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

APPELLANT'S APPENDIX VOLUME 5

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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 5** upon each of the parties by electronic service through the E-Flex rules of service.

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

4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE BARRY L. BRESLOW

CITY OF RENO,

Plaintiff,

vs. Case No. CV18-01895

PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC., dba THE PURDUE FREDERICK COMPANY, INC.; PURDUE PHARMACEUTICALS, LP; TEVA PHARMACEUTICALS USA, INC.; MCKESSON CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6, INC.; CARDINAL HEALTH TECHNOLOGIES LLC; CARDINAL HEALTH 108 LLC, dba METRO MEDICAL SUPPLY; DEPOMED, INC.; CEPHALON, INC.; ENDO HEALTH SOLUTIONS, INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN USA, INC.; ALLERGAN FINANCE LLC, fka ACTAVIS, INC., fka WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS PHARMA, INC., fka WATSON PHARMA, INC.; ACTAVIS LLC; MALLINCKRODT LLC; MALLINCKRODT BRAND PHARMACEUTICALS, INC.; and

Department No. 8

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

Defendants.

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TRANSCRIPT OF PROCEEDINGS

Motions

January 7, 2020

APPEARANCES:

For the City:	Mark Wenzel Attorney at law Reno, Nevada
	Robert Eglet Robert Adams Richard Hy Cassandra Cummings Attorneys at law Las Vegas, Nevada
For Defendant Endo:	Pat Lundvall Attorney at law Las Vegas, Nevada
	John Lombardo Attorney at law Los Angeles, California
For Defendant Allergan:	Max Corrick Attorney at law Las Vegas, Nevada
	Zac Ciullo Attorney at law Chicago, Illinois
	Maria Rivera Attorney at law Chicago, Illinois
For Defendant Teva:	Philip Hymanson Attorney at law Las Vegas, Nevada

For Defendant Cardinal:	Daniel Polsenberg Paul Matteoni Attorneys at law Reno, Nevada
	Suzanne Salgado Attorney at law Washington, D.C.
For Defendant McKesson:	Rosa Solis-Rainey Attorney at law Las Vegas, Nevada
	Nathan Shafroth Attorney at law San Francisco, California
For Defendant Purdue:	Alex Spjute Attorney at law Los Angeles, California
For Defendant AmerisourceBergen:	Jarrod Rickard Attorney at law Las Vegas, Nevada
	Rachel Weil Attorney at law Philadelphia, Pennsylvania
For Defendant Mallinckrodt:	Steve Guinn Attorney at law Reno, Nevada
Reported by:	Isolde Zihn, CCR #87

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

THE COURT: Good morning, everyone.

Please be seated.

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

I'm Judge Breslow, presiding judge here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

enough said about that.

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

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

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

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

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

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

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

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

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

submitted, and then hearing today.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Why don't we start with Mr. Eglet.

MR. EGLET: Thank you, Your Honor.

Good morning, Your Honor.

Robert Eglet, on behalf of the City of Reno.

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

THE COURT: Go ahead.

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

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

THE COURT: Well, let's go back to the Ohio case.

How many plaintiffs were involved in that, roughly?

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

MR. ADAMS: I believe it was just distributors.

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

THE COURT: Okay. Hold on.

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

MS. WEIL: Good morning, Your Honor.

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

Again, I represent AmerisourceBergen.

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

THE COURT: Okay. Thank you.

Please continue.

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

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

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

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

MR. POLSENBERG: Ken Dawson.

MR. EGLET: Thank you, Dan.

And he did not hear the motion. Judge Polster put a time limit on Judge Dawson to hear the motion before they transferred it to the MDL.

THE COURT: Well, who transferred it?

MR. EGLET: Well, I don't know if it was just an automatic transfer tagalong, or if Judge Dawson actually just passed it off to Judge Polster to handle the remand. But the remand motion is now pending in front of Judge Polster -- well, have we not filed that --

THE COURT: Please state your name.

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

For the record, Robert Adams, on behalf of the City of Reno.

THE COURT: Yes, Mr. Adams.

MR. ADAMS: So what happened was, it went to the JPML. The JPML handled several of these issues, these remand issues, as a group. They selected a few people to argue. Unfortunately, we weren't selected to argue. And now our case has been sent to the MDL in Ohio, the Clark County case.

THE COURT: Where it now stands?

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

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

THE COURT: Remand it first to --

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

THE COURT: That's two steps.

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

THE COURT: -- out there?

MR. EGLET: -- out there --

THE COURT: Hold on.

Mr. Polsenberg.

MR. POLSENBERG: Dan Polsenberg, for Cardinal Health.

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

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

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

MR. EGLET: Okay.

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

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

MR. ADAMS: And Douglas County.

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

THE COURT: Okay.

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

THE COURT: So what is he doing?

MR. EGLET: Right now --

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

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

THE COURT: What exactly was he tasked to do?

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

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

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

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

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

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

THE COURT: All right. Thank you.

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

MR. POLSENBERG: Just a little bit.

Dan Polsenberg, for the Cardinal Health defendants.

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

MR. EGLET: That's correct.

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

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

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

MR. POLSENBERG: Not sure --

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

MR. ADAMS: No.

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

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

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

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

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

MR. POLSENBERG: No.

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

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

THE COURT: No need to postpone that.

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

THE COURT: Okay. All right. Thank you.

Anyone like to further comment on that particular issue?

MR. LOMBARDO: Very briefly.

Good morning.

John Lombardo.

THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: He does?

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

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

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

MR. LOMBARDO: I may have misheard.

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

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

MR. EGLET: Just let me comment on that.

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

by him as a Special Master.

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

THE COURT: Understood.

Yes, sir.

MR. POLSENBERG: Dan Polsenberg.

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

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

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

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

There was hearings in front of Judge -- Justice

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

THE COURT: Okay.

MR. EGLET: -- when it was removed.

THE COURT: Thank you for explaining that.

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

MR. EGLET: Yes.

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

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

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

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

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

THE COURT: Oh.

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

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

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

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

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

THE COURT: Okay. Thank you.

