and Teva and the other defendants and dismiss the case.

Thank you.

THE COURT: Thank you.

You know, as we've been proceeding over the last day

and a half, two things occurred to me that I want to put on the record, that I apologize for not doing earlier. And I will make these statements, these disclosures, and then you don't have to say anything now. You can give some thought to whether that matters, and if you want to take a position.

The first thing is that the Court has a child who is a former medical scribe at a place here in Northern Nevada called -- I believe it's called Sweetwater Pain Management Clinic, if I have the name right. Was there for two years, as I recall, full-time.

Now, she's aware that this case is pending, but we haven't talked about it. We don't talk about what the Court does, and we don't talk in any level of specificity on any particular case.

But I do have a child who for two years worked in a pain management clinic as a medical scribe.

If I'm doing the full brag, she's now a student right here: UNLV School of Medicine.

Second disclosure. I have a child who is a physician. That's right. I have another child who graduated medical school, University of Nevada School of Medicine. In fact, I have a blue mug in my office. I call them my two $40,000 mugs. He's an emergency-medicine physician. Nothing really to do with pain management, or the issues that bring

the parties before the Court.

But if you think that for whatever reason that places the Court in a position where either I could not be fair and impartial, or, alternatively, the appearance that I could not be fair and impartial to an objective observer, would impair the ability of the Court to do its job, I'll certainly entertain dialogue in that regard.

Now, obviously, if I thought about it more fully, I would have said that a long time ago, so we wouldn't have had to spend one and two-thirds days on these hearings, only to be preempted somehow, and have another judge have another day and two-thirds. So I apologize. But that shows you the level of which it really was not in the core front of my thinking, because I didn't for a moment think that would impair the Court's ability to in any way adjudicate fairly in this matter.

Would anyone like to be heard on anything with respect to that at this time? And you don't have to say anything now, if you don't care to, or ever. But if you care to, I certainly respect a party's right to take a position on anything I've just disclosed.

All right. Very good.

The matters will now be submitted. I will get -- I looked back at our initial pre-trial conference from August,

when we set these hearing dates. I opined at that time that, after the hearings, it would be hopeful that within a couple weeks if the Court would have a decision out. That might have been a little bit optimistic, based on the level of analysis and the depth of argument here. In addition to the fact that the distributors have 15 additional days to respond to new matters that may have been raised. But I will do my level best to get a decision out on these motions as quickly as I can, based on other work the Court has.

So with that, thank you to everyone. Excellent job and presentation. And the Court will be in recess.

MR. POLSENBERG: Thank you, Your Honor.

(Recess.)

STATE OF NEVADA)
COUNTY OF WASHOE)

I, ISOLDE ZIHN, a Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department 8 of the above-entitled court on Wednesday, January 9, 2020, at the hour of 10:15 a.m. of said day, and took verbatim stenotype notes of the proceedings had upon the matter of CITY OF RENO, Plaintiff, versus PURDUE PHARMA, et al., Defendants, Case No. CV18-01895, and thereafter reduced to writing by means of computer-assisted transcription as herein appears;

That the foregoing transcript, consisting of pages 1 through 163, all inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the proceedings had at said time and place.

Dated at Reno, Nevada, this 10th day of January, 2020.

/s/ Isolde Zihn
Isolde Zihn, CCR #87

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CITY OF RENO,

Plaintiff,

v.

PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC. d/b/a THE PURDUE FREDERICK COMPANY, INC.; PURDUE PHARMACEUTICALS, L.P; TEVA PHARMACEUTICALS USA, INC.; McKESSON CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6 INC.; CARDINAL HEALTH TECHNOLOGIES LLC; CARDINAL HEALTH 108 LLC d/b/a METRO MEDICAL SUPPLY; DEPOMED, INC.; CEPHALON, INC.; JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN USA, INC.; ALLERGAN FINANCE, LLC f/k/a ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC.; ACTAVIS LLC; INSYS THERAPEUTICS, INC.;

Caption continued on next page

Case No. CV18-01895

Dept. No. 8

OMNIBUS ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS; AND GRANTING LEAVE TO AMEND

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

Defendants.

