IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF RENO,

Appellant,

vs.

TEVA PHARMACEUTICALS USA, INC.; 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.; ACTAVIS PHARMACY, INC. F/K/A WATSON PHARMA, INC.; AND ACTAVIS LLC,

Respondents.

Supreme Court No. 85412

District Court Case No. CV18-01895

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APPELLANT'S APPENDIX VOLUME 4

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of April 2023, I served a true and correct copy of the foregoing **APPELLANT'S APPENDIX VOLUME 4** upon each of the parties by electronic service through the E-Flex rules of service.

By: /s/ *Jennifer Lopez*
An Employee of EGLET ADAMS

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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,

vs.

PURDUE PHARMA, L.P. et al.,

Defendants.

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

REPLY IN SUPPORT OF MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

Oral Argument Requested

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INTRODUCTION

The City's Opposition ("Opp.") to Manufacturer Defendants'[1] Joint Motion To Dismiss ("Joint MTD") invites the Court to expand the settled boundaries of Nevada law by advancing legal theories that have no support in traditional doctrine. The City asserts these novel theories to remedy a complex, multifaceted societal crisis and seeks to impose unprecedented liability on pharmaceutical companies for developing and marketing FDA-approved prescription medications. It urges the Court to follow the examples of courts in some other jurisdictions that have permitted claims of municipal government plaintiffs seeking money damages for opioid-related social ills to survive a motion to dismiss.

Recently, however, a North Dakota court, following the lead of *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019), dismissed a similar opioid-related action brought by North Dakota's Attorney General at the pleading stage. *See* Order, *North Dakota v. Purdue Pharma L.P. et al.*, No. 08-2018-CV-01300 (Burleigh Cty. Dist. Ct. May 10, 2019), **Exhibit A**. These decisions underscore that governmental lawsuits to recover claimed losses flowing from the opioid abuse crisis "are ordinary civil damages cases and face the ordinary civil rules about who can sue for what." *City of New Haven*, 2019 WL 423990, at *1. As in *City of New Haven* and *North Dakota*, the dispassionate application of "ordinary civil rules" to the City's First Amended Complaint ("FAC") compels its dismissal as against Manufacturer Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE CITY LACKS AUTHORITY TO MAINTAIN THIS ACTION

In the FAC, the City alleged it had "standing to bring this litigation" "to address matters of local concern[.]" FAC ¶ 45. Now that Manufacturer Defendants have shown this case does not address a "matter of local concern" as defined by Nevada law (Joint MTD at 4:5-5:23), the City has pivoted sharply and all but abandoned reliance on the "local concern" statute. Now the City says it may bring this action—whether or not it addresses a matter of local concern—simply because it

[1] The moving "Manufacturer Defendants" are identified in footnote 1 of the Joint MTD.

claims it can prove cognizable injury flowing from opioid abuse sufficient to establish traditional standing. Opp. at 2:11-4:6, 7:25-26 ("Reno has standing to bring this lawsuit, regardless of whether the opioid crisis is a matter of local concern."). It further argues that Dillon's Rule, the bedrock legal principle that limits municipalities to taking only those actions the Nevada Legislature has expressly authorized, is outdated, and asks this Court to ignore it. *Id.* at 4:8-7:26. The City's arguments are without merit.

A. The City Lacks Authority To Maintain This Lawsuit Under Dillon's Rule, Which Strictly Limits Cities To Exercising Only Powers Expressly Granted By The Legislature

As the Nevada Supreme Court has explained, "a municipal corporation . . . is but a creature of the legislature, and derives *all* its powers, rights and franchises from legislative enactment or statutory implication." *Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133, 136 (1937) (emphasis added). This principle is commonly known as Dillon's Rule, which the Nevada Supreme Court adopted in *Ronnow*:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, *and no others*: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

Id. (some emphasis omitted). In short, "[n]either the [municipal] corporation nor its officers can do *any* act . . . not authorized," and "*[a]ll* acts beyond the scope of the powers granted are void." *Id.* (emphasis added). Moreover, "[a]ny fair, reasonable, substantial doubt concerning the existence of power is resolved . . . against the [municipal] corporation, and the power is denied." *Id.*

In 2015, the Nevada Legislature codified Dillon's Rule. It declared that "Dillon's Rule serves an important function in defining the powers of city government and remains a vital component of Nevada law." NRS 268.001(5). The Nevada Legislature elaborated on Dillon's Rule as follows:

> 1. Historically under Nevada law, the exercise of powers by the governing body of an incorporated city has been governed by a common-law rule on local governmental power known as Dillon's Rule, which is named after former Chief Justice John F. Dillon of the Iowa Supreme Court who in a case from 1868 and in later treatises on the law governing local governments set forth the common-law rule defining and limiting the powers of local governments.

> 2. In Nevada's jurisprudence, the Nevada Supreme Court has adopted and applied Dillon's Rule to county, city and other local governments.
>
> 3. As applied to city government, Dillon's Rule provides that the governing body of an incorporated city possesses and may exercise only the following powers and no others:
>
> (a) Those powers granted in express terms by the Nevada Constitution, statute, or city charter;
>
> (b) Those powers necessarily or fairly implied in or incident to the powers expressly granted; and
>
> (c) Those powers essential to the accomplishment of the declared objects and purposes of the city and not merely convenient but indispensable.

NRS 268.001(1)-(3). The Nevada Legislature also reaffirmed that, under Dillon's Rule, "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." NRS 268.001(4).

The City asks the Court to ignore Dillon's Rule. It claims that there "have been debates in various jurisdictions regarding the viability of Dillon's Rule," criticizes the "policy" underlying the Rule, and cites a Utah case to claim "Dillon's Rule is outdated." Opp. at 5:3-4, 6:14-17, 7:12-13. But "debates in various [*other*] jurisdictions" cannot override the *Nevada* Legislature's controlling determination that Dillon's Rule remains "a vital component of Nevada law." NRS 268.001(5).

The City further asserts that "Dillon's Rule does not" preclude this action "[s]o long as this litigation is not contrary to the laws of the state or federal government and so long as it does not infringe on any state regulations[.]" Opp. at 7:19-22. This assertion turns Nevada law on its head, and there is no support for it. Under Dillon's Rule, the City lacks authority to take any action unless the Nevada Legislature positively grants it authority to act, and all doubts about that authority are resolved against the City. *See* NRS 268.001(3)-(4). Indeed, the City concedes that "Dillon's rule limits localities to exercis[ing] . . . those powers expressly delegated to them by the state legislature or necessary to implement or necessarily implied from express legislative grants." Opp. at 4:12-13 (internal quotation marks and citation omitted).

The City has plainly failed to show that it is empowered to maintain this action under Dillon's Rule (and that explains its request that the Court ignore the Rule). It has not identified any "express

term[]" of "the Nevada Constitution, statute, or city charter" that authorizes this lawsuit. NRS 268.001(3)(a). Nor does it contend that such authority is "necessarily or fairly implied" from any "expressly granted" power. NRS 268.001(3)(b). And finally, the City nowhere contends that this action is "indispensable" to "the accomplishment of the declared objects and purposes of the city"; indeed, the City has not even identified its "declared objects and purposes." NRS 268.001(3)(c).

Instead, the City offers the unremarkable assertion that "the Reno City Charter was created to 'provide for the orderly government of the City of Reno and the general welfare of its citizens.'" Opp. at 10:6-7 (citing Reno City Charter Art. I, § 1.010(1)). But that provision merely explains why the City created its charter; it does not affirmatively grant the City authority to do anything, much less do *everything* that might possibly "provide for . . . the general welfare of" its citizens. The City also claims its charter "empowers Reno to adopt and enforce local health and safety measures." *Id.* at 10:8-9. But the FAC does not allege the City is seeking to enforce any municipal health and safety measures here; rather, it asserts claims for statutory and common-law public nuisance, negligence, negligent misrepresentation, unjust enrichment, and punitive damages. FAC ¶¶ 178-308.