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

So like most of you, I was anticipating some

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

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

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

Yes, sir.

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

MR. LOMBARDO: Thank you.

John Lombardo.

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

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

THE COURT: If and when.

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

a further motion to dismiss at that point.

THE COURT: Thank you.

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

MR. ADAMS: Fully ordered.

MR. EGLET: What was it?

MR. ADAMS: Fully ordered.

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

THE COURT: What do you believe it said?

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

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

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

THE COURT: Thank you.

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

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

We have Mr. Eglet and Mr. Adams.

Ms.?

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

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

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

THE COURT: Nice to see you.

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

THE COURT: Mr. Wenzel.

MR. POLSENBERG: Good morning, Your Honor.

Dan Polsenberg, for the four Cardinal Health defendants.

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

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

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

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

THE COURT: Hi.

MR. SHAFROTH: Good morning, Your Honor.

Nate Shafroth, from Covington and Burling, for McKesson.

THE COURT: Excellent. Thank you.

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

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

THE COURT: Thank you.

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

All right. Then in the back.

MR. HYMANSON: Good morning, Your Honor.

Phil Hymanson, on behalf of the Teva defendants.

THE COURT: Welcome again.

MR. CORRICK: Good morning, Your Honor.

Max Corrick, on behalf of the Allergan defendants.

THE COURT: Thank you.

Good morning.

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

THE COURT: Hello.

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

THE COURT: Thank you.

MR. RICKARD: Hello, Your Honor.

Jarrod Rickard, on behalf of AmerisourceBergen.

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

THE COURT: Thank you.

MS. WEIL: Thank you, Your Honor.

THE COURT: Now, go ahead -- sorry.

MR. GUINN: Good morning, Your Honor.

Steve Guinn, on behalf of Mallinckrodt, LLC.

THE COURT: Thank you.

MR. LOMBARDO: Good morning.

John Lombardo, on behalf of the Endo defendants. That's Endo Health Solutions, Inc., and then Endo Pharmaceuticals, Inc.

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

THE COURT: Excellent. Thank you.

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

Purdue Pharma, and its related entities?

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

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

Sounds like, Mr. Polsenberg, you do.

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

THE COURT: Yes.

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

MR. ADAMS: No objection, Your Honor.

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

THE COURT: Well, you never know.

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

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

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

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

Thank you.

THE COURT: Where are you licensed currently, please?

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

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

MS. SALGADO: Yes, Your Honor.

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

MS. SALGADO: Thank you, Your Honor.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: Thank you.

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

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

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

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

you want to do, Your Honor.

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

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

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

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

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

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

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

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

Who will argue that on behalf of the movants?

MR. LOMBARDO: Good morning.

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

THE COURT: It is.

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

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

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

THE COURT: -- are out.

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

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

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

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

Put another way, cities have no inherent powers

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

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

So what does Dillon's Rule provide?

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

"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 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."

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

In the Legislature's words again -- quote -- "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." That's in NRS 268.001, Subsection (4).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

adopt an ordinance.

Finally, the City makes the peculiar argument that Dillon's Rule does not preclude this action -- quote -- "so 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" -- close quote.

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

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

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

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

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

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

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

And, C, does not concern, one, a state interest that requires statewide uniformity of regulation; two, the regulation of business activities that are subject to substantial regulation by a federal or state agency; or, three, 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 regulations that preempts local regulation.

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

First, the City's own allegations directly negate the

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

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

MR. LOMBARDO: "Primarily."

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

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

THE COURT: Okay. Thank you.

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

THE COURT: Please continue.

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

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

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

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

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

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

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

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

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

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

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

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

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

medications.

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

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

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

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

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

otherwise, as the City is trying to do here.

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

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

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

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

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

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

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

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

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

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

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

And, indeed, the exception that the City seeks and

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

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

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

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

That simply isn't a factor or a relevant

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

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

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

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

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

The Attorney General's Office informs Mayor Schieve

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

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

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

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

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

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

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

MR. LOMBARDO: It applies either way.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

all-encompassing.

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

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

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

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

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

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

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

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

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

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

So here again, the City never gets to this

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

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

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

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

Unless the Court has questions on that point --

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

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

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

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

THE COURT: Very good. Thank you.

Please continue.

MR. LOMBARDO: Thank you, Your Honor.

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

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

As the Ninth Circuit put it --

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

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

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

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

THE COURT: How so?

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

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

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

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

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

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

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

And as the Court explained there in Steelman, 97

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

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

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

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

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

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

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

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

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

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

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

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

cases reject the limitations that the City advances here.

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

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

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

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

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

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

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

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

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

MR. LOMBARDO: Right.

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

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

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

THE COURT: Okay.

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

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

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

which relief can be granted as against any manufacturer defendant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

pleading requirements," close quote.

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

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

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

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

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

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

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

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

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

That's at 1126 of the Kearns case.

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

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

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

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

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

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

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

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

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

THE COURT: Go ahead.

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

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

THE COURT: Well, the First Amended Complaint,

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

MR. LOMBARDO: Thank you, Your Honor.

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

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

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

MR. LOMBARDO: Thank you, Your Honor.

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

Go ahead.

MR. LOMBARDO: Thank you.

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

The first several paragraphs just put into context

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Endo or Mallinckrodt or Teva, the manufacturer defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

within the narrow exception for Rocker discovery

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

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

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

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

Even under Nevada's notice pleading standard, a

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

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

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

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

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

more adequate.

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

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

(Recess.)

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

Please proceed.

MR. LOMBARDO: Thank you, Your Honor.

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

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

THE COURT: Common law.

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

First, with respect to the statutory public nuisance

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

THE COURT: One is not implied.

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

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

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

THE COURT: Sure.

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

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

And the Nevada Supreme Court noted -- quote -- "The absence of 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."

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

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

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

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

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

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

And so the import of these two cases, pled together for the criminal public nuisance statute at issue here, is clear. Baldonado controls here because here, as in Baldonado, the statute contains no clear evidence that the Legislature intended to create a private cause of action. The State, through its prosecuting attorneys, is to enforce the public nuisance statute, through criminal misdemeanor suits, just as the Labor Commissioner was to enforce the tip laws through administrative proceedings in Baldonado. The normal ordinary presumption, thus, controls here, as in Baldonado, that 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And, finally, the common law public nuisance claim.