/

OMNIBUS ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS; AND GRANTING LEAVE TO AMEND

Before the Court are several *Motions to Dismiss*, specifically:

(1) Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint;

(2) Distributors' Joint Motion to Dismiss First Amended Complaint;

(3) Defendant Mallinckrodt LLC's Joinder to Manufacturer Defendants' Joint Motion to Dismiss and Motion to Dismiss First Amended Compliant;

(4) Allergan USA, Inc.'s and Allergan Finance, LLC's Motion to Dismiss the Amended Complaint;

(5) Endo Health Solutions, Inc., and Endo Pharmaceuticals, Inc.'s Motion to Dismiss First Amended Complaint;

(6) Motion to Dismiss of Defendants Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc.; and

(7) Motion to Dismiss of Defendants Cephalon, Inc., and Teva Pharmaceuticals USA, Inc.

The matters have been briefed[1] and argued. Being fully apprised, the Court Grants in Part and Denies in Part the *Motions*.

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[1] Including Supplemental Briefs, a Sur-reply and a Response to Sur-reply. Also including various joinders.

I. LEGAL STANDARD

Pursuant to NRCP 12(b)(5), a Court may dismiss a cause of action that fails to state a upon which relief can be granted. Nevada is a "notice-pleading" jurisdiction and, therefore, a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the adverse party has "adequate notice of the nature of the claim and relief sought." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). In reviewing motions to dismiss under NRCP 12(b)(5), the court must construe the pleadings liberally, accept all factual allegations in the complaint as true, and draw every fair inference in favor of the non-moving party. *See Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (citing *Simpson v. Mars. Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997)).

If the Court grants a motion to dismiss, it must then decide whether it should grant leave to amend. The court should "freely give" leave to amend when justice so requires. NRCP 15(a); *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 284, 357 P.3d 966, 970 (Nev. App. 2015). The Nevada Supreme Court has held that "in the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant—the leave sought should be freely given." *Id.* (quoting *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105–06, 507 P.2d 138, 139 (1973)).

II. ANALYSIS

A. Neither NRS 228.170 et seq. nor Common Law Dillion's Rule, or the Legislature's 2015 Enactment of NRS 268.001 et seq. Preclude Plaintiff's Action.

A threshold determination for the Court is whether Plaintiff may bring this action, as opposed to the State of Nevada[2] being the only party which the law empowers to seek the relief sought.

Defendants vigorously argue that only the State may proceed.

Plaintiff responds that it is not preempted and may sue on behalf of itself and its citizens.

For the following reasons, the Court agrees with the Plaintiff. The case may proceed.

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[2] Indeed, the State of Nevada is already a plaintiff in its own action, filed in Nevada's Eighth Judicial District (Clark County), as case number A-19-796755-B.

1. NRS 228-State Interest.

NRS 228.170 provides that when it is necessary "to protect and secure the interest of the State…the Attorney General shall commence [an] action or make [a] defense." Defendants argue that the mandatory language of this statute gives the Attorney General exclusive authority to bring actions affecting a statewide interest. The opioid epidemic—so the argument goes—is a matter not only of statewide but of nationwide concern. This larger context, of which Reno's alleged distress is only a small part, forecloses the City's ability to independently seek relief.

The Court finds Defendants' argument misplaced. The beginning and the end of the issue is simply this: the City of Reno did not bring this action on behalf of the State of Nevada. The City is not purporting to be protecting Nevada's interest. Rather, the City's concern, and its requested relief, is local. While there can be no doubt that the opioid epidemic reaches every corner of the nation, the extent of its magnitude is not dispositive. Instead, there is no reason to differentiate between the City's interest in fighting the crisis and the City's interest in addressing any number of other issues common to municipalities around the country. NRS 228.170 designates the Attorney General as the proper authority to bring suits protecting the State's interests. This is ongoing in Clark County. That filing does not, however, preclude the City's suit, filed on behalf of itself and alleging an independent and isolated injury.[3]

2. Dillon's Rule.

Named after the late Iowa Supreme Court Chief Justice John F. Dillon, Dillon's Rule refers to the reported cases of *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455

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[3] Defendants are also concerned with the potential for double recovery. However, it is unclear what portion, if any, of the State's requested relief would benefit Reno. In addition, double recovery is governed by a different set of rules to be analyzed if at all, on the back end, and is immaterial to whether a case can be brought in the first place. Finally, this issue is not ripe in any event because the outcome of the State's case is yet uncertain.