The City accepts that Dillon's Rule can "prevent local governments from passing ordinances," (Opp. at 3:15-17) but contends it has no application when a city "bring[s] a lawsuit" (*id.* at 5:11-14). That assertion likewise ignores Nevada law. As the Nevada Supreme Court has explained, "*[a]ll* acts beyond the scope of the powers granted" to a municipality "are void." *Ronnow*, 57 Nev. 332, 65 P.2d at 136 (emphasis added). Moreover, this action seeks to halt conduct just as an ordinance or regulation would. Among other things, the City seeks "injunctive relief" to alter "Defendants' promotion and marketing of opioids." FAC Prayer for Relief ¶ 8. When it comes to whether a city has authority to regulate business conduct, there is no meaningful distinction between legislative, executive, or judicial actions to achieve that result. *See City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 889 (E.D. Pa. 2000) (refusing to distinguish between ordinances and lawsuits in an action seeking to regulate the gun industry, explaining that "[w]hat the City cannot do by an act of the City Council it now seeks to accomplish with a lawsuit. The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a

government's regulatory power.") (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996)).

The City has failed to establish its authority to maintain this action under Dillon's Rule.

B. The City Also Lacks Authority To Maintain This Lawsuit Under The Narrow Exception To Dillon's Rule For "Matters Of Local Concern"

Because the City cannot satisfy Dillon's Rule, its FAC relies on the narrow exception to Dillon's Rule for "matters of local concern." *See* FAC ¶ 45; Opp. at 9:5-12.

The Nevada Legislature supplemented the limited powers that Dillon's Rule affords to cities by expressly granting them "all powers necessary or proper to address matters of local concern." NRS 268.001(6)(a). As the Nevada Legislature declared, "*with regard to matters of local concern*, a strict interpretation and application of Dillon's Rule unnecessarily restricts [cities] from taking appropriate actions[.]" NRS 268.001(5) (emphasis added). Accordingly, the Legislature "[m]odif[ied] Dillon's Rule as applied to [cities] so that if there is any fair or reasonable doubt concerning the existence of a power of [a city] *to address a matter of local concern*, it must be presumed that the [city] has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature." NRS 268.001(6)(b) (emphasis added). In other words, the Legislature reversed Dillon's Rule's presumption that a power does *not* exist, but only for actions that address matters of local concern. The Legislature made clear that the strict requirements of Dillon's Rule continue to apply as to "*[a]ny* powers other than those powers necessary or proper *to address matters of local concern*." NRS 268.001(7)(b) (emphasis added).

The Legislature clearly defined what constitutes a "matter of local concern":

> 1. "Matter of local concern" means any matter that:
>
> (a) Primarily affects or impacts areas located in the incorporated city, or persons who reside, work, visit or are otherwise present in areas located in the city, *and* does not have a significant effect or impact on areas located in other cities or counties;
>
> (b) Is not within the exclusive jurisdiction of another governmental entity; *and*
>
> (c) Does not concern:
>
> (1) A state interest that requires statewide uniformity of regulation;

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

NRS 268.003(1) (emphasis added). The Legislature's use of the conjunctive "and" connecting subdivisions (a), (b), and (c) requires the City to plead and prove that the subject matter of its lawsuit satisfies *all* three subdivisions. *See State Dept. of Employment, Training and Rehabilitation, Employment Sec. Div. v. Reliable Health Care Services of Southern Nevada, Inc.*, 15 Nev. 253, 257-58, 983 P.2d 414, 417 (1999) (holding that a party must satisfy all three criteria of NRS 612.085, which has three statutory requisites conjoined by "and"). And under subdivision (1)(c), which contains three discrete subparts connected by the disjunctive "or," if the "matter" concerns any of the three subparts, then the "matter" is *not* one of local concern. *See Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (use of the disjunctive "or" requires "one or the other, but not necessarily both").

In an effort to satisfy the statutory definition, the City leapfrogs subsection 1 (cited above) and seizes on the statement in subsection 2 that "matters of local concern" can include "[p]ublic health, safety and welfare in the city," and "[n]uisances and graffiti in the city." NRS 268.003(2)(a), (c); *see* Opp. at 10:9-12. But the Legislature could not have made more clear that the examples listed in subsection 2 do *not* relieve the City from satisfying the strict threshold requirements of subsection 1: "[t]he provisions of subsection 2 . . . [m]ust not be interpreted as . . . expanding the meaning of the term 'matter of local concern' as provided in subsection 1." NRS 268.003(3)(c). In other words, a matter affecting "[p]ublic health, safety and welfare in the city" or "[n]uisances and graffiti in the city" can be a "matter of local concern" *only* if all three prongs of subsection 1 are independently satisfied. This conclusion is further confirmed by the Legislature's statement, in introducing subsection 2, that "[t]he term includes, without limitation, any of the following *matters of local concern*"—*i.e.*, the "illustrative" examples in subsection 2 must, as a threshold, qualify as a "matter of local concern" under subsection 1. NRS 268.003(2) (emphasis added).

The City does not and cannot satisfy subsection 1.

1. The Action Does Not Satisfy The Local "Impact" Requirement Of NRS 268.003, Subdivision (1)(a)

Subdivision 1(a) requires the City to show *both* that the opioid abuse crisis "[p]rimarily affects or impacts" persons or areas within the City *and* "does not have a significant effect or impact on areas located in other cities or counties." NRS 268.003(1)(a). The City's allegations, accepted as true on a motion to dismiss, foreclose it from making this showing. Joint MTD at 4:12-5:23. Indeed, in its opposition, the City concedes "it is not alone in its struggle to address the *nationwide* opioid epidemic." Opp. at 8:4-5 (emphasis added). The widespread impact of the opioid abuse crisis is underscored by the fact that the same private lawyers representing the City have filed a virtually identical complaint on behalf of Clark County (*see Clark Cty. v. Purdue Pharma L.P. et al.*, No. A-17-765828-C (Clark Cty. Dist. Ct.)), and the State of Nevada, through its Attorney General, has likewise filed a lawsuit seeking "relief for Nevada, *and its municipalities and counties*," from the same statewide opioid abuse crisis. Compl., *State v. Purdue Pharma L.P.*, Case No. A-18-1774437-B, ¶ 3 (emphasis added). What's more, the City's private lawyer has traversed the state to recruit Nevada cities and counties to become plaintiffs in opioid cases and, in presenting to these localities, has repeatedly emphasized the statewide impact of the opioid abuse crisis.[2]

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[2] *See* **Exhibit B** (Mar. 21, 2018 Opioid Epidemic in Nevada Counties Presentation) at 037 ("The opioid epidemic has placed a financial burden on every Nevada City and County."); **Exhibit C** (Mar. 21, 2018 Churchill County Board of County Commissioners Meeting Transcript) at 12:13-18 ("Counties' criminal justice budgets from top to bottom in Nevada . . . have had to expend anywhere from 25 to in excess of 35 percent of their annual budget on the opiate crisis."); *id.* at 15:25-16:3 (asserting the opioid abuse crisis "has affected everybody . . . . [I]t is an epidemic that is plaguing our state unbelievably, and it is a huge crisis."); *see also* **Exhibit D** (Feb. 15, 2018 Board of Lyon County Commissioners Meeting Minutes); **Exhibit E** (Mar. 19, 2018 Humboldt County Board of Commissioners Agenda); **Exhibit F** (Apr. 4, 2018 Letter from Robert C. Eglet to Mayor Carolyn Goodman); **Exhibit G** (Opioid Epidemic in Nevada's Counties Presentation to Nevada Association of Counties during January 2018 Board of Directors Meeting). These materials are publicly available and subject to judicial notice pursuant to NRS 47.130 and 47.150. While matters outside the complaint ordinarily cannot be considered in determining a motion to dismiss, exceptions to this rule include "matters of public record." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). These exhibits are supported by the Declaration of Pat Lundvall, **Exhibit I**.