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

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

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

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

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

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

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

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

The manufacturer defendants respectfully submit that

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

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

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

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

Thank you very much.

Mr. Guinn.

MR. LOMBARDO: Thank you.

MR. GUINN: Thank you, Your Honor.

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

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

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

this case on March 4, 2019.

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

MR. GUINN: Correct, Your Honor.

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

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

THE COURT: Got it.

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

THE COURT: Yes.

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

THE COURT: Got it.

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

It's deliberately reserved for that later argument.

THE COURT: Understood.

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

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

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

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

practitioner.

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

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

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

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

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

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

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

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

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

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

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

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

The patients eventually then get the opioids. And

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

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

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

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

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

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

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

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

It's a very broad statement.

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

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

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

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

emotional distress, or property damage."

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

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

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

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

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

evaluating negligence causations.

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

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

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

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

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

opioid problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

think, you'll actually hear two things.

Number one, Nevada is a notice pleading state. That's Black Letter Law. I don't think anyone disputes that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The connection is just too attenuated, Your Honor.

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

the bounds of anything recognized in the law.

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

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

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

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

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

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

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

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

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

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

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

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

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

about, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So we're talking about --

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

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

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

And we are circling back to where I started, Your

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

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

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

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

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

Eglet.

THE COURT: Thank you.

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

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

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

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

(Recess.)

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

THE COURT: Thank you.

Please be seated.

We're back on the record.

Plaintiff may proceed with his opposition.

MR. EGLET: Thank you, Your Honor.

THE COURT: You're welcome.

MR. EGLET: Good afternoon, Your Honor.

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

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

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

THE COURT: Sure.

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

to dismiss should be denied in its entirety.

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

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

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

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

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

Mr. Guinn outlaid for you the supply chain in

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

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

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

If I may approach, Your Honor.

THE COURT: Sure.

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

It actually starts with the raw-material suppliers.

THE COURT: Mr. Guinn, you can approach.

MR. GUINN: Thank you.

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

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

Then the raw materials go to the manufacturers, who

then manufacture and produce opiates.

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

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

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

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

And the doctors, of course, are here.

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

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

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

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

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

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

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

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

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

Excuse me. I just spilled all over myself.

Thank you.

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

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

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

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

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

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

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

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

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

MR. EGLET: I would agree, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

deceptive trade practices allegation. Nothing else.

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

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

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

THE COURT: It's possible.

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

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

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

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

government power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the prayer for relief in the Complaint, paragraph

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

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

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

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

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

Next, the manufacturers argue that the Municipal Cost

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

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

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

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

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

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

application to single-event emergencies.

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

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

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

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

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

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

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

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

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

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

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

MR. EGLET: Sure.

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

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

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

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

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

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

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

Now, the --

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

misrepresented what to whom, when?

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

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

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

THE COURT: All right. Please proceed.

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

of conduct was -- it was a unified course of fraudulent conduct, and relied entirely on that course of conduct for the basis of the claim. That's why the Kearns case was dismissed.

In Vess, the Court said, if there are allegations of fraud, but fraud is not an element of the causes of action, the Court can disregard or skip the Complaint of those allegations that remain to determine whether a claim has been asserted, Your Honor. And so those are the two cases they relied on there.

So to the extent Your Honor finds that one or more of Reno's claims sound in fraud, the Complaint provides specific allegations and multiple examples of specific misrepresentations attributed to each defendant.

Moreover, the facts and information manufacturers claim Reno should have included, such as each and every prescribing doctor who heard a false statement from manufacturers in its Complaint are in manufacturers' possession. So Reno would not have the information necessary to provide such detail, if, in fact, it was required.

The Nevada Supreme Court case of Rocker v. KPMG provides that a plaintiff should be permitted to conduct early discovery in cases where a plaintiff is unable to plead a fraud or mistake claim with appropriate detail because the

facts necessary are in the defendants' possession.

Related to -- and with respect to the Rocker argument, only defendants know what was false about their marketing. So until discovery is commenced and engaged in this case, knowing they engaged in widespread marketing does not mean we know or can know all of the information defendants knew was false that they concealed. We don't know how they plan to get the message out to everyone in Reno until we've done discovery on this.

We know, on a national level, and we know from information we have regarding other jurisdictions around the country, that it was the same marketing plan everywhere. It wasn't different in Reno than it was in Dayton, Ohio, or, you know, Baton Rouge, Louisiana. It was all the same. But we don't know the specific instances here until we've had the opportunity to do discovery.

So the supplemental brief implicated everyone by and through the inclusion of the ARCOS data, Your Honor. Everyone. Because an enormous amount of drugs, just in the six-year period that was released by the Sixth Circuit, an enormous amount of opiates were not only distributed around the country, but in Nevada it was an unbelievably enormous amount. We were in the top four, Your Honor, in the country.

So related to this point in the manufacturers'

argument that Reno has to allege what facts influence the prescribing doctors' state of mind with heightened details. But NRCP 9 (b) states that an individual's knowledge, intent, or state of mind need not be particularly alleged. You don't have to state exactly what was in their state of mind.

At this point in the litigation, Reno's well-pleaded allegations are more than sufficient to put manufacturers on notice of the nature of Reno's claims.

And to give Your Honor some insight as to the type of information available to defendants, yet kept from public, Reno filed -- that's why we filed the supplement in September of 2019. Unfortunately, because of the protective order that's still in place, the Sixth Circuit did not strike down the entire protective order. It did order Judge Polster to go through an analysis on all of the documents on whether they actually should be privileged or not. And some have been released so far. But we're talking about millions and millions and millions of documents. And it's trickling out.

So we weren't able, because of the protective order, to attach those. We were only able to supply information that has been released from the protective order. There's millions of e-mails that have not -- that implicate every single one of these manufacturers and distributors, Your Honor. Every single one of them. But they haven't been

released.