(1868), and *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868),[4] and his treatises[5] thereafter discussing state versus municipal rule. Generally speaking, Dillon's rule was thus born as a common-law rule defining and limiting the powers of local governments.

Dillon's Rule was primarily a response to the absence of legal constraints on municipalities. Such municipalities had taken it upon themselves to, for example, borrow money to fund public improvements and railroads, which later failed and left its citizens footing the bill.[6] This, understandably, was a problem.

It is not a problem implicated by this case, however. Here, the City has not passed an ordinance or adopted a regulation. Nor has Plaintiff attempted to traverse a state law or make Nevada responsible for the City's obligations. Rather, the City has filed a lawsuit seeking to redress a perceived civil wrong visited upon its citizens.

Second, the codification of common law Dillon's Rule left open the prospect of seeking judicial relief independent of that sought by the State. Defendants emphasize NRS 268.001(4), which states, "Dillon's Rule also provides that if there is any fair or reasonable doubt concerning the existence of a power, that doubt is resolved against the governing body of an incorporated city and the power is denied." This might otherwise be dispositive, were it not for a later provision specifically included to alter the traditional application of the Rule:

> To provide the governing body of an incorporated city with the appropriate authority to address matters of local concern for the effective operation of city government, the provisions of NRS 268.001 to 268.0035, inclusive:
> ...

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[4] *See also* Brian Chally, *Dillon's Rule in Nevada*, Nevada Lawyer, June 2013, at 6; Gregory Taylor, *Dillon's Rule: A Check on Sheriffs' Authority to Enter 287(g) Agreements*, 68 Am. U. L. Rev. 1053, 1060–61 (2019) (discussing a brief history of Dillon's Rule); Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" For Washington Cities*, 38 Seattle U.L. Rev. 809, 813–14 (2015) (discussing origins of Dillon's Rule).

[5] John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 237, p. 448–51 (5th ed. 1911).

[6] *See generally* Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Governmental Law*, 67 Chi.-Kent L. Rev. 959 (1991).

> (b) Modify Dillon's Rule as applied to the governing body of an incorporated city so that if there is any fair or reasonable doubt concerning the existence of a power of the governing body to address a matter of local concern, it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature.

NRS 268.001(6) and (6)(b). Defendants thus have the burden of rebutting the presumption that the City indeed does have the power to bring the instant suit and can only do so with "evidence of a contrary intent by the Legislature." Here, at least, the unequivocal intent of the Legislature was to reverse the presumption typically attributed to Dillon's Rule and expand the City's authority to act in matters of local concern.

Defendants argue that the opioid epidemic is not merely a matter of local concern because it has a significant impact or effect on areas located in other cities or counties. They also argue that the manufacture, distribution, sales, and the prescribing and dispensing of opioids is subject to substantial regulation by a federal or state agency. While this may be so, it does not end the inquiry but rather, merely dispenses with the presumption favoring the City. Thus, were this the end of the analysis, this lawsuit would not be deemed presumptively valid under Dillon's Rule. But the Court's analysis continues:

As set forth above, Dillon's Rule was the response to circumstances that do not exist here. Compounding this is the fact that the Court is unaware of persuasive authority in which Dillon's Rule has been utilized to limit a City's ability to litigate as opposed to the passage of local ordinances, signing of contracts, and the conduct of other non-litigious activities in which a city might participate. Indeed, it is rather axiomatic that cities must, and regularly do, commence and defend civil lawsuits. It would be nigh impossible for the legislature to explicitly enumerate every potential issue a city may face and define how a city must address it. Taking Defendants' argument to the extreme, the City would be limited by Dillon's Rule to commencing only those actions for which the Legislature has provided a statutory right. In other words, the lack of an express grant of power to prosecute and defend suits to which the City is a

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party would by omission imply that the power does not exist. This, it would seem, could not possibly be the Legislature's intent.[7]

Rather, the Court's consideration is furthered by a review of NRS 266.190(2)(e), which requires that the city's mayor "shall cause legal proceedings to be instituted or defended...where necessary or proper to protect the interests of the city." The Court therefore concludes that Dillon's Rule, at least with respect to the City's powers does not contemplate, and therefore does not limit, the City's ability to litigate. If it did, NRS 266.190 would be rendered meaningless.[8]

Finally, the Court observes, again, that the City of Reno is not seeking relief on behalf of the State, and further, the relief sought by the State addresses alleged wrongs, theories, and damages not pursued in this case. Rather, Reno states a cognizable local concern by virtue of the impact the alleged conduct has had on its citizens' health, safety and welfare, including the concomitant stress placed on its police, fire, and social services. This stress directly impacts the city's budget, finances, and expenditures.