The City asks the Court to ignore its repeated dispositive concessions of statewide and nationwide impact and focus instead on the alleged impact to the City alone. *See* Opp. at 8:5-15 ("Reno is only seeking redress for the financial burdens it has been forced to bear . . . . As such, this case is limited to matters of local concern . . . and the City is not seeking to recover any costs incurred by . . . other municipalit[ies] for injuries they have suffered."). This strained argument, if accepted, would rob NRS 268.003(1)(a) of any meaning. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 371, 252 P.3d 206, 210 (2011) ("[W]e must not render any of the phrases of [a statute] superfluous.") (citation omitted). Accordingly, under the plain language of NRS 268.003(1)(a), this action does not address a "matter of local concern." *See City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.").

2. The Action Does Not Satisfy The "No Substantial Regulation" And "Statewide Uniformity" Requirements Of NRS 268.003, Subdivision (1)(c)

Nor can the City satisfy subdivision (1)(c)(2), which requires it to show that the "matter . . . [d]oes not concern . . . [t]he regulation of business activities that are subject to substantial regulation by a federal or state agency[.]" NRS 268.003(1)(c)(2); *see* Joint MTD at 4:16-19. The "business activit[y]" the City seeks to change is Manufacturer Defendants' marketing of FDA-approved prescription opioid medications. *See*, *e.g.*, FAC ¶¶ 8, 240, 242-43. The City expressly seeks to enjoin Manufacturer Defendants' "promotion and marketing of opioids for inappropriate uses in Nevada, currently and in the future." *Id.* Prayer for Relief ¶ 8. Yet the marketing and promotion of these medications is comprehensively regulated by federal laws and agencies. *See generally* 21 C.F.R. Parts 201-203, 310, 312, 314 *et seq.* (FDA regulations regarding the manufacture, marketing, and sale of prescription opioid medications).[3]

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[3] *See also United States v. Harkonen*, No. C 08-00164 MHP, 2009 WL 1578712, at *11 (N.D. Cal. June 4, 2009) ("FDA regulations and the case law make clear that labeling under the [federal Food, Drug, and Cosmetic Act] is construed expansively, such that it may encompass nearly every form of promotional activity, including package inserts, pamphlets, mailing pieces, fax bulletins, reprints of press releases, and all other literature that supplements, explains, or is otherwise textually related to the product."); *Strayhorn v. Wyeth Pharm., Inc.*, 737 F.3d 378, 394 (6th Cir. 2013)

As one commentator has explained:

> The FDA has extensive authority over the advertising and marketing claims that drug manufacturers may make for all approved pharmaceuticals, whether to patients or physicians. . . . [T]he FDA's regulatory reach over the private sector is panoptic—the FDA controls nearly every aspect of communication that the drug industry has with every prescriber and consumer of pharmaceutical products in the United States.

Katherine A. Helm, *Protecting Public Health From Outside the Physician's Office: A Century of FDA Regulation From Drug Safety Labeling to Off-Label Drug Promotion*, 18 Fordham Intell. Prop. Media & Ent. L.J. 117, 120-21 (2007). Further underscoring the comprehensive nature of federal regulation, a North Dakota district court recently dismissed (at the pleading stage) substantially identical claims brought by North Dakota's Attorney General on the ground that the claims, "which are based on the marketing of [opioid] medications for their FDA-approved uses," were preempted by federal law. Order, *North Dakota v. Purdue Pharma L.P. et al.*, No. 08-2018-CV-01300 (Burleigh Cty. Dist. Ct. May 10, 2019), at 15, **Exhibit A**. Accordingly, the City's claims squarely seek to regulate "business activities that are subject to substantial regulation by a federal or state agency[.]" NRS 268.003(1)(c)(2).

The City likewise cannot satisfy subdivision (1)(c)(1), which requires a showing that this action does not concern "[a] state interest that requires statewide uniformity of regulation." NRS 268.003(1)(c)(1). The Nevada Legislature has declared that "the practice of pharmacy"—broadly defined to include "activities associated with manufacturing, compounding, labeling, dispensing and distributing of a drug"—is "subject to protection and regulation by the State." NRS 639.213 and 639.0124(1). The State's ability to "protect[] and regulat[e]" these activities would be undermined if cities could impose their own views of how to regulate the "practice of pharmacy," through litigation or otherwise, as the City attempts here.

The Nevada Attorney General agrees. As he has made clear, the State has a strong interest in uniform rules controlling the manufacture, marketing, and distribution of prescription opioid

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(similar); *Del Valle v. PLIVA, Inc.*, 2011 WL 7168620, at *4 (S.D. Tex. Dec. 21, 2011) ("In essence, virtually all communication with medical professionals concerning a drug constitutes labeling.").

medications. Contrary to the City's assertion that "the Nevada Attorney General has never objected to this lawsuit" (Opp. at 8:21-22), the Attorney General explicitly discouraged the City from pursuing this action, emphasizing the importance of "battl[ing] Nevada's opioid crisis" with "a unified front, not separately," explaining that "patchwork litigation" by municipalities could "thwart" the Attorney General's ability to "uniformly address the opioid crisis in Nevada." Nov. 8, 2017 Letter from A. Laxalt to H. Schieve at 1, 3, see **Exhibit H**.[4] Patchwork litigation by Nevada municipalities would untenably undermine the State's interest in a uniform response to opioid abuse. *See*, *e.g.*, *Craig v. Cty. of Chatham*, 356 N.C. 40, 48, 565 S.E.2d 172, 177-78 (2002) ("If each of North Carolina's one hundred counties is free to create its own particularized regulations . . . , the overall balance which the General Assembly has reached within a uniform plan for the entire state will be lost. . . . [Businesses] could be forced to adapt to differing, even conflicting, regulations. Any such dual regulation would present an excessive burden on [businesses]."). Thus, the City's lawsuit also concerns "[a] state interest that requires statewide uniformity of regulation." NRS 268.003(1)(c)(1).

3. The City Is Not Presumed To Have Authority To Bring This Action

Despite its clear failure to satisfy the "matter of local concern" definition, the City baldly asserts that "[p]ursuant to NRS 268.001, it is presumed that the City has authority to bring this action." Opp. at 12:9-10 (emphasis omitted); *see also id.* at 9:23-27. The City blatantly misreads the statute. The Legislature "[m]odif[ied] Dillon's Rule as applied to [cities] so that if there is any fair or reasonable doubt concerning the existence of a power . . . to address *a matter of local concern*, it must be presumed that the [city] has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature." NRS 268.001(6)(b) (emphasis added). By the plain terms of this provision, a "presum[ption] that the [city] has the power" arises if, *and only if*, "there is a[] fair or reasonable doubt" about whether the City is empowered to take action "to address a matter of local concern." *Id.* Here, as discussed, the City does not and cannot show that its lawsuit involves a "matter of local concern" as defined in subsection 1 of NRS 268.003, and accordingly, the question

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[4] This letter is a publicly available document subject to judicial notice. *Supra* note 2.

never arises whether a power exists to address such a matter. Thus, the conditions for triggering the "presum[ption] that the [city] has the power" do not exist, and the presumption does not arise.

Simply put, under the plain language of NRS 268.003, the City's action does not address a "matter of local concern."

C. The City's "Standing" Argument Is A Red Herring

The City's assertion that it can maintain this action because it has allegedly sustained cognizable injury is a red herring. Opp. at 2:11-7:26. To be sure, any plaintiff, the City included, must plead and prove cognizable injury. Separately, however, the City must *also* establish that it has authority from the Legislature to maintain this action. *See Ronnow*, 57 Nev. 332, 65 P.2d at 136 ("*All* acts beyond the scope of the powers granted [to municipalities] are void.") (emphasis added). As courts have explained, this latter requirement is distinct from the traditional concept of "standing." *See*, *e.g.*, *Cmty. Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y. 2d 148, 154-56 (1994) (distinguishing "capacity" to bring an action from "the concept of standing," explaining that "[g]overnmental entities created by legislative enactment . . . have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate."). The City plainly recognizes this independent requirement of legislative authorization to bring this action, having alleged "standing to bring this litigation . . . to address matters of local concern including the public health, safety . . . and general welfare" of City citizens (FAC ¶ 45)—language closely tracking various provisions of NRS 268.003.