Now, the State of Nevada's case, Judge Gonzalez has put a protective order in place which is significantly different than what Judge Polster's protective order is. And we expect that we're going to -- when they respond to our written discovery, which has started in the State's case, then we would expect we're going to have those documents.

But until we conduct discovery, until we get the documents, we gave what we had, which has been the protective order by Judge Polster had been lifted on, and that's all we could give Your Honor.

THE COURT: Okay.

MR. EGLET: But there's a lot more.

In this case, of course, you know, as I said, in June of last year, after a series of motions and appeals from the Washington Post and other media outlets, the Sixth Circuit vacated the applicable protective order that kept the DEA ARCOS data. Most of it was explicit just to the ARCOS data. The ARCOS data -- they kept it from the public eye.

The ARCOS data tracks the sales of dangerous prescription drugs. Once the protective order was vacated, the ARCOS data from 2006 to 2012 was released to the public. That data revealed that a shocking number of opiates were shipped during that six-year period alone, and that Nevada

was in the top four recipients of opiates.

The data also provides the information regarding the name of the drug manufacturer, the name of the drugs, the potency of the drugs, the distributor, and the pharmacy information.

We're in the process of analyzing all that ARCOS data, tracking exactly what distributors sent what pills and how many doses to each pharmacy, and what pharmacies in the state.

The ARCOS data also revealed the identity of the companies who shipped the majority of the opiates into Nevada, many of which are named in this case as defendants.

Additionally, the Sixth Circuit vacated a number of orders permitting documents to be filed under seal in the MDL. And a number of the documents were unsealed -- not that many so far, though -- after the Sixth Circuit order. It's an ongoing process, demonstrating just how much the drug companies knew about the epidemic, encouraged the increased use of opiates in the interest of profits over human cost, and their truly callous attitude to the damage they were causing.

And so one of the clearest indications that wasn't still under protective order that we could provide the Court of this callous attitude comes from an e-mail exchange, dated

January of 2009, between Steve Cochrane, vice president of purchasing for Key Source Medical, Inc., which is a chain pharmacy, and Victor Borelli, the national account manager for retail at Mallinckrodt.

In the first e-mail, Steve Cochrane writes -- quote -- "Keep 'em coming," explanation mark. "Flying out of here. It's like people are addicted to these, or something. Oh, wait. People are."

Mr. Borelli responds, "Just like Doritos. Keep eating. We'll make more."

Reno also included other recently released documents showing highly suspicious orders of opiates being proved in as little as one minute.

Suspicious orders are required, first of all, to be stopped, if they're suspicious and not shipped, and then reported to the DEA, the suspicious order. And then the distributors and the manufacturers -- they both have a duty on that -- have a duty to investigate that suspicious order. And until that investigation is complete, and the suspicious order is found to be not suspicious, it's not supposed to be shipped.

They systematically violated that around the country, all the distributors, over and over and over for years and years. And many are continuing to.

There are e-mails between salespeople stating that, "The goal is to sell as much as possible, and to do whatever is necessary to sell as much as possible." Whatever is necessary.

Reno provided the Court with these documents to demonstrate that these have been solely in the possession of defendants. And even when produced in litigation, they were kept under seal, so no other plaintiffs across the country knew about them, and could not use them in any pleadings.

This is just a sample. Reno expects the defendants have millions and millions of pages of documents, to which Reno does not have access at this point, that would provide the information defendants insist must be included in the Complaint.

Accordingly, if Your Honor believes Reno needs to provide more details in any aspect of its Complaint, it requests the ability to conduct discovery under Rocker in order to gain access to the information needed to add those details.

Reno has alleged a viable and valid public nuisance claim against the manufacturers. Reno's statutory nuisance claim is adequately alleged in the Complaint. The mere fact that Nevada's public nuisance statutes allow for criminal charges does not immediately prohibit the City from asserting

a civil cause of action for statutory public nuisance.

NRS 202.453 defines "a public nuisance" as, "An act or omission that annoys, injures, or endangers the health of any considerable number of persons, or in any way renders a considerable number of people insecure in life."

Nevada's public nuisance statutes do not include any language preventing a civil cause of action. In fact, the statutes imply that there is a right to a civil cause of action.

Now, Mr. Lombardo talked about the Baldonado case, Baldonado versus Wynn Las Vegas case. That, of course, involved a table-game dealer sued by Wynn, alleging that the tip-pooling and distribution policies violated Nevada's labor statutes.

In its analysis, the Court said that labor statutes do not explicitly create a private cause of action. The Court considered whether the statutes implied a private cause of action, which it notes is a question of legislative intent.

The Court was guided by three factors that were originally stated in a U.S. Supreme Court decision: whether the plaintiffs are the class for whose benefit the statute was enacted; two, whether the legislative history indicates an intention to create or to deny a private remedy; and,

three, whether implying such remedy is consistent with the underlying purposes of the legislative scheme.

Reno is within the class for whose benefit the statute was enacted; the legislative history does not indicate an intention to deny a civil cause of action; and Reno's cause of action and request for relief are consistent with the underlying purposes of the statute. So we meet all three of these guidelines.

And, of course, the holding of the Legislature indicated the Legislature entrusted labor laws enforcement to the Labor Commissioner, and private causes of action could not be implied. There's no enforcement procedure in the Legislature, or by any state agency, to enforce what we're trying to enforce here on behalf of the City of Reno. So there is an implied right here, Your Honor, of a civil cause of action.

The opiate epidemic has wreaked havoc on the public health in Reno. Reno is seeking to recover damages it has incurred as a result of the damage to the public health, and to abate the future harm caused by the opiate epidemic.

Because an epidemic will not end in a single day. It will take time, effort, and treatment to abate the epidemic caused by defendants.

Additionally, the Coughlin case, cited by defendants,

did not discuss whether NRS 202.450 implies a right to a civil cause of action; only whether it expressly provides for a private cause of action. The Coughlin analysis does not provide guidance as to whether there is an implied civil right of action.

Reno's requested damages are available under the public nuisance statute. Its damages are not limited to criminal penalties.

Defendants claim that compensatory damages are not available under the statute, but fail to provide any authority to support that position.

