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. 81121

District Court Case No. CV18-01895

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

For the first time in this litigation, the City argues that Section 1.020 of its charter "is an express grant of authority" authorizing its lawsuit. Response ("Resp.") at 1. The City has never made this argument before for a reason: the argument is unpersuasive.

According to the City, its capacity to "sue and be sued" in its own name empowers it to bring any civil claim that state law does not expressly preclude it from bringing. *See* Resp. at 9. The City conjures this purported power not from any language in Section 1.020 affirmatively *authorizing* any particular claim, but instead from the absence of any language in that section explicitly *prohibiting* any specific claim. The City is wrong. Nevada law requires the City to identify an affirmative *grant* of power authorizing its claims, or to accept dismissal; the absence of an express prohibition does not suffice. The City fails to cite any case holding that a locality's capacity to "sue and be sued" authorizes any particular claim, and fails to distinguish the many decisions rejecting its argument, as this Court should do here.

The City's argument, if accepted, would also render numerous Nevada statutes superfluous. The City asserts that statutes granting cities the power to bring particular civil claims do not "eliminate" other "available" causes of action, Resp. at 10-11, but fails to recognize that these statutorily created causes of action were not "available" to cities until the Legislature enacted statutes granting cities the power

to bring them. If, as the City contends, cities possess the power to bring "any cause of action . . . not otherwise unavailable . . . through specific statutory language," *id.* at 9, then all of the statutes granting cities the power to bring particular civil claims would be superfluous, upending longstanding Nevada principles of statutory construction.

The City's mere capacity to "sue and be sued" in its own name does not authorize the City's sweeping claims. Petitioners respectfully request that the Court grant the requested writ directing that the City's lawsuit be dismissed as *ultra vires*.

II. ARGUMENT

A. The Charter Grants The City Capacity To Appear In Court To Bring Civil Claims Authorized By Other Provisions Of Nevada Law, Not The Power To Bring Any Particular Lawsuit

The City argues that its capacity to "sue and be sued" empowers it to bring any civil claim that state law does not expressly *prohibit* it from bringing. *See* Resp. at 9 (arguing the City may bring "any cause of action that is not otherwise unavailable to the City through specific statutory language"). This is so, the City contends, because the charter provision providing the City capacity to "sue and be sued" "does not contain . . . any limitations upon the City's ability to sue." *Id.* at 3. The City is wrong.

The City does not cite any case holding that a locality's capacity to "sue and be sued" grants power to bring any claim other than those state law expressly forbids

the locality from bringing. The reason is simple: as Petitioners have shown, a locality's mere capacity to "sue and be sued" is not an affirmative grant of power to bring any particular claim, but merely the right to appear in court to bring claims authorized by grants of power contained in *other* provisions of state law. *See* Supp. Br. in Supp. of Pet. for Writ of Mandamus at 3-8.

Nevada cities "possess[] and may exercise *only*" the "powers" granted to them "*and no others*," NRS 268.001(3) (emphases added), and "[a]ll acts beyond the scope of the powers granted are void." *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133, 136 (1937). This Court has repeatedly recognized that capacity to "sue and be sued" does not provide the requisite power to bring any particular claim. *See Withers v. Rockland Mines Co.*, 58 Nev. 98, 71 P.2d 156, 161 (1937) ("[A] plaintiff with capacity to sue may have no right of action."); *State Bar v. Sexton*, 64 Nev. 459, 476, 184 P.2d 356, 365 (1947) ("[M]ore [is] required to authorize" a particular lawsuit "than the mere capacity to sue." (emphasis omitted)); *see also Derouen v. City of Reno*, 87 Nev. 606, 608, 491 P.2d 989, 990 (1971) (holding constitutional provision providing municipalities with capacity to "sue and be sued" does not establish "the existence of a cause of action").

The City fails to distinguish these Nevada cases. It argues that "*Withers* does not contain any discussion regarding the authority to sue," Resp. at 5, but the City fails to grapple with this Court's pronouncement that "[t]he want of capacity to sue

is something pertaining *to the person of the party*—personal incapacity—and not to the cause or right of action." *Withers*, 58 Nev. 98, 71 P.2d at 161 (emphasis added). In other words, capacity asks whether the person or entity bringing the claim has "the right to come into court"; whether that person or entity—once in court—may bring a particular claim is a separate question. *Id.*

The City's discussion of *Sexton* is equally misguided. It argues that *Sexton* is inapposite because "the Reno City Charter does not limit . . . the causes of action" the City may bring. Resp. at 6. But *Sexton* declared it "obvious[]" that "more [is] required to authorize" a particular lawsuit "than the mere capacity to sue." *Sexton*, 64 Nev. at 476, 184 P.2d at 365 (emphasis omitted).