The City also asserts that "[t]here is no other entity better situated to bring these claims[.]" Opp. at 3:25. Yet the City ignores that Nevada's Attorney General has already filed a lawsuit seeking redress for the statewide opioid abuse crisis. *See* Compl., *State of Nevada v. Purdue Pharma L.P.*, Case No. A-18-1774437-B (Clark Cty. Dist. Ct.). In that action, the Attorney General seeks "relief for Nevada, *and its municipalities and counties*[.]" *Id.* ¶ 3 (emphasis added); *see also id.* ¶ 4 (alleging the Attorney General's Consumer Advocate "is vested . . . with parens patriae authority to represent the public interest on behalf of the State, which includes its municipalities and counties."); *id.* ¶ 13 (alleging the opioid abuse crisis has "caus[ed] extensive public harm to . . . the State[] and its

municipalities and counties"); *id.* ¶ 192 (alleging that "[t]he opioid epidemic exists in all counties in Nevada").

II. THE CITY'S CLAIMS FOR RECOUPMENT OF GOVERNMENT EXPENDITURES ARE BARRED BY THE MUNICIPAL COST RECOVERY RULE

The City attempts to distinguish the municipal cost recovery rule from the Nevada Firefighter's Rule on the ground that the principles underlying each are "entirely different." Opp. at 14:9-11. The opposite is true. The Firefighter's Rule "developed from the notion that taxpayers employ firemen and policemen, at least in part, to deal with future damages that may result from the taxpayers' own negligence." *Steelman v. Lind*, 97 Nev. 425, 427, 634 P.2d 666 (1981). The principle underlying the municipal cost recovery rule is analogous. In *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983), then-Judge Kennedy explained that the rule is rooted in the legislative policy of taxing citizens to pay for governmental services. *Id.* at 323-24. As such, the City's attempt to distinguish the two rules is unavailing—both are concerned with spreading the cost burden of government services among all taxpayers. Any decision to redistribute the cost of government services is the province of the Legislature rather than the courts. *Id.* at 324 ("[T]he legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.").

The City asserts that the municipal cost recovery rule is limited to "isolated emergency incident[s]." Opp. at 15:17-20. That assertion is wrong. *See*, *e.g.*, *Matter of James AA*, 594 N.Y.S.2d 430, 432 (N.Y. App. Div. 1993) (barring recovery of public expenditures made in the performance of a governmental function in a non-emergency situation, where Attorney General's costs of bringing conservatorship action were not recoverable from conservatee); *Torres v. Putnam County*, 541 S.E.2d 133, 136 (Ga. App. 2000) (county's costs of "enforcing its laws and protecting its citizens" by conducting zoning inspections for ongoing violations were not recoverable from violators of zoning laws). Rather, "[w]hether a municipality is dealing with an isolated emergency or a continuing problem has little to do with the municipal cost recovery [rule's] rationale." *Baker v. Smith & Wesson Corp.*, 2002 WL 31741522, at *6 (Del. Super. Ct. Nov. 27, 2002). If anything, applying the municipal cost recovery rule to ongoing conduct is *more* appropriate than applying it to

isolated emergencies. Unlike isolated emergencies, which are often unpredictable, a local government can anticipate its response to "ongoing" conduct. Opp. at 15:7-9; *see Baker*, 2002 WL 31741522, at *6 ("[R]epetitive or on-going wrongs lend themselves to the [municipal cost recovery] rule better than isolated acts. Almost by their nature, repeated or on-going acts are predictable.").

There is no legitimate reason to reject the municipal cost recovery rule in Nevada. That Nevada's Legislature has enumerated circumstances allowing for recovery of certain municipal costs suggests that in *other* circumstances not so enumerated the Legislature expects State and local governments to finance their expenses through taxes and fees. *See*, *e.g.*, NRS 475.230 (allowing fire department to recover expenses incurred as a result of fighting fire on State-owned property); NRS 405.230 (allowing county agency to recover expenses incurred for removing obstacles placed on public roads by private persons). This result is consistent with the well-established maxim of construction "'expressio Unius Est Exclusio Alterius,' the expression of one thing is to the exclusion of another," which "has been repeatedly confirmed in" Nevada. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967).

Citing dicta from *Flagstaff*, the City asserts that an exception to the municipal cost recovery rule arises where "the acts of a private party create a public nuisance which the government seeks to abate." Opp. at 15:28-16:3 (emphasis omitted). But Nevada has never recognized such an exception to its Firefighter's Rule or any analogous principle. Moreover, in *Flagstaff*, the Ninth Circuit cited three cases in recognizing that "recovery has been allowed" in certain public nuisance cases. 719 F.2d at 324. All three cases are distinguishable because they involved federal common-law nuisance claims regarding interstate waterways and/or a state statute authorizing recovery of the damages at issue. *See Town of East Troy v. Soo Line R. Co.*, 653 F.2d 1123, 1127 (7th Cir. 1980) (statutory authorization); *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1017–19 (7th Cir. 1979) (federal common law); *United States v. Illinois Terminal R. Co.*, 501 F. Supp. 18, 21 (E.D. Mo. 1980) (same). Indeed, courts presented with state-law public nuisance claims have repeatedly rejected a general public nuisance abatement exception to the rule where, as here, the municipality lacks express statutory authorization to recover the municipal costs sought. *See*, *e.g.*, *County of Erie, New York v. Colgan Air, Inc.*, 711 F.3d 147, 152 (2d Cir. 2013); *Walker Cty. v. Tri-State Crematory*,

643 S.E.2d 324, 328 (Ga. App. 2007); *Baker*, 2002 WL 31741522, at *6; *Board of Sup'rs of Fairfax Cty., VA v. U.S. Home Corp.*, 1989 WL 646518, at *2 (Va. Cir. Ct. Aug. 14, 1989); *City of Philadelphia*, 126 F. Supp. 2d at 894-95.

Moreover, even if this Court were inclined to create a so-called public nuisance abatement exception (no Nevada court has done so), the exception would not apply here. The City's claims cannot properly be characterized as claims merely to *abate* a public nuisance. Rather, the City's action seeks *damages*, namely, the cost of public services. FAC ¶¶ 21, 35, 40, 181, 194-95, 221-22. For instance, the City cannot recast "reimbursement for all prescription costs incurred by consumers related to opioids" (*id.* Prayer for Relief ¶ 7) as mere costs to eliminate the alleged nuisance. *See Abatement*, Black's Law Dictionary (10th ed. 2014) ("The act of eliminating or nullifying."). Nor can the City legitimately categorize recovery of costs for "prosecution, corrections and other services" (FAC ¶¶ 194, 221) as "abating a public nuisance." *Baker*, 2002 WL 31741522, at *5 ("[T]here remains an area where the people as a whole absorb the cost of such services—for example, the prevention and detection of crime. No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief.") (internal quotation marks omitted). Plainly, the costs the City seeks here represent *recoupment* and *reimbursement*—not abatement—for expenses purportedly caused by the Manufacturer Defendants' alleged acts. FAC Prayer for Relief ¶¶ 5-7. Thus, even if a public nuisance abatement exception existed, the City's claims would not fall within it.

III. THE FAC SUFFERS FROM MULTIPLE PLEADING FAILURES

A. The FAC Is Replete With Improper Group Pleading

The City baldly claims that its allegations lumping the Manufacturer Defendants together are sufficient because "there is no bar on group pleading in Nevada." Opp. at 17:6. That is incorrect. The City's allegations fail to give each Defendant "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Taylor v. State*, 73 Nev. 151, 152, 311 P.2d 733, 734 (1957) (affirming dismissal because plaintiff pleaded insufficient facts, leaving defendants "wholly unable to admit or deny [plaintiff's claim] intelligently or conscientiously"); *see also Breliant*, 109 Nev. at 846, 858 P.2d at 1260 ("The test for determining

whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested."). By lumping all individual Manufacturer Defendants into an indistinguishable monolith, the City has made it impossible for any Manufacturer Defendant to know which allegations are being levied against it. *See Taylor*, 73 Nev. at 153, 311 P.2d at 734 (complaint properly dismissed because "[w]ithout knowledge of the basis for the plaintiff's conclusion defendants are wholly unable to admit or deny it intelligently or conscientiously").