For all these reasons, the Court finds that this action may proceed notwithstanding NRS 228, common law Dillon's Rule, and NRS 268.001 et seq.

B. The Municipal Cost Recovery Rule is Neither Binding nor Applicable Here.

Defendants argue that the City's claims for the recoupment of government costs fail under the cost recovery rule. They contend that under this rule, public expenditures made in the performance of governmental functions are not recoverable. However, while acknowledging that Nevada has yet to address the doctrine, Defendants argue that the cost recovery rule is akin

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[7] The Court is aware of the apparent incongruity between NRS 268 (municipalities) and NRS 244 (counties) in this regard. However, the Court does not find that distinction to be dispositive here.

[8] This conclusion is bolstered by NRS 268.0035 which holds, "the governing body of an incorporated city has: (a) All powers expressly granted to the governing body." As set forth above, the mayor, as a representative of the "governing body," has the power to initiate suits, such as the one here, which are deemed necessary or proper to protect the interests of the city.

to the underlying principles of the firefighter's rule[9] and would thus support adoption of the cost recovery rule.[10]

The municipal cost recovery rule, also known as the free public services doctrine, generally provides that "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983). The rationale for this rule is that when such governmental services are provided to the public, the cost and thus the risk of certain losses is spread to the public through shifting the financial responsibility to taxpayers instead of making each and every individual bear the costs for calling necessary services. *See id.*; *see also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1144 (Ill. 2004). However, even with this justification in mind, Nevada has never specifically adopted the cost recovery rule. This Court declines to do so now, finding its rationale inapposite to this matter.

Even if Nevada had adopted such rule, this is not the type of case to which it should apply; here, Plaintiff alleges intentional and wrongful conduct, over many years, effecting the whole community. The facts thus pled are inconsistent with those in which the rule has been invoked.

This Court is not alone in taking this approach. Courts around the country have declined to apply the rule, most notably those grappling with opioid litigation. *See In re Nat'l Prescription Opiate Litig.*, Case Nos. 1:17-md-2804; 1:18-op-45459;1:18-op-45749, 2019 WL 3737023, *7–8 (N.D. Ohio June 13, 2019) [hereinafter *National Prescription*][11] (stating that "[t]he Court finds that the municipal cost recovery rule does not apply in this case. In five

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[9] *See Moody v. Manny's Auto Repair*, 110 Nev. 320, 323–28, 871 P.2d 935, 937–40 (1994); *Steelman v. Lind*, 97 Nev. 425, 427–29, 634 P.2d 666, 667–68 (1981).

[10] The Court finds that the firefighter's rule is neither applicable to the present case nor does it compel a different result.

[11] The Court does not cite these cases for their binding effect, but only for their persuasive value.

separate courts, and in the multi-district federal litigation based in Ohio, judges have rejected the notion that the municipal cost recovery rule bars recovery for public costs.") (quoting *State ex rel. Jennings v. Purdue Pharma L.P.*, No. N18C-01-223MMJ CCLD, 2019 WL 446382, at *6 (Del. Super. Ct. Feb. 4, 2019)). The Court in *National Prescription* continued:

> The current trend among state court judges ruling in opioid-related cases around the country is that the municipal cost recovery rule does not apply when, as alleged here, an ongoing and persistent course of intentional misconduct creates an unprecedented, man-made crisis that a governmental entity plaintiff could not have reasonably anticipated as part of its normal operating budget for municipal, county, or in this case, tribal services. The Court concludes that the Oklahoma and Montana high courts would likely follow this trend and reject the municipal cost recovery rule's application to Plaintiffs' state law claims.