The City likewise strains to suggest that *Derouen*'s discussion of the constitutional provision providing municipal corporations with capacity to "sue and be sued" means that a city is free to "assert[] any cause of action that is not otherwise unavailable to the City through specific statutory language." Resp. at 9. *Derouen* does not support that conclusion. To the contrary, *Derouen* recognized that the constitutional "sue and be sued" provision means only that "a similar method of procedure" applies to lawsuits brought by municipalities and non-municipalities alike. *Derouen*, 87 Nev. at 608, 491 P.2d at 990. The decision says nothing about the particular actions a municipality is authorized to bring. And here, the Legislature

has declared that the City must identify an affirmative grant of power authorizing its claims. *See* NRS 268.001(3).

Several courts from other jurisdictions have rejected the City's argument. Colorado's highest court has held that a locality's "right to sue relates to [its] function as a body corporate and can only be exercised within the framework of the specific powers granted," and "does not grant a general power to sue in any and all situations." *Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 172 Colo. 121, 126, 470 P.2d 861, 863 (1970). A federal district court has likewise explained that a locality must "point to a specific statutory power, not just the general right to 'sue and be sued' . . ., that is sought to be vindicated by its suit." *Bd. of Cnty. Comm'rs of Cnty. of Boulder v. Rocky Mtn. Christian Church*, 481 F. Supp. 2d 1181, 1186 (D. Colo. 2007). And Missouri's highest court dismissed a locality's public nuisance claim as *ultra vires* despite the fact that state law granted the locality capacity "to sue and be sued." *Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam Cnty.*, 946 S.W.2d 234, 240-41 (Mo. 1997).

The City's attempt to distinguish these cases is unavailing. The City argues that *Love* is limited to "lawsuits by local governments against state agencies." Resp. at 6. Not so. As *Love* made clear, the case-dispositive question was whether state law affirmatively granted the county the power to bring its action—a question that must be answered in every action whether or not the defendant is a state agency—

because localities "possess only such powers as are" conferred by state law. *Love*, 172 Colo. at 125, 470 P.2d at 862 (citations omitted). Because "the legislature ha[d] not seen fit to grant such power and authority," the court dismissed the locality's suit as *ultra vires*. *Id.* at 126-27, 470 P.2d at 863.

Rocky Mountain Christian Church, 481 F. Supp. 2d at 1185-86, further confirms that *Love* is not limited to locality actions brought against state agencies. In *Rocky Mountain Christian Church*, a county brought a declaratory judgment action against a church arising from the church's desired use of its land, and the church moved to dismiss the action on the ground that "state law does not confer upon the [county] the power to file suit against a land use applicant." *Id.* at 1185. The court agreed and rejected the county's argument—the same argument raised by the City here—that its capacity to "sue and be sued" authorized the county's action. *Id.* at 1185-86. Citing *Love*, the court held that the county must "point to a specific statutory power, not just the general right to 'sue and be sued' under [a statute], that is sought to be vindicated by its suit." *Id.* at 1186.

The City's attempt to distinguish *Premium Standard Farms* fares no better. It argues that the court dismissed a township's public nuisance claim because the township "attempt[ed] to enforce a regulation it had no authority to create." Resp. at 6. The City misreads the case. The *Premium Standard Farms* court analyzed two separate questions. The first—the one the City seizes on—was whether state law

authorized the township to enact a particular regulation. *Premium Standard Farms*, 946 S.W.2d at 238-40. But the second question—which the City ignores—is the pertinent one here: whether state law authorized the township to "maintain an action for public nuisance" against a hog farm. *Id.* at 238. On that question, the court explained that "local governments possess only those powers" provided by state law, and no state statute—including one providing the township capacity "to sue and be sued"—authorized the township to bring "a public nuisance action." *Id.* at 240-41. Because the "[t]ownship ha[d] no power to commence a public nuisance action," the court dismissed the action as *ultra vires*. *Id.* at 235.