Courts routinely dismiss complaints that, like the FAC, rely on group pleading that requires defendants to "guess which facts apply to which parties." *See Volcano Developers LLC v. Bonneville Mort.*, 2012 WL 28838, at *5 (D. Nev. Jan. 4, 2012); Joint MTD at 8:10-9:2 (collecting cases). The Court should do the same here.

B. The City Fails To Plead Its Fraud Allegations With Sufficient Particularity

The City asserts that its claims do not sound in fraud because "fraud is not an essential element to any of the City's claims[.]" Opp. at 18:9-12. This assertion is contrary to settled law (Joint MTD at 9:11-20) and ignores the very standard the City itself sets forth: even "where fraud is not an essential element of a claim," "allegations of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)." Opp. at 18:5-7 (internal quotation marks and citations omitted).

The City unmistakably alleges a unified course of fraudulent conduct. *E.g.*, FAC ¶ 8. It alleges, for example, that Manufacturer Defendants sought to "convinc[e] doctors that it was safe and efficacious to prescribe opioids" even as they "knew" otherwise. *Id.* ¶¶ 11-13. The City further avers that Manufacturer 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." *Id.* ¶ 131. The City concedes that its claims sound in fraud. *See* Opp. at 19:25-27 (describing "Manufacturers' massive scheme . . . to cause physicians to be misled"); *id.* at 24:19-22 ("This case involves claims . . . all based upon Defendants' deceptive . . . conduct"); *id.* at 33:16-19 (describing "Manufacturers' fraudulent and deceptive marketing campaign"). The City's claims thus sound in fraud. *See In re Daou Sys., Inc.*, 411 F.3d 1006, 1028 (9th Cir. 2005) (regardless of whether claims required proof of fraud as an element, claims sounded

in fraud where plaintiffs sought "damages resulting from a fraudulent scheme and course of business by defendants").

The City alternatively asserts it has pleaded its claims with particularity because the FAC includes generic descriptions of how Manufacturer Defendants purportedly promoted their products and examples of marketing materials. *See* Opp. at 18:12-19:6. These allegations are insufficient because under Nevada law, "[t]o plead with particularity, plaintiffs must include in their complaint 'averments to the time, the place, the identity of the parties involved, and the nature of the fraud.'" *Rocker v. KPMG LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 708 (2006) (citation omitted), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). These required details are absent from the FAC. *See* Joint MTD at 10:8-25.

The City attacks a straw man by asserting that "Manufacturers argue that Reno must identify each and every prescribing doctor who heard a false statement and prescribed an opioid because of that false statement[.]" Opp. at 19:19-22. Manufacturer Defendants make no such argument. Rather, the FAC is fatally flawed because it does not allege sufficient particulars—indeed, *any* particulars—about the alleged "massive scheme . . . to cause physicians to be misled into changing their prescribing habits." *Id.* at 19:25-27. It does not even attempt to identify a single false statement by each Manufacturer Defendant in the City, much less connect such a statement to a single doctor or prescription in the City. Rather, the FAC offers only the conclusory assertion that "[u]pon information and belief . . . Defendants employed . . . the same marketing plans and strategies and deployed the same messages in Nevada as they did nationwide." FAC ¶ 102.[5]

Citing *Rocker*, the City asserts that "in certain cases, a plaintiff is unable to plead a fraud or mistake claim with the required particularity because the facts of the fraudulent activity are in the defendant's possession." Opp. at 19:7-9. This observation falls far short of triggering *Rocker*'s

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[5] The City's argument that it need not identify a single misled prescriber because NRCP 9(b) allows "[m]alice, intent, knowledge, and other conditions of . . . mind" to "be alleged generally" (*see* Opp. at 20:6-8) misses the mark. This standard concerns the state of mind of the purported defrauder (*i.e.*, scienter), not whether the recipient was actually misled (*i.e.*, identity of defrauded person, reliance, injury). In any event, the City does not even allege generally that any specific City prescriber was misled.

exception, which requires a plaintiff to "state *facts* supporting a strong inference of fraud" and "s*how* in [the] complaint that [plaintiff] cannot plead with more particularity because the required information is in the defendant's possession." *Rocker*, 122 Nev. at 1195, 148 P.3d at 709 (emphasis added); *accord Snyder v. US Bank, N.A.*, 2015 WL 3400512, at *3 (D. Nev. May 27, 2015) (same). As shown, the City has failed to allege *any* particularized details about the allegedly misleading marketing scheme. Joint MTD at 10:8-25. Nor has the City "show[n]" in the FAC that it "cannot plead with more particularity." *Rocker*, 122 Nev. at 1195, 148 P.3d at 709. Indeed, the FAC's allegations show why this is *not* such a circumstance. The City alleges that the purportedly misleading statements forming the basis of its claims were widely and publicly disseminated (*see* FAC ¶¶ 96, 101-02, 105) going so far as to call it "one of the biggest pharmaceutical marketing campaigns in history" (*id.* ¶ 8). These allegations contradict the City's assertion that it cannot identify with further particularity the factual basis of its claims.

IV. THE STATUTORY PUBLIC NUISANCE CLAIM FAILS (COUNT I)

A. The City Cannot Bring A Criminal Statutory Public Nuisance Claim

The City does not deny that NRS 202 *et seq*. is a criminal statute that does not expressly permit a civil cause of action. Opp. at 20:22-23:10. The City instead asserts that "a civil cause of action . . . is implied[.]" *Id*. at 20:24-25. However, neither of the two cases cited by the City establishes that a criminal statute providing for a misdemeanor criminal conviction and limited penalties somehow also gives rise to an implied civil cause of action for "compensatory damages, and punitive damages . . . attorney fees and costs, and pre- and post-judgment interest."[6] FAC ¶ 198.

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[6] The City cites *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008), and *Neville v. Eighth Judicial District Court*, 406 P.3d 499 (2017). Opp. at 21. Both cases examined *civil* statutes on unpaid wages under NRS Chapter 608, and both narrowly held that a provision allowing an employee-plaintiff to recover attorneys' fees when suing for unpaid wages could imply that the Legislature intended to create a private cause of action for unpaid wages. As the *Neville* court explained, "[i]t would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself." 406 P.3d at 504. Furthermore, the *Baldonado* court examined several other subsections within NRS Chapter 608 and found *no* implied private cause of action existed under the relevant statutes. *Baldonado*, 124 Nev. at 960, 194 P.3d at 102.

The City argues the "related legislative history[] demonstrates there is an implied private cause of action for public nuisance in Nevada" (Opp. at 21:8-9), but cites no legislative history to support that argument. Instead, it relies on self-serving divination of the Legislature's "intent." Yet the best evidence of what the Legislature intended—the statute itself—squarely contradicts the City's argument: by enacting NRS 202 *et seq*. within the criminal statute—and by limiting the penalties to a misdemeanor conviction and a fine "of not less than $500 but no more than $5,000"—the Legislature made clear that there are no parallel civil remedies implied in the statute. NRS 202.450 and 202.470. Indeed, as the City's own authorities recognize, "the absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy." *Baldonado*, 124 Nev. at 959, 194 P.3d at 101.