2019 WL 3737023, at *8.

Courts addressing the opioid epidemic are hardly the only courts to find the cost recovery rule inapplicable. The Court in *City of Gary ex rel. King v. Smith & Wesson Corp.* stated:

> ...but the mere fact that the City provides services as part of its governmental function does not render the costs of those services unrecoverable as a matter of law. We do not agree that the City, as a governmental entity, is necessarily disabled from recovering costs from tortious activity. Rather, we agree with those courts that have rejected the municipal cost doctrine as a complete bar to recovery.

801 N.E.2d 1222, 1243 (Ind. 2003). Some courts have even indicated that this rule should be abolished on the grounds that tortfeasors can use it as a shield to preclude them from liability. *See James v. Arms Tech., Inc.*, 820 A.2d 27, 48–49 (N.J. Super. Ct. App. Div. 2003). Considering what appears to be the majority view that the municipal cost recovery rule should not be a bar, and the persuasive argument against its implication here, the Court denies Defendants' *Motions* on this ground.[12]

[12] Defendants cite cases that are sufficiently distinguishable from the present case. That is, as the City points out, most involve a single emergency situation. *See e.g. Flagstafff*, 719 F.2d at 323 (railroad tank cars carrying liquified petroleum gas derailed, causing mass evacuations); *Walker Cty. v. Tri-State Crematory*, 643 S.E.2d 324, 325–26 (Ga. Ct. App. 2007) (discovery of improperly disposed, decaying bodies at crematorium). Nothing of the type is at issue here.

C. Plaintiff's Negligence and Unjust Enrichment Claims Sound in Fraud, Are Not Pled with Requisite Specificity, and Must be Amended.

The complaint alleges that Defendants' conduct amounted to negligence (Claims III and V) and unjust enrichment (Claim VI).

Actionable negligence requires proof by a preponderance of the evidence that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injuries; and (4) the plaintiff suffered damages. *See Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777, 291 P.3d 150, 153 (2012) (citing *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 412, 282 P.3d 727, 732 (2012)).

Unjust enrichment is recognized under Nevada law when an aggrieved party proves that: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated such benefit; and (3) there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (citing *Unionamerica Mtg. v. McDonald,* 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)) (internal quotations omitted).

The parties disagree whether the elements of unjust enrichment and negligence have been—or could be—sufficiently pled under Rule 12(b)(5). Pursuant to the Court's reasoning below, as currently pled Plaintiff's claims cannot proceed.

Defendants cite over a dozen instances demonstrating the City's claims both sound in and are replete with averments of fraud, and thus are required to meet the heightened pleading standard required for fraud cases. Because the City's complaint does not comply with Rule 9(b), movants argue the complaint must be dismissed.

Responding, the City asserts its claims are based on negligent (only) conduct and do not implicate intentional or fraudulent action. It additionally argues that Defendants are attempting to circumvent the Rule 8 notice pleading standards by "recasting" the negligence and unjust

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Rather, the City alleges it has been required to address an ongoing health and social services crisis over many years. Thus, the argument additionally fails on these grounds.

enrichment claims so that they sound in fraud. The City cites *In re Daou Sys., Inc.*,[13] suggesting that a claim "sounds in fraud" only if there is a "unified course of fraudulent conduct" and "relies entirely" on that conduct. The City thus concludes it must only meet the NRCP 8 pleading standard.

NRCP 9(b), states: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See also Rocker v. KPMG LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 707 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). The circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake. *Brown v. Kellar*, 97 Nev. 582, 583–84, 636 P.2d 874 (1981); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged.") (internal quotations omitted).

Moreover, "where allegations in a complaint do not use the word 'fraud,' but 'sound in fraud,' are 'grounded in fraud,' or allege a 'unified course of fraudulent conduct,' the pleading standards of [FRCP] 9(b) still apply." *See Oaktree Capital Mgmt., L.P. v. KPMG*, 963 F. Supp. 2d 1064, 1075 (D. Nev. 2013). FRCP 9(b) contains identical language to NRCP 9(b),[14] and it is only "where fraud is not an essential element of a claim[] [that] only those allegations of a complaint which aver fraud are subject to [FRCP] 9(b)'s heightened pleading standard."[15] *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citing *Vess*, 317 F.3d at 1105).

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[13] 411 F.3d 1006, 1027 (9th Cir. 2005).