In short, *Love*, *Rocky Mountain Christian Church*, and *Premium Standard Farms* are directly on point and persuasive. All three reject the same argument the City asserts here: that a locality's mere capacity to "sue and be sued" empowers a locality to freely bring civil claims that are not expressly prohibited by state law. Instead, as these cases make plain, a locality may bring only those claims authorized by an affirmative grant of power, and the general capacity to "sue and be sued" is *not* such a grant of power.

Finally, the City's assertion that its capacity to "sue and be sued" authorizes it to bring any lawsuit a natural person could bring is incorrect. *See* Resp. at 3, 9. Unlike natural persons, political subdivisions like the City are "creature[s] of the legislature" that possess no inherent powers but "derive[] all [their] powers, rights

and franchises from legislative enactment or statutory implication," and thus "[a]ll acts beyond the scope of the powers granted are void." *Ronnow*, 57 Nev. 332, 65 P.2d at 136. Put simply, "[u]nlike natural persons[,] [political subdivisions] can exercise no power except such as have been" affirmatively granted to them by state law. *Neb. League of Sav. & Loan Ass'ns. v. Johnson*, 215 Neb. 19, 24 (1983) (holding Nebraska political subdivisions lacked power to "deposit funds in a savings and loan association"). To that end, the Legislature's codification of Dillon's Rule applies to cities, not natural persons. NRS 268.001(3).

B. The Nevada Legislature's Selective Grant Of Municipal Causes Of Action Confirms That The City's Mere Capacity To Sue Does Not Authorize The City To Bring This Lawsuit

The City argues that statutes authorizing cities to bring particular civil claims do not "eliminate" other "available" causes of action, Resp. at 10-11, but this argument is beside the point. The statutes discussed in Petitioners' supplemental brief *created* the power for cities to bring the claims provided therein. *See* Supp. Br. in Supp. of Pet. for Writ of Mandamus at 8-11. In other words, before the Legislature enacted these statutes, the causes of action provided therein were not "available" to cities. After all, if cities had always possessed the power bring these claims, then statutes providing those powers would be "meaningless or superfluous," in violation of settled principles of statutory construction. *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009).

The City cannot sidestep the fact that its allegations implicate Nevada's hospital lien and prisoner reimbursement statutes. The City asserts that the hospital lien statutes do not apply because "Reno is not a hospital, nor is it litigating personal injury claims." Resp. at 11. These misguided arguments do not aid the City. The hospital lien statutes permit "the owner[s] or operator[s]" of hospitals to recover "the amount due the hospital for the reasonable value of the hospitalization rendered" "[w]henever any person receives hospitalization on account of any injury" caused by a third-party tortfeasor. NRS 108.590 and 108.610. These are precisely among the costs the City seeks to recover here—it asserts that Petitioners' alleged wrongdoing caused the City to provide treatment to hospitalized persons with opioid-related conditions.[1]

Similarly, the City's bald assertion that it "is not seeking the types of costs it may seek under" the prisoner reimbursement statutes is without merit. Resp. at 11. These statutes authorize a city to recover "from a nonindigent prisoner" the

[1] For instance, the City asserts that it "provides its residents" with "hospital, emergency and ambulatory services" for opioid-related conditions, and that opioid abuse has "financially strained th[ose] services" (II PA00174:17-21); that it "provide[s] necessary medical care, facilities, and services for treatment of City residents" with opioid-related conditions (II PA00219:28-29); that it "paid . . . a significant amount for health care costs that stem from prescription opioid dependency," including "emergency department services[] and inpatient hospital services" (II PA00174:21-25); that "[o]pioid-induced hospitalizations and emergency room visits are a significant area of health expenditure" (II PA00202:24-26); and that its alleged "compensatory damages" "includ[e] necessary medical, hospital, and concomitant expenses" (II PA00211:20-22).

"expenses incurred" for "[t]he maintenance and support of the prisoner in a . . . city jail or detention facility," including "without limitation" "the costs of providing heating, air-conditioning, food, clothing, bedding and medical care." NRS 211.2415; *see also* NRS 211.245 (authorizing cities to "file a civil action" to recover these costs and establishing procedural requirements for such actions). Here again, the City seeks to recover such "corrections" costs in the underlying action.[2] The City's attempt to bypass the procedural requirements of these statutes by bringing sweeping tort claims for the types of costs these statutes address violates settled Nevada law: where a statute "requir[es] the governing body of an incorporated city to exercise a power . . . in a specific manner, the governing body may exercise the power only in that specific manner." NRS 268.0035(2).