Notably, the Legislature *did* enact a civil cause of action for *private* nuisance: "other than the criminal public nuisance statutes . . . , the only other nuisance cause of action recognized under Nevada law . . . is a civil cause of action for private nuisance [under] N.R.S. § 40.140." *Coughlin v. Tailhook Ass'n, Inc.*, 818 F. Supp. 1366, 1372 (D. Nev. 1993) (holding that NRS 202.450 is a criminal statute and does not create a civil cause of action for statutory public nuisance), *aff'd sub nom.*, 112 F.3d 1052 (9th Cir. 1997).[7] Thus, the Legislature decided it was necessary to create a civil cause of action for a private nuisance available to "any person whose property is injuriously affected." NRS 40.140. Had the Legislature also intended to create a civil cause of action for *public* nuisance, it could have done so. It did not. The City has not alleged a nuisance under NRS 40.140. Because the criminal statute the City relies on to bring its statutory public nuisance claim only authorizes abatement and civil penalties in a criminal proceeding, not in a civil action, the claim fails as a matter of law.

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[7] The City's attempt to distinguish *Coughlin* by arguing that it does not analyze whether there is an "implied civil right of action" fails. Opp. at 23:1-3 (emphasis omitted). As discussed above, the Legislature clearly conveyed its intention by enacting a criminal statute to prosecute public nuisances and a civil statute for private nuisances affecting persons' property. Moreover, the City's argument that because NRS 202 *et seq*. "outline[s] the criminal misdemeanor offenses, the language of the statutes . . . indicate[s] a legislative intent to permit a private, civil cause of action arising out of [a] public nuisance," has no legal basis. *Id*. at 21:21-25.

Finally, even if NRS 202 *et seq*. were a civil statute (it is not), it still would not apply because NRS 202.450 does not apply to the sale of lawful products. Under the statute, a "public nuisance" is limited to specific "place[s]" or "building[s]" not applicable here, and certain "[a]gricultural activit[ies]" and "shooting range" noise levels that are likewise inapplicable. NRS 202.450(2), (4)-(6). While the statute also applies to certain "act[s] unlawfully done" which "endanger[] the safety, health, comfort or repose of any considerable number of persons," or "render[] a considerable number of persons insecure in life or in the use of property" (NRS 202.450(3)), no Nevada appellate court has ever applied that provision to the sale of lawful goods. Notably, a North Dakota district court very recently dismissed a substantially similar statutory public nuisance claim in an opioid-related action. In that case, the State of North Dakota asserted a public nuisance claim under a statute that proscribes acts and conditions that are substantially identical to NRS 202.450(3). *See* Order, *North Dakota v. Purdue Pharma L.P. et al.*, No. 08-2018-CV-01300 (Burleigh Cty. Dist. Ct. May 10, 2019), at 24, **Exhibit A**.[8] The district court explained that "North Dakota courts have not extended the nuisance statute to cases involving the sale of goods" (*id.* at 25) yet the State was "clearly seeking to extend the . . . nuisance statute to a situation where one party has sold to another a product that later is alleged to constitute a nuisance" (*id.* at 26 (emphasis in original)). Because the statute did not apply "to cases involving the sale of goods," the court dismissed North Dakota's statutory public nuisance claim. *Id.* at 27. The same result is warranted here.

B. The City Cannot Recover The Damages It Seeks

The City does not deny that the plain language of NRS 202 *et seq*. allows only for a misdemeanor conviction and an order to abate the nuisance and/or "pay a civil penalty of not less than $500 but not more than $5,000." NRS 202.450, 202.470. The statute does not permit recovery of damages.

Citing no authority, the City asserts that it may recover monetary damages because such damages "are appropriate under a public nuisance claim." Opp. at 23:22-25. That assertion ignores settled Nevada law. Where "the statute's express provision of . . . remedies reflects the Legislature's

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[8] *Compare* N.D.C.C. § 42-01-01, *with* NRS 202.450(3).

intent to provide only those specified remedies, [courts] decline to engraft any additional remedies therein." *Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 124 Nev. 313, 317, 183 P.3d 133, 136 (2008); *see also Builders Ass'n of N. Nevada v. City of Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."); *Richardson Const., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 24 (2007) ("Because NRS 338.1381 provides this express remedy, we will not read any additional remedies into the statute."). Lacking *any* statutory basis to recover the damages the City seeks, the statutory public nuisance claim is limited only to the criminal penalties available under NRS 202 *et seq.* The City's statutory public nuisance claim thus fails.

V. THE COMMON-LAW PUBLIC NUISANCE CLAIM FAILS (COUNT II)

An essential element of common-law public nuisance is interference with a public right—a right "common to all members of the general public" that is "collective in nature and *not like* the individual right that everyone has not to be assaulted or defamed *or defrauded or negligently injured*." Joint MTD at 14:19-21. The City invites the Court to ignore the well-defined contours of a "public right" in favor of a virtually limitless construction of the concept, one that would threaten to "devour in one gulp the entire law of tort.'" *Camden Cnty. Bd. of Chosen Freeholders*, 273 F.3d 536, 540 (3rd Cir. 2001) (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir 1993)). The common-law public nuisance claim should be dismissed.

A. The City Fails To Plead Interference With A Public Right

The City's assertion that it has "adequately alleged an interference with" a public right merely because it alleges the Manufacturer Defendants' conduct "impact[ed] . . . the public health" and "resulted in widespread harm" is contrary to settled law. Opp. at 26:25-27:1, 28:11-16.

"[A] public right is more than an aggregate of private rights by a large number of injured people." *State v. Lead Industries Ass'n, Inc.*, 951 A.2d 428, 448 (R.I. 2008). Thus, "allegation[s] that defendants have interfered with the health, safety, peace, comfort or convenience of the residents of the state standing alone do[] not constitute an allegation of interference with a public right." *Id.* at 453 (internal quotation marks and brackets omitted). Rather, "[t]he term public right is reserved more appropriately for those *indivisible resources shared by the public at large*, such as air, water,

or public rights of way." *Id.* (emphasis added); *see also City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 374 (2004) ("We are . . . reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it.").

Consistent with these principles, "[t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's . . . conduct is unreasonable—is not an actionable violation of a public right." *Lead Industries*, 951 A.2d at 448 (citations omitted).

No Nevada appellate court has adopted the City's expansive construction of "public right," which lies far outside the established meaning of that term and does not remotely resemble the types of public nuisance claims permitted by Nevada courts. *See* Joint MTD at 16:9-17:2. The City notes the absence of any Nevada decision "*reject[ing]* public nuisance claims in the face of a vast interference on [sic] the public health," but its reasoning has it backwards. Opp. at 30:22-24 (emphasis added). The City is the one seeking to invoke a novel theory of what constitutes a "public right," and the City must establish that its theory is permitted by Nevada law. It has not done so.

Nor does the Restatement support the City's argument. Seizing on isolated, out-of-context phrases from the Restatement, the City asserts that "[a] public nuisance can be something that 'affect[s] the health of so many persons as to involve the interests of the public at large.'" *Id.* at 29:1-2 (quoting Restatement (Second) of Torts § 821B cmt. g). This assertion improperly conflates distinct concepts: a "public right" and "the interests of the public at large." *Id.* "That which might benefit (or harm) 'the public interest' is a far broader category than that which actually violates 'a public right.'" Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Civ. L. Rev. 741, 815 (2003). "[W]hile it is in the public interest to promote the health and well-being of citizens generally, there is no common law public right to a certain standard of medical care" and "a government recoupment action . . . initiated to . . . protect the public interest[] is not necessarily a

legitimate vindication of the violation of a public right." *Id.* at 815-16; *see also Lead Industries*, 951 A.2d at 448 (same).

Moreover, the City self-servingly omitted key limiting language from the Restatement phrases it quoted: "*the spread of smoke, dust or fumes over a considerable area*"—a classic example of a nuisance—"may interfere also with the use of the public streets or affect the health of so many persons as to involve the interests of the public at large." Restatement (Second) of Torts § 821B cmt. g (emphasis added). No similar allegations are (or could be) made here.