[14] *See Rocker*, 122 Nev. at 1193, 148 P.3d at 708.

[15] This Court uses federal law to supplement its analysis of Nevada law where the rules are identical. *See Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1253 (2005) *as modified* (Jan. 25, 2006); *Executive Mgmt., Ltd. V. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (citing *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)) (stating that "[f]ederal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.") (internal quotations omitted).

However, while such is the standard of heightened pleading for fraud, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." NRCP 9(b).

Upon close scrutiny of the City's complaint, it is evident that, regardless how styled, the City's negligence and unjust enrichment claims at the very least sound in fraud. Consider the following excerpts:

> 93. To take advantage of the lucrative market for chronic pain patients, **Defendants developed a well-funded marketing scheme based on deception**. Defendants used both direct marketing and unbranded advertising disseminated by purported independent third parties to **spread false and deceptive statements** about the risks and benefits of long-term opioid use.
>
> 131. To convince prescribing physicians and prospective patients that opioids are safe, **Defendants deceptively concealed the risks of long-term opioid** use, particularly the risk of addiction, **through a series of misrepresentations**. **Defendants manipulated** their promotional materials and the scientific literature **to make it appear that these items were accurate, truthful, and supported by objective evidence when they were not**.
>
> 235. **Defendants' conduct exhibits such an entire want of care as to establish that their actions were a result of fraud**, ill will, recklessness, or willful and intentional disregard of Plaintiff's rights, and, therefore, Plaintiff is entitled to punitive damages.
>
> 249. **Defendants intended and had reason to expect** under the operative circumstances **that the Plaintiff would be deceived** by Defendants' statements, concealments, and conduct as alleged herein and that **Plaintiff would act or fail to act in reasonable reliance** thereon.

Compl. at ¶¶ 93, 131, 235, 249 (emphasis added).

There are other examples. These include headings: **B. Defendants' Fraudulent Marketing**, and **F. The Consequences of Defendants' Fraudulent Scheme**.[16] In this case, while fraud is not necessarily an element of a claim, the City has chosen to allege that Defendants have engaged in fraudulent activity. This is more than merely alleging the "conditions of a person's mind." Thus, the Court finds the City's complaint alleges a unified

[16] *See* Compl. at 19:18, 37:5.

course of conduct such that it invokes the standards of NRCP 9(b) and warrants a heightened pleading standard required of fraud claims. The negligence and unjust enrichment claims are insufficient to withstand dismissal at this time. Accordingly, this Court **GRANTS** Defendants' *Motion to Dismiss* **WITH LEAVE TO AMEND.**[17]

D. Plaintiff's Public and Private Nuisance Claims Survive Dismissal.

The complaint alleges both statutory and common law public nuisance claims. For the reasons set out below, Plaintiff's claims survive the *Motions to Dismiss*.

1. Statutory Public Nuisance.

Succinctly stated, Defendants argue the City's statutory public nuisance claim must be dismissed because the Nevada public nuisance statute, NRS 202 et seq. deals with crimes. Defendants aver that its topic, "crimes and punishments" reflects the statute's limited applicability. That statute also identifies punishment for public nuisance as a criminal, not civil, misdemeanor. Thus, Defendants conclude that civil liability cannot be derived from a criminal statute.

Defendants further argue that *Coughlin v. Tailhook Ass'n, Inc.*,[18] supports this. *Coughlin* states in part, "there is no indication that § 202.450 et seq. was intended to create a private cause of action." *Id.* Finally, Defendants claim that a civil public nuisance claim is unprecedented under Nevada law.

In opposition, the City argues that the claim may proceed because, while not expressly stated, public nuisance as a civil cause of action is implied within the language of NRS 202.450 et seq. The City extrapolates from *Baldonado v. Wynn Las Vegas, LLC*,[19] to assert that an

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[17] Plaintiff may have ninety (90) days from the date of this order to file a Second Amended Complaint. In addition, pursuant to *Rocker v. KPMG LLP*, limited discovery on issues relative to the claims which sound in fraud may commence immediately. *See Rocker*, 122 Nev. at 1194-95, 148 P.3d at 709.

[18] 818 F. Supp. 1366, 1372 (D. Nev. 1993), *aff'd sub nom. Coughlin v. Tailhook Ass'n*, 112 F.3d 1052 (9th Cir. 1997).