Defendants also argue that Reno cannot recover its damage due to the Economic Loss Doctrine, which does not apply to bar Reno's damages on the nuisance claim, or any of Reno's causes of action.

The Economic Loss Doctrine was designed to mark the boundary between the expectancy interests associated with contract law and the types of damages recoverable under tort law.

Tort law is designed to secure the protection of all citizens from the danger of physical harm, to their person or property, and seek to enforce -- seeks to enforce standards of conduct that are created and imposed by society.

Nevada's Economic Loss Doctrine does not apply to bar

tort recovery where the defendants had a duty imposed by law, rather than by contract, and where the defendants' intentional breach caused purely monetary harm to plaintiffs.

Reno has pled facts which, if proven, establish the existence of a common law tort duty manufacturers owed to the City.

Although the City is not asserting personal injury claims on behalf of individual residents, the City's tort and nuisance claims addressed Reno's costs incurred as a result of the opiates that flooded the community, which include, among others things, healthcare and rehabilitation costs. These costs are unique to Reno and can only be recovered by Reno.

Reno's common law public nuisance claim is appropriate, and properly pled, as well. Common law claims for public nuisance have been recognized in Nevada, and the right to such a claim is not limited by a criminal statute on the same issue.

Nevada's courts have not specifically defined the scope of a public nuisance within the state, but the courts in Nevada have regularly turned to the Restatement for guidance.

Section 821, (b) (1) of the Restatements defines "a public nuisance" as, "Unreasonable interference with a right

common to the public. 'A public right' is defined to include conduct involving a significant interference with the public health, public safety, or public peace. Public nuisances can be the result of continuing conduct, as well as conduct that has a permanent or long-lasting effect."

There is a long history of representative public nuisance actions brought by governmental plaintiffs that have been recognized for centuries, both here and in England. Both Judge Williams, and Judge Gonzalez, in the Clark County District Court, have denied defendants' motions to dismiss this, as well as the statutory nuisance claim.

Other jurisdictions have recognized common law claims for public nuisance wherein the public health was impacted, such as where individuals practiced medicine without appropriate licensing, or any license at all.

There are thousands of opiate cases around the nation in which courts have denied motions to dismiss on public nuisance causes of action.

Here, Reno has adequately pled that manufacturers have significantly interfered with Reno's residents' right to public health through their spread of opiate use in the city, as well as public safety. Reno seeks redress for the widespread public harm caused by the defendants' conduct.

In their reply, manufacturers argue that Reno has not

alleged an interference with a public right because the manufacture of products are rarely, if ever, causes of violation of the public's right.

Contrary to manufacturers' argument, Reno did not pick and choose language from the Restatement to support its allegations. The Restatement defines "a public right" as interference with the public health.

Manufacturers cite to the Lead Industries case to support an argument that there is no common law public right to a certain standard of medical care. They claim that this is the leading case in the country on nuisance law. It's not. It's just their statement. But that is not what Reno is alleging here, anyway.

By engaging in deceptive marketing, misleading entire communities as to the safety of opiates for long-term use, manufacturers deliberately caused an increase in opiate use, which has caused substantial harm to individuals, as well as to Reno's agencies.

Common law public nuisance claims are not limited to interference with property rights.

Second, the Rhode Island court may have found that a number of children suffering from lead poisoning was not enough to establish a public right. But this case is not analogous to one involving several individuals suffering from

lead poisoning. The opiate epidemic impacts everyone in the community, not just those addicted. It impacts the families, co-workers, friends, neighbors, church members, and everyone else with a relationship with someone suffering from addiction or dependence.

If you happen to be one of the rare few who has not been impacted directly by the opiate epidemic, you have been indirectly impacted, whether it be by an increase in crime -- because there has been, clearly, an increase of crime.

I'm a victim myself of that in Las Vegas, where three kids, who went to the same high school my kids did, in Las Vegas, Bishop Gorman High School, robbed my wife and I's house, stole thousands of dollars' worth of various types of merchandise to use to hock at pawnshops -- they caught them all because they're on film hocking -- at pawnshops, to get money to buy opiates.

All three of these kids had sports injuries in high school, had a minor surgery to a knee or an ankle or shoulder; after the surgery, were prescribed these opiates by their physicians, because they were recommended by the manufacturers. All three of them got addicted to opiates.

And this is a typical story in Nevada, and across the country. All three of them got addicted to opiates, started buying opiates on the street. When they couldn't get any

more prescriptions, started buying the pills. And then soon discovered, like 80 percent of the now-heroin addicts in this country who started on prescription opiates, that's how they became heroin addicts: because they couldn't get the prescription, they turned to heroin, and became heroin addicts.

THE COURT: Well, let me make a comment here. Two things.

First thing: It's not lost on the Court -- well, it shouldn't be lost on anyone here that, unlike in Las Vegas, the general-jurisdiction judges here in the North, as I think everyone knows, handle both criminal justice and civil justice matters. So in the Court's experience, I've handled 5,000 criminal justice matters in the last three years. And it's -- the Court has had exposure to the impacts of opioids on people's activities with respect to criminal justice. That's the first comment.

The second comment is, if I'm going to allow a level of editorializing or anecdotes from personal experience for a motion like this, it's going to be equal on both sides.

MR. EGLET: Understood, Judge.

THE COURT: Normally, I'd probably shut that down, make a comment that, "While interesting, it's not necessarily informative to the Court's decision on the issues before it."

If I'm going to allow it, without objection, not going to curb it, I'm going to let either side have a similar --

MR. EGLET: Understood. Thank you, Your Honor.

THE COURT: Sure.

MR. EGLET: Anyway, so, if you are one of the rare few that has not been impacted, you have been indirectly impacted by an increase of crime, or your ability to enjoy community parks because of drug use, or the increase in the homeless population caused by the opiate epidemic, or the increase in DUIs because of the opiate epidemic.

I just tried a case last month in Las Vegas involving a DUI woman, who ran into my client's car, with three people in there, injuring all three of them, who was on Oxycodone, and was under the influence, and injured three people significantly.