The City's citation to non-binding dismissal orders from opioid-related suits in other states is likewise unavailing. *See* Opp. at 30:15-26. To the extent those courts concluded that the plaintiffs adequately alleged interference with a public right under the laws of their respective jurisdictions, Manufacturer Defendants respectfully submit that those courts erred. For example, in *In re Opioid Litig.*, Index No. 400000/2017 (N.Y. Sup. Ct. June 18, 2018), which is currently pending appeal, the court concluded that merely alleging that conduct impacted "public health" was sufficient to plead interference with a public right. *See id.* at 28. As shown above, this reasoning departs from well-established limits defining a public right and improperly conflates the public *interest* with a public *right*. The court also conflated the elements of "public right" and "unreasonable interference." *See id.* Under the Restatement, conduct does not qualify as a public nuisance absent interference with a public right, even if that conduct constitutes "significant interference" to the "public health." Restatement (Second) of Torts § 821B(1)-(2)(a).[9]

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[9] The remaining orders cited by the City are likewise unpersuasive. *See* Opp. at 30:15-26. The Ohio court reasoned that it was bound by state supreme court precedent not applicable here. *See State of Ohio v. Purdue Pharma L.P. et al.*, No. 17 CI 261 (Ohio Ct. Com. Pleas Aug. 22, 2018), slip op. at 7. The MDL order the City cites narrowly held that the Ohio Product Liability Act did not abrogate a common-law absolute public nuisance claim. *See County of Summit v. Purdue Pharma L.P. et al.*, No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018), Dkt. 1203 at 22-28. The New Hampshire decision placed undue weight on "behavior" that interferes with public health, without recognizing that that behavior must independently interfere with a public right. *See State of New Hampshire v. Purdue Pharma Inc. et al.*, No. 217-2017-cv-00402 (N.H. Super. Ct. Sept. 18, 2018), slip op. at 27. The West Virginia decision does not include any analysis of the public right issue. It simply cites to a prior order and notes that there is "nothing new" requiring the court to depart from that prior order. *See State of West Virginia et al. v. Cardinal Health, Inc.*, No. 12-C-140 (W. Va. Cir. Ct. Feb. 19, 2016), slip op. at 27. In any event, the prior order cited by the West Virginia court erred by concluding that conduct interfered with a public right simply if it imposed "unwarranted injuries." *State of West Virginia et al. v. Cardinal Health, Inc.*, No. 12-C-140 (W. Va. Cir. Ct. Apr.

The City also ignores that Manufacturer Defendants' activities are extensively regulated by federal and state laws and agencies (Joint MTD at 15:21-27) and that "[i]f a defendant's conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established recognized standard." Restatement (Second) of Torts § 821B cmt. e.

Because the City has failed to plead interference with a public right, its common-law public nuisance claim should be dismissed.

B. The City's Novel Theory Impermissibly Collapses Product Liability and Public Nuisance Law

In addition to having no basis in Nevada law, the City's public nuisance theory collapses the critical distinction between nuisance and product liability law.

The City argues that its claims do not sound in product liability because it "does not seek to recover damages for personal injuries suffered by individual Reno residents." Opp. at 28:21-22. Yet the City plainly seeks indirect expenses (*e.g.*, healthcare and criminal justice costs) purportedly flowing from injuries to individual consumers allegedly caused by Manufacturer Defendants' products. *See* FAC ¶¶ 214, 220-22. Indeed, in arguing its claims are not barred by the economic loss rule, the City asserts that "*[t]he underlying physical harm and injuries Defendants caused to the public* show that there is more at stake here than purely economic damages[.]" Opp. at 25:18-20 (emphasis added). The City cannot disavow product liability claims and then rely on underlying injuries to consumers as a basis to pursue its claims for indirect expenses arising therefrom. The Court should reject the City's transparent effort to end-run the particular requirements applicable to product liability claims by dressing up such claims in the garb of a novel public nuisance action. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543 (2006) ("The current effort to expand public nuisance theory to provide sanctions against manufacturers of lawful products is disconcerting because it

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17, 2015), slip op. at 17. And finally, the Clark County order contains no analysis whatsoever of common-law public nuisance. *See* Order Re Defs.' Mot. to Dismiss, *Clark County v. Purdue Pharma L.P. et al.*, No. A-17-765828-C (Clark Cty. Dist. Ct. Mar. 15, 2019).

would fundamentally change the entire character of public nuisance doctrine, as well as undermine products liability law.").

VI. THE NEGLIGENCE CLAIM FAILS (COUNT III)

The City does not and cannot dispute that Manufacturer Defendants do not owe the City a duty to protect it from third-party misconduct. *See* Opp. at 31:1-32:28. Instead, the City asserts that "Reno's claims are based on the Manufacturers' own . . . conduct," and that it "is not alleging that Manufacturers failed to protect the City from harm caused by others." Opp. at 32:14-18. But that is precisely what the City has alleged.

The City seeks to hold Manufacturer Defendants liable for "all costs incurred . . . to combat the abuse and diversion of opioids[.]" FAC ¶ 40(e); *see also id.* ¶ 32 (alleging damages from "opioid misuse," "criminal justice costs," and "the secondary drug market"). For the City to incur such costs, a downstream third-party actor must intervene: a doctor must write an improper prescription; a patient must misuse a medication; or a pharmacy, distributor, or individual must divert the medication from the legitimate distribution chain. *See*, *e.g.*, *id.* ¶¶ 67-68, 73-74, 76-80, 152-64, 261-86 (alleging third parties who "play[] an integral role in the chain of opioid[]" distribution). And the City has alleged that third parties—not Manufacturer Defendants—have "exclusive control of the distribution management of opioids that [they] distributed and/or sold in Reno." *Id.* ¶ 280.

Because the City has failed to plead any facts establishing that Manufacturer Defendants owed a duty to protect the City from third-party misconduct, the negligence claim fails. *See* Joint MTD at 18:1-23. The claim also fails under the economic loss rule. *Id.* at 18:24-27.[10]

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[10] The City misstates the law by suggesting that the economic loss rule cannot apply because the City "does not allege any breaches of contract[.]" Opp. at 24:18-19. Under well-established law, the absence of a contract between the parties does *not* foreclose application of the economic loss rule. Dan B. Dobbs et al., The Law of Torts § 608 (2nd ed. 2018) ("The plaintiff's economic harm may also be barred when the parties are strangers, which is to say when they are *not* in a contractual relationship."). As Utah's Supreme Court recently explained, "[t]he economic loss rule has two complementary yet distinct applications," one of which "bars recovery of economic losses in negligence actions unless the plaintiff can show physical damage to other property or bodily injury," and "[t]his branch of the economic loss rule applies when there is no contract between the relevant parties." *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.*, 881 Utah Adv. Rep. 46, 435 P.3d 193, 196 (2018) (internal quotation marks and citation omitted).

VII. THE NEGLIGENT MISREPRESENTATION CLAIM FAILS (COUNT IV)

Putting aside that the City does not identify a single false statement or omission made by any Manufacturer Defendant to the City or any City provider, its assertion that it has stated a negligent misrepresentation claim because Manufacturer Defendants "were transacting business in" the City is a red herring. Opp. at 33:20-21. The City must allege it received false information from a defendant *while engaged in a business transaction with that defendant*. *See* Joint MTD at 19:2-20. Merely alleging that a defendant "transact[ed] business" is not sufficient. Similarly, the City's assertion that its claim is based on both affirmative misrepresentations and "wrongful concealment" is immaterial because it has nothing to do with whether the City received false information while engaged in a business transaction with Manufacturer Defendants. Opp. at 34:18-20.