[19] 124 Nev. 951, 958–59, 194 P.3d 96, 100–01 (2008).

implied right of action exists after considering the statutory scheme, reason, and public policy at issue and assessing *Baldonado's* three factor test for assessing an implied civil action.

The Court agrees with the City. While the statute does not directly address a civil cause of action for public nuisance, this is not the end of the Court's analysis. A fair reading of NRS 202's public nuisance statutes, as construed by the Court, suggest an implied right of the City to do so. For instance, NRS 202.480 is entitled "Abatement of nuisance; civil penalty." While NRS 202.480 seemingly applies to NRS 202.470, the Court is unaware of legislative intent to preclude a civil public nuisance claim by virtue of its absence.

Moreover, *Coughlin* is distinguishable. First, the facts are markedly different from the present case. In *Coughlin*, Plaintiff Lieutenant Paula Coughlin, was seeking redress from the Tailhook Association and Hilton Hotels based on being attacked while at the convention. *See Coughlin*, 818 F. Supp. at 1367. Lieutenant Coughlin, individually, does not present with the same concerns or allegations of harm as does a municipality. The Court notes as well that *Coughlin* did not find that there can *never* be a civil cause of action for a public nuisance. *See id.* at 1371–72. This also informs the Court's analysis. As the Court reads *Coughlin*, its holding must be construed narrowly.

Second, the Court is cognizant that, while often persuasive, federal district court decisions from Nevada are not binding on this Court. The Court must decide the issue as it interprets the law in this case, at this time.

The Court does not find Defendants' argument persuasive, and therefore **DENIES** the *Motions to Dismiss* this claim.

2. Common Law Public Nuisance.

Defendants next seek dismissal of Plaintiff's common law public nuisance claim. Specifically, Defendants argue Plaintiff does not allege there was interference with a public right (as opposed to interest), or that Defendants had control over the instrumentality of the nuisance at the time it was created. Defendants observe that the opioid crisis as a pressing public health problem does not implicate a public right. Rather, Defendants aver that the misconduct alleged implicates only private rights.

The City argues that the Restatement's definition of public nuisance is broad, and that it should be able to seek recovery against Defendants for the allegedly widespread harm and costs to it. Moreover, it asserts that the complaint sets forth facts alleging that Defendants have impacted the public health, which they reason, is a public right. Plaintiff thus maintains it is not an inherently novel theory, as the viability of such claims have been recognized by other jurisdictions handling their own opioid cases.

Under the Restatement:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B (1979).

While Nevada has not specifically adopted the Restatement's definition of public nuisance, case law indicates the Restatement may guide the Court's analysis. *See generally Land Baron Inv. v. Bonnie Springs Family LP*, 131 Nev. 686, 689, 356 P.3d 511, 514 (2015); *Layton v. Yankee Caithness Joint Venture, L.P.*, 774 F. Supp. 576, 577–78 (D. Nev. 1991). In doing so, the Court finds unpersuasive Defendants' argument that the opioid epidemic, as pled, does not allege a viable interference with a public right.

Nor is the omission of the control element determinative. As noted by the City in its Sur-Opposition and during oral argument, this was the product of clerical error. The Court agrees that satisfactory allegations are set forth in the First Amended Complaint, and as such they withstand—at the pleading stage—the heightened standard of dismissal. Therefore, Defendants' *Motion to Dismiss* as to the common law public nuisance claim is **DENIED**.

E. Plaintiff's Negligent Misrepresentation (Claim IV) and Punitive Damages (Claim VII) Claims are Dismissed Without Leave to Amend.

The City's complaint alleges that Defendants' conduct amounted to negligent misrepresentation (Claim IV), and appears to seek the remedy of punitive damages, among other relief on Claims III, IV, and VI. Oddly, the City also pleads punitive damages (Claim VII) as a standalone cause of action. But a review of applicable law informs the Court that these two claims must be dismissed.