And the drug enforcement officer, the expert in drug recognition, testified that: Yeah, there's been an increase in DUIs not just across the country, but specifically in Nevada, that's primarily driven by opiates.

This case does not support the dismissal of Reno's public nuisance cause of action. Section 821 (b) of the Restatement specifically states that a public nuisance may exist where there is a significant interference with the

public health or public safety.

Cases in which an interference with the public health have been found to be the basis for a public nuisance include keeping diseased animals, defective sewers, and the unlicensed practice of medicine.

This last one is particularly interesting, because certainly not everyone in the community had an interaction with the unlicensed doctor, but yet the mere threat of the individual's unlicensed status to the public health was enough to find a public nuisance.

Manufacturers engaged in deceptive marketing of opiates, including in Reno, knowing it would result in a flood of dangerous drugs into this community.

People in the community, exercising their public right, came into contact with opiates that should have never been provided. Many Reno citizens became addicted, and many died, as a result.

And as I previously stated, it's not just the individuals who are addicted who suffer from opiate epidemic; it is everyone around them.

The manufacturers attempt to distinguish the opiate epidemic from -- quote -- "the spread of smoke, dust, or fumes over a considerable area" -- end quote. Which they state is a classic example of a public nuisance which may

affect the health of so many persons to involve the public at large.

This is not so distinct from the spread of opiate use throughout a community. These drugs have spread as a direct result of defendants' wrongdoing, including manufacturers' deceptive marketing.

The use of opiates spread over a considerable area, the entire city of Reno, and affected the health of so many persons in the city, so as to involve the public at large.

It also affected the safety of so many persons in the city to involve the public at large.

The increasing sales of opiates fall within a traditional category of public nuisance, as defined in Section 821 (b) (2) (a) of the Restatement, which defines "a public nuisance" as including the significant interference with the public health or public welfare. Plaintiffs -- or safety.

Plaintiffs' argument regarding the purported failure to allege an interference with a public right failed -- excuse me -- manufacturers' argument regarding the purported failure to allege an interference with a public right failed to take into account the language of the Restatement, which Nevada tends to follow, Nevada's courts tend to follow.

It is not necessary for an entire community to be

affected by a public nuisance in order for a claim to exist, so long as the nuisance will interfere with those that come in contact with it in the exercise of a public right, or it otherwise affects the interest of the community at large.

Reno's allegations set forth in its Complaint outline the acts of the defendants that interfered with the public health, such that it would constitute a public nuisance, which include the ongoing deceptive marketing by defendants designed to increase opiate use and defendants' profits.

Simply because a theory or claim may be novel or unique or different, according to the defendants, does not render it subject to dismissal. Defendants ask this Court to dismiss the common law public nuisance claim because it is a novel theory, according to them. But simply because a theory is novel does not mean it cannot be pursued. Moreover, Reno's nuisance causes of action are not really that novel.

The State has never explicitly limited nuisance claims to property-based claims; thus, it is inaccurate to claim that a cause of action involving anything other than property is novel or new.

The defendants cite to the Jezowski versus Reno case to support their position that nuisance claims can only relate to injury to property. But the Jezowski court defined "a nuisance" as "indecent or unlawful conduct causing injury

to the right of another, or to the public."

The Court went on to state that the issue of whether something is a nuisance is a question of fact.

Finally, defendants fail to address the numerous jurisdictions around the country that have already held the governmental entity's public nuisance claims in opiate litigation are not subject to dismissal.

Nevada courts have never rejected public nuisance claims in the face of a vast interference with the public health, and it would not be proper for this Court to do so now, Your Honor.

Defendants repeatedly reference and attempt to rely on two State cases -- New Haven, out of Connecticut, and a case from North Dakota -- which are in the extreme small minority of jurisdictions that granted motions to dismiss in the opiate cases.

Neither New Haven or North Dakota is persuasive here. The decisions are based on laws within those states, and have no bearing here in Nevada.

Manufacturers owed a duty to the City of Reno, both based upon common law, and derived from statutory responsibilities.

Under Nevada law, all persons -- and "persons" include businesses -- have a duty to act reasonably toward

others. Manufacturers owe Reno a duty of care to prevent the reasonably foreseeable harm associated with excessive opiate sales and use.

In the late 1990s, governmental entities across the country filed lawsuits against gun manufacturers and sellers arising out of the foreseeable harm they caused in communities by creating a gun market, without any regard to the likelihood of the damage they would cause.

This is, of course, prior to the federal legislation passed giving gun manufacturers and suppliers and ammunition manufacturers immunity.

Courts in Ohio and Massachusetts recognized that gun manufacturers had a duty to communities -- to the communities, based on the foreseeable harm caused by the sale of guns.

Similarly, defendants created opiate medications, which are dangerous drugs. They determined what type of marketing should be conducted in order to profit from the sale of their products. Disregarding the foreseeable harm associated with the increased use of dangerous opiates, defendants continued with a misleading marketing campaign.

What we have learned from the documents released over the summer is that these companies knew the opiates were addictive and dangerous, but continued to push the sale of

those drugs to increase profits.

The harms caused by the defendants were not only foreseeable, they were foreseen.

Contrary to defendants' argument that there is no requirement that a special relationship -- contrary to defendants' argument, there is no requirement that a special relationship exists between Reno and the defendants in order to find that the defendants owed a duty of reasonable care to Reno.

Reno's claims arise directly from the defendants' own conduct, not the conduct of a third party; and, thus, a special relationship is not necessary. Reno has adequately alleged the existence of defendants' common law duty owed to the City of Reno; thus, the motion to dismiss should be denied.

Reno has adequately -- also adequately asserted a claim for negligent misrepresentation. Reno received false information from the defendants regarding the efficacy, purpose, and addictive nature of opiate medications, thereby adversely affecting Reno's ability to govern. Because Reno is regularly engaged in the business of providing law enforcement, health services, and other public services to its residents, the misrepresentations made by defendants influenced Reno's City business in a significant way.

As alleged in the Complaint, defendants' misrepresentation caused an increase in the costs expended by Reno for the citizens that relied upon -- and the doctors that relied upon any such misinformation and/or were harmed when the defendants concealed such important information.