The City further asserts that "courts have interpreted [Restatement] § 552 to extend liability for a misrepresentation made to a third party." *Id.* at 33:28-34:1. While that proposition is true, it has no bearing here because the question is whether the City has alleged facts sufficient to support an inference that Manufacturer Defendants "supplie[d] false information for the guidance of [*the City*] in [*the City's*] business transactions." *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nevada*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978) (quoting Restatement (Second) of Torts § 552(1) (1977)). The City's assertion that Manufacturer Defendants misled "the public at large" is likewise inapt. Opp. at 34:8-10. Liability for negligent misrepresentation "is limited to loss suffered (a) by the person or *one of a limited group of persons for whose benefit and guidance* [the defendant] intends to supply the information . . . and (b) through reliance upon it *in a transaction that [the defendant] intends the information to influence*." Restatement (Second) of Torts § 552(2) (emphasis added). The City's "public-at-large" argument cannot be squared with the limited group of indirect recipients who could potentially pursue a negligent misrepresentation claim under Nevada law (set forth in the Restatement). Under the City's argument, every single person (*i.e.*, the "public at large") would have

a negligent misrepresentation claim, which would render the specific limitations under Nevada law meaningless.[11]

Separately, the claim fails under the economic loss rule. Joint MTD at 20:3-5; *supra* note 10.

VIII. THE UNJUST ENRICHMENT CLAIM FAILS (COUNT VI)

The City advances a theory never before adopted by any Nevada appellate court: that by paying for alleged downstream "costs" of Manufacturer Defendants' purported misconduct, *i.e.*, "externalities,"[12] the City somehow conferred a benefit on those Defendants. *See* Opp. at 35:3-6 (citing FAC ¶ 290), 36:2-3. No Nevada case law recognizes that paying for "externalities" can be sufficient to establish that the plaintiff conferred a benefit on the defendant for purposes of an unjust enrichment claim, and other appellate courts that have considered the theory have rejected it. *See*, *e.g.*, *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1270-71 (11th Cir. 2015) (affirming district court's conclusion that "paying for externalities cannot sustain an unjust enrichment claim"), *vacated on other grounds*, 137 S. Ct. 1296 (2017). This Court should decline to adopt a theory of unjust enrichment that has no basis in Nevada law. *See id.*; *see also Badillo v. Am. Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001) (though the Supreme Court of Nevada "possesses the power to create a common law cause of action" it "construe[s] such power narrowly and exercise[s] it cautiously").

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[11] The City incorrectly cites *Epperson v. Roloff*, 102 Nev. 206, 212, 719 P.2d 799, 803 (1986), for the proposition that a defendant can be "liable for misrepresentation where it communicates misinformation to the recipient with the intent of, or having reason to believe that, the recipient would communicate the misinformation to a third party." Opp. at 34:4-8. The standard the *Epperson* court noted is far narrower than the City suggests: "a party may be held liable for misrepresentation where he communicates misinformation *to his agent*, intending or having reason to believe that *the agent* would communicate the misinformation to a third party." *Epperson*, 102 Nev. at 212, 719 P.2d at 803 (emphases added). Moreover, *Epperson* concerned a fraudulent misrepresentation claim, which is governed by a different standard than the City's negligent misrepresentation claim. *See id.*, 102 Nev. at 210-211, 719 P.2d at 802. And in any event, the City does not allege that Manufacturer Defendants communicated any false information with intent or knowledge that some unidentified recipient would or did communicate such information to the City (much less that Manufacturer Defendants' intent was to guide the City in a business transaction or that the City did rely on it in a business transaction).

[12] The City refers to "externalities" and "negative externalities," terms that are interchangeable insofar as, according to the City, they both denote "the [alleged] costs of the harm caused by Defendants' [alleged] negligent distribution and sales practices." *See* Opp. at 35:3-36:3.

Moreover, the City does not address the FAC's complete lack of factual allegations supporting the other elements of an unjust enrichment claim. *See* Joint MTD at 20:16-21:3.

Lastly, the City's contention that Manufacturer Defendants "raise[] issues of fact not appropriate for resolution at the pleading stage" (*see* Opp. at 36:9-11) does nothing to rectify the City's failure to adequately plead an unjust enrichment claim. Nor has the City explained what "issues of fact" are supposedly "raise[d]." *Id.* The issue is ripe for decision now, and the Court should dismiss this claim.

IX. THE CITY'S PUNITIVE DAMAGES CLAIM AND ITS REQUEST FOR PUNITIVE, SPECIAL, AND EXEMPLARY DAMAGES AGAINST THE MANUFACTURER DEFENDANTS FAIL (COUNT VII)

The City argues that it is not "prohibited" from asserting a claim for punitive damages. Opp. at 37:6-9. The City is wrong. The Nevada Supreme Court has held that no stand-alone claim for punitive damages exists. *See*, *e.g.*, *Massi v. Nobis*, 2016 Nev. Unpub. LEXIS 249, at *2-3 (Apr. 15, 2016) ("punitive damages is not a cause of action, but a remedy…."); *see also* Dan B. Dobbs et al., The Law of Torts § 483 (2d ed. 2018) ("No cause of action exists for punitive damages as such.").[13]

Moreover, the City may not recover punitive damages in connection with its negligence or unjust enrichment claims because neither claim involves intentional wrongdoing. NRS 42.005(1) requires clear and convincing proof of "oppression, fraud or malice," and the Nevada Supreme Court has expressly held that negligence—even gross negligence or recklessness—is insufficient as a matter of law to support a punitive damages award. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 742-43, 192 P.3d 243, 254-55 (2008) ("Since its language plainly requires evidence that a defendant acted with a culpable state of mind, we conclude that N.R.S. 42.001(1) denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence."); *see also Ford v. Marshall*, Dist. Ct. Nev., Case No. 12A670205, 2013 WL 1092060, ¶¶ 30-33 ("Negligence claims

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[13] Contrary to the City's assertion, *Davenport v. GMAC Mortg.*, No. 56697, 2013 Nev. Unpub. LEXIS 1457, at *14 n.5 (Sept. 25, 2013), did not "reinstate" a punitive damages claim. Rather, *Davenport* confirmed that there is no such stand-alone punitive damages claim by ruling that plaintiff's "demand" for punitive damages could be considered only "if [plaintiff] prove[d] his claim for civil conspiracy." *Id.*

exist for breaches of duty due to carelessness; if a mental state to cause injury existed, then the claim would be an intentional tort.").

The City further fails to plead *facts* showing oppression, fraud, or malice as to any Manufacturer Defendant. All but conceding this, the City argues that state of mind may be "averred generally" and cites to conclusory assertions in the FAC that do no more than parrot the requisite scienter language. Opp. at 37:17-38:13. Nevada law, however, requires factual allegations—not mere conclusions—to support the alleged state of mind. *See*, *e.g.*, *Elliott v. Prescott Co., LLC*, 2016 WL 2930701, at *2-3 (D. Nev. May 17, 2016) (allegations that defendants "acted with conscious disregard of his safety or rights" were conclusory and did not include sufficient facts to establish the requisite state of mind); *Taylor v. State & University*, 73 Nev. at 153, 311 P.2d at 734 (alleging a legal conclusion without pleading "the facts from which the conclusion flows" renders a complaint deficient).

X. THE CITY SHOULD NOT BE GRANTED LEAVE TO AMEND

The City requests leave to amend "[s]hould this Court find any . . . deficiencies with the City's pleading." Opp. at 38:25-27. But the City is not automatically entitled to an opportunity to amend (NRCP 15(a)) and it has not identified *any* new allegations it would plead to cure the FAC's numerous deficiencies (*see* Opp. at 38:19-39:2). The decision to permit amendment "is addressed to the sound discretion of the trial court" (*MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv. Op. 31, 416 P.3d 249, 254 (2018)) and the Court should decline to exercise that discretion here because the City has offered no concrete reason to believe it can cure its deficient pleading.

CONCLUSION

For the reasons stated herein and in the Joint MTD, Manufacturer Defendants respectfully request that the Court dismiss the FAC with prejudice as against them.

AFFIRMATION

The undersigned affirms that the preceding document does not contain personal information as described in WDCR 10(7).

DATED this 28th day of May, 2019.

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LIST OF EXHIBITS

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano and that on this date, a true and correct copy of the **REPLY IN SUPPORT OF MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT** was electronically served via the Court's electronic filing system to the following parties associated with this case. For the following parties not registered with the court's electronic filing system, then a true and correct copy of the above-named document was served via U.S. mail:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 28, 2019.

/s/ Beau Nelson
An employee of McDonald Carano LLP