1. Negligent Misrepresentation is Not and Cannot be Pled.

Negligent misrepresentation is a close cousin of negligence and is found where the plaintiff shows by clear and convincing evidence that: (1) the defendant made a representation; (2) while in the course of his business, profession, employment or other action of pecuniary interest; (3) the defendant failed to exercise reasonable care or competence in obtaining or communication the representation to the plaintiff; (4) the representation was false; (5) the representation was supplied for the purpose of guiding the plaintiff in its business transactions; (6) the plaintiff justifiability relied on the false information; and (7) the plaintiff sustained a loss due to the false information. *See* Nev. Jury Instr. – Civ. 10.7 (2018); *Bill Stremmel Motors, Inc. v. First Nat. Bank of Nevada*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978).

Regardless of how couched by Plaintiff, the complaint is devoid of factual allegations which, if proven, could result in a verdict on any of these claims. Whatever else is disputed in this case, this much is not: the City of Reno did not enter into a business transaction with moving Defendants. It did not enter into a commercial transaction with moving Defendants. There were no direct representations or concealments made to or withheld from Plaintiff.

Without such hallmark factual allegations, there is no claim. Accordingly, Claim IV is **DISMISSED WITHOUT LEAVE TO AMEND.**[20]

[20] It is well-settled that where, as here, amendment would be futile, the Court may foreclose such opportunity. *See Allum v. Valley Bank of Nevada*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (citing *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990)); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013). As set forth above, there are no set of facts which could establish all the elements of this claim, the Court declines to allow amendment. Because of this, the issue as to availability of punitive damages as a remedy is moot as to this claim.

2. Punitive Damages Are a Remedy Not a Separate Claim.

As to Claim VII, the law in Nevada is well-settled, as elsewhere,[21] that punitive damages are a remedy, not a cause of action. *See Massi v. Nobis*, No. 72546, 2016 WL 1565201, at *1 (Apr. 15, 2016) (*citing Doe v. Colligan*, 753 P.2d 144, 145 n.2 (Alaska 1988) ("Punitive damages do not constitute a cause of action.")). Accordingly, the Court **GRANTS** the *Motions to Dismiss* as to Claim VII **WITHOUT LEAVE TO AMEND**.[22]

IT IS SO ORDERED.[23]

DATED this 14 day of February, 2020.

BARRY L. BRESLOW
District Judge

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[21] See *e.g., Murray v. Gencorp, Inc.*, 979 F.Supp.1045, 1050 (E.D. Pa. 1997) ("under Pennsylvania law there is no separate cause of action for punitive damages"); *Rhodes v. Sutter Health*, 949 F. Supp. 2d 997, 1011 n.8 (E.D. Cal. 2013) (quoting *McLaughlin v. Nat'l Union Fire Ins. Co.*, 29 Cal. Rptr. 2d 559, 579 (1994) ("In California there is no separate cause of action for punitive damages")); *Biggs v. Eaglewood Mortg., LLC,* 582 F. Supp. 2d 707, 711 n.5 (D. Md. 2008) ("[t]there is no separate cause of action for punitive damages apart from an underling cause of action upon which punitive damages can be grounded. This is true both as a matter of federal law and state law.") (internal citations omitted).

[22] Claim VII is dismissed as a stand-alone claim for relief. Plaintiff may pursue this remedy—if properly pled and otherwise available to claims not dismissed— in its Second Amended Complaint.

[23] To the extent not otherwise addressed by this Omnibus Order, the Court has considered and denies all other separate or collaborative grounds for dismissal brought by movants.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 14 day of February, 2020, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

SARAH JOHANSEN, ESQ.
J. JORGENSEN, ESQ.
CHAD FEARS, ESQ.
JAMES PISANELLI, ESQ.
DANIEL POLSENBERG, ESQ.
RYAN LEARY, ESQ.
STEVEN GUINN, ESQ.
ABRAHAM SMITH, ESQ.
ROBERT ADAMS, ESQ.
PHILIP HYMANSON, ESQ.
BILL BRADLEY, JR., ESQ.
STEVEN BORANIAN, ESQ.
JAKE MILLER, ESQ.
AMANDA YEN, ESQ.
JEFFREY BENDAVID, ESQ.
ROSA SOLIS-RAINEY, ESQ.
JARROD RICKARD, ESQ.
STEVE MORRIS, ESQ.
MAX CORRICK II, ESQ.
PATRICIA LUNDVALL, ESQ.
JOEL HENRIOD, ESQ.

CHRISTINE KUHL
Judicial Assistant