Nevada courts have adopted the definition of negligent misrepresentation in the Restatement Second of Torts, which also recognizes the tort of negligent misrepresentation by non-disclosure.

Reno has alleged various misrepresentations, as well as manufacturers' intentional omissions of important information regarding the use and efficacy of opiates.

THE COURT: To Reno, or to third parties? This goes back to my initial question.

MR. EGLET: Right. To third parties --

THE COURT: This one is hard for the Court to understand --

MR. EGLET: And I'm about to get to the third-party issue. I'm almost there, Your Honor.

THE COURT: All right. Fine.

MR. EGLET: So defendants failed to disclose important information regarding the safety and use of their products, which they had a duty to disclose, knowing that it may induce doctors and citizens and the City to behave in a

certain way, in a business transaction; i.e., in the City's case, allowing ongoing separate promotion and sales of opiates throughout the city.

Defendants' silence about material facts basic to the transaction, when combined with manufacturers' duty to speak, is the functional equivalent of a misrepresentation, or supplying false information.

And, Your Honor, the fact that misrepresentations or omissions may have been made to third parties is not a sufficient basis for dismissal of a cause of action.

Nevada recognizes a theory of recovery based on false statements to third parties, where those misrepresentations denied Reno and its citizens of notice of the defendants' potential liability and possible legal claims. Defendants' wrongful concealment of important facts resulted in Reno's inability to obtain vital information underlying its claims.

Reno and its citizens relied upon defendants, as professionals in their industries, to not make misrepresentations about dangerous products with the potential to cause widespread harm throughout the community.

Additionally, the extent of defendants' deception was such that they denied Reno and its residents the opportunity to make informed decisions regarding the use of opiates for treatment of chronic pain.

Reno's cause of action for negligent misrepresentation includes sufficient allegations to put defendants on notice of their potential for liability, and dismissal is not appropriate.

Again, with respect to the negligent misrepresentations, manufacturers made direct misrepresentations to doctors. This included ads in medical journals. And this is on paragraph 96 of the Complaint.

It also includes the use of detailers, who made in-person -- which are the sales reps -- in-person visits to doctors and medical staff. That's paragraph 97 of the Complaint.

Kickbacks and other incentives were paid to healthcare providers. That's paragraph 98 of the Complaint.

Doctors were also paid speaker fees to spread these lies about "The opiates are safe" throughout the community. That's paragraph 100.

And manufacturers also made indirect representations through front groups and key opinion leaders, all of which are devised to target doctors and medical staff and patients.

And the speaker fees, talking about the doctors' speaker fees, were a sham, intended only to reward doctors for prescribing more opiates.

And evidence of that has now been released, Your

Honor, by the Sixth Circuit, or by Judge Polster, based on the Sixth Circuit's order. Some, as it is trickling out, though, Your Honor.

And as I said, we've started -- I think we've just now sent our initial request for information to defendants, and they've served us in the State's case, as well, so we expect, in the State's case, it's going to start coming out in Nevada.

So defendants were unjustly enriched by their improper marketing. In order to plead a cause of action for unjust enrichment, Reno must allege that the City conferred a benefit on the defendants, the defendants appreciated that benefit, and defendants' retention of the benefit under the circumstances was inequitable.

Court's indulgence, Your Honor.

THE COURT: Yes.

Do you need a moment? I'll put some white noise on. Do you need to confer?

MR. EGLET: No. I'm good, Your Honor. I just need to know where to put that note.

They keep me pretty organized, Your Honor.

So defendants were unjustly enriched by their improper marketing. And I laid out the elements: that it conferred a benefit on the defendants, the defendants

appreciated the benefit, the defendants' retention of the benefit under the circumstances is inequitable.

Reno has alleged that it has conferred a benefit on the defendants by paying for defendants' externalities, the cost of harm caused by the defendants' wrongdoing, such as costs arising out of healthcare services, addiction treatment, increased law enforcement, drug courts, jails, on and on, coroners, on and on and on it goes. First responder calls, Narcan, everything.

The defendants were well-aware of the obvious benefit it received from selling opiates, not only in the form of profits, but also in avoiding paying the societal costs caused by their aggressive and immoral sales techniques. The defendants retained the benefits, despite knowing they were unjust.

Any arguments by defendants that their conduct was not unconscionable or inequitable are issues of fact not appropriate for resolution at this stage.

Unjust enrichment claims have survived dismissal in numerous opiate cases, including the Clark County case, Your Honor.

Accepting all allegations as set forth in the Complaint as true, and drawing every fair inference in favor of the City, as the Court must do, Reno's claim for unjust

enrichment is properly alleged.

Finally, Your Honor, Reno's cause of action for punitive damages should not be dismissed.

Out of an abundance of caution, Reno included specific allegations for punitive damages in a separate cause of action in the Complaint, which was also done to guarantee the defendants were on notice of Reno's intent to seek such damages. Nevada law does not expressly prohibit plaintiffs from including a separate cause of action for punitive damages.

Additionally, Reno's tort claims could be the basis for punitive damages, particularly where Reno's Complaint is replete with references to specific intentional misconduct committed by defendants, all of which were expressly incorporated into the tort causes of action.

Moreover, whether defendants' conduct rises to the level of oppression, fraud, or malice, it's purely a factual question which cannot be resolved at this stage. Reno requests this cause of action, or at the very least, the claim for punitive damages, not be dismissed.

If Your Honor believes that any areas of the Complaint require additional facts or allegations, Reno requests leave to amend the Complaint in lieu of dismissal.

Reno's Complaint contains sufficient facts and

allegations to put manufacturers on notice of the basis for their liability, and, accordingly, Your Honor, the City of Reno respectfully requests the manufacturers' joint motion to dismiss be denied.

Thank you, Your Honor.

THE COURT: Thank you.

Who would like to respond on behalf of the defendants?

MR. LOMBARDO: I will start, Your Honor.

THE COURT: Are we ready to go, or do you need a moment to --

MR. LOMBARDO: I'm okay going, unless the Court would like --

THE COURT: Move the lectern anywhere you want.