The City likewise has no persuasive response to the many other statutes that provide carefully delineated grants of power to cities to bring certain civil actions, including actions to abate enumerated public nuisances, to collect damages from gang members, and to seek damages for graffiti on city-owned property. *See* Supp.

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[2] For instance, the City asserts that Petitioners' alleged conduct has given rise to "diversion and the commission of [third-party] criminal acts to obtain opioids" (II PA00175:11-13), resulting in alleged opioid-related arrests by the "Reno Police Department" (II PA00205:14-17), purportedly leading to "significant expenses for . . . *corrections* and other services" (II PA00208:13-15 (emphasis added); *see also* II PA00212:24-26 (same)). The City seeks to recover "*all* costs incurred . . . to combat the abuse and diversion of opioids" (II PA00176:8-9 (emphasis added)), and "*all* damages flowing from Defendants' conduct" (II PA00212:21-22 (emphasis added)).

Br. in Supp. of Pet. for Writ of Mandamus at 10-11. The City's assertion that these statutes "maintain their purpose even if" the City's suit proceeds is a red herring. Resp. at 12. The Legislature enacted these statutes *because* an affirmative grant of power from the State was needed to authorize cities to bring the claims. Concluding otherwise would run afoul of the bedrock principle that legislatures do not enact "vain or meaningless legislation." *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1057 (9th Cir. 2004) (citation omitted).

Finally, the City concedes that statutes granting cities the power to enact ordinances establishing procedures for abating enumerated property-based public nuisances fall within the scope "of power that is contemplated by Dillon's Rule and NRS 268.001." Resp. at 12. Put differently, the City concedes that it could not enact such ordinances—or pursue the civil abatement actions provided therein—"without being expressly, or impliedly, granted the power to do so." *Id.* These concessions highlight the absurdity of the City's argument here. Namely, if—as the City concedes—it could not pursue the civil abatement actions set forth in these statutes in the absence of those statutes, then it makes little sense to conclude that the City could have brought the very same abatement actions via a public nuisance claim untethered to any statutory grant of power.

In all events, the Legislature's selective enactment of certain municipal grants of power to sue underscores the absence of municipal power to bring any civil action not otherwise prohibited by state law.

III. CONCLUSION

Time and again, the City has failed to identify an affirmative grant of power authorizing its claims. That is why it urges this Court to excuse it from doing so. Its argument on this front has taken many shapes, but the upshot is always the same: that the City need not identify an affirmative grant of power authorizing its claims. It has argued that lawsuits are categorically exempt from NRS 268.001 *et seq.*; that the Legislature's 2015 codification of Dillon's Rule should be discarded as an outdated relic; that its claims should be shoe-horned into an exception to Dillon's Rule for "matters of local concern" notwithstanding the City's allegations showing it cannot satisfy the plain language of that statutorily-defined term; and now its assertion that its bare capacity to "sue and be sued" in its own name permits any civil action that is not expressly prohibited by state law.

The City essentially asks this Court to fundamentally rewrite Nevada law. But that is a task for the Legislature, not the judiciary. Petitioners respectfully request that the Court grant their writ petition and order the district court to dismiss the City's suit as *ultra vires*.

RESPECTFULLY SUBMITTED this 15th day of March, 2021.

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Verification

STATE OF NEVADA)

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COUNTY OF CLARK)

Pat Lundvall, being first duly sworn, deposes and says:

1. I am over the age of 18 years and am personally familiar with the facts stated in this verification. Pursuant to NRAP 21(a)(5), NRS 15.010 and NRS 34.170, I am co-counsel for Petitioners Endo Pharmaceuticals Inc. and Endo Health Solutions Inc. I know the contents of this supplemental reply brief in support of Petitioners' writ petition.

2. The facts stated herein are true and correct to the best of my knowledge or based on information and belief. The relevant facts are largely procedural and drawn from the proceedings before the district court and therefore are within my knowledge as co-counsel for Petitioners Endo Pharmaceuticals Inc. and Endo Health Solutions Inc.

DATED this 15th day of March, 2021.

Pat Lundvall

Subscribed and sworn to before me
this 15th of March, 2021.

Notary Public

TUBOU NELSON
Notary Public, State of Nevada
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Certificate of Compliance

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3,085 words.

I further certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 15th day of March, 2021, a copy of the foregoing Supplemental Reply Brief In Support Of Petition for Writ of Mandamus 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 Supplemental Reply Brief in Support of Petition for Writ of Mandamus 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