And while we're just changing advocates here, feel free to stand up and stretch a little bit, if you'd like.

Some of you are sitting in the jury box. That's often the Court's encouragement, when we're changing -- when we transition from one witness to the next, "Feel free to stand up and move about the cabin."

MR. EGLET: Your Honor, after the manufacturers have completed their reply argument, before the distributors start, could we have a short comfort break?

THE COURT: We'll take a break at that time, sure.

Absolutely.

All right. Please proceed.

MR. LOMBARDO: Thank you, Your Honor.

And I expect to be quite efficient on my rebuttal. I tried to be comprehensive this morning. And I don't think it's a good use of the Court's time for me simply to repeat points that I think I've already addressed, even though they're in anticipation and responsive to the City's points. So I'm going to be specific and quick in addressing points that the City made.

Mr. Eglet mentioned that the parties are not identical in this case, and in the Nevada Attorney General's case, for the State.

And if the Court would like a copy of the Nevada AG Complaint, I have a VeloBound copy here.

Are the Complaints precisely identical? No, of course not. The Attorney General is doing things slightly different than the City of Reno is here.

There are minor differences in which corporate affiliates are named. As you've seen, probably, there are a number of corporate groups, where you have a number of corporate affiliates that are named. They didn't make the same decisions in each of those two cases.

But none of that really is of any moment, because the

point is that Reno has no authority to maintain this lawsuit, because that authority has not been expressly granted by the Legislature, and maintaining this lawsuit is not addressing a matter of local concern. And that's true whether the Attorney General has filed a lawsuit or not.

The Attorney General's lawsuit is interesting because it highlights the separation of powers, the division of responsibility that issues of statewide importance and issues of local concern were structurally designed to be handled by the different levels of state government. But whether the cases are identical or not is really of no moment to the question whether the City of Reno has authority to maintain this case to address a matter of local concern, or under Dillon's Rule.

Would Your Honor like a copy --

THE COURT: I don't need that. I can access that if I --

MR. LOMBARDO: Terrific.

THE COURT: -- by other means, if I need to.

MR. LOMBARDO: Starting with the Dillon's Rule point and the questions of authority. Plaintiffs' counsel indicated that the letter from the Attorney General Office to Mayor Schieve was just limited to the issue of deceptive trade practices. And that's simply not the case. The letter

is written with much broader import.

And just as an example, on page 2, after discussing the Deceptive Trade Practices Act claim, the Attorney General and the Consumer Advocate wrote -- quote -- "Although there may be other novel legal theories available to the City, including public nuisance claims, the consequences of asserting those actions has the potential to harm the bi-partisan, multi-state investigation that is currently underway" -- close quote.

And that's the multi-state investigation that the Nevada AG was participating in, and that was its focus as a coordinated statewide-level approach to dealing with the opioid abuse crisis. So the letter is clearly much more broadly written than that.

You asked a question of plaintiffs' counsel, and you got a very important admission. The admission was that the City would not have the power to regulate or tax the marketing of opioid medications.

And the reason that admission is important is because it's an admission, then, that addressing the opioid abuse crisis and the marketing of opioid through an ordinance, through regulation or legislation, is not addressing a matter of local concern.

And so the only remaining point then that the City

must be hinging its argument on is that Dillon's Rule doesn't preclude lawsuits. It only precludes legislation or regulations.

And that's an important point, and it's a point that the City has not supported with citation to authorities. And in particular, the City has not cited any case from Nevada or any other state where the Court refused to apply Dillon's Rule -- I'm sorry -- where the Court -- yes -- where the Court refused to apply Dillon's Rule because the local government was asserting the right to bring a lawsuit, as opposed to acting legislatively.

And we have sought a case, the Premium Standard case, where, under Dillon's Rule, the Missouri Supreme Court held that a township could not bring a public nuisance lawsuit because it had not been authorized, it had not received authority to bring such a lawsuit.

And, again, the Nevada Supreme Court's articulation of Dillon's Rule and the statutory articulation of Dillon's Rule draw no distinction whatsoever between whether a city is acting legislatively through ordinances or through litigation. All acts beyond the scope of powers granted are void. That's Ronow. All acts. Not all legislative acts. And the statute, likewise, precludes the exercise of all powers not granted, not merely legislative powers.

Plaintiffs' counsel argued that only Reno can seek these damages. It's been harmed. It would be unfortunate, as a matter of policy, if it weren't able to proceed in this case.

Respectfully, that's an argument that has nothing to do with the language of the statute of whether this is a matter of local concern. And that's an argument that the City needs to address to the State Legislature.

If it believes that it should have this power, that hasn't been granted, and it's over a matter of statewide concern or national concern, it can address that argument to the Legislature and ask for that authority. But it doesn't have it now.

There were a few points about the pleading questions, fraud pleading, and the like. And, respectfully, there's been no substantial distinguishing facts between this case and Kearns and Anchor Gaming.

There was no discussion of how the allegations in this case line up with the allegations that the plaintiffs made in Kearns and Anchor Gaming. The Court has seen or will see that the allegations in this Complaint match up neatly and on all-fours with the allegations in Kearns and Anchor Gaming; that is, the plaintiffs in all three of these cases allege a unified course of fraudulent conduct, and rely on

that conduct entirely for their claim.

The claim against the manufacturer defendants here, to step back and ask "What is it?" it's about deceptive marketing of opioid medications. And the allegations of the Complaint are very clear in alleging that the manufacturer defendants did so fraudulently, that they knew about the risks of opioids, they knew their statements were false, and they intended to induce reliance based on those false statements. Those assertions are in the First Amended Complaint. They line up perfectly with Kearns and Anchor Gaming. Rule 9 (b) applies to those allegations.

I want to just quickly -- it's probably not necessary, but I want to clear up a point that the Court raised earlier during Mr. Guinn's comments.

There was some sort of seeming intention between the point I was making about fraud pleading and the point that Mr. Guinn was making about punitive damages.

THE COURT: Well, I thought it seemed a little inconsistent, so.

MR. LOMBARDO: Fair enough. And I just want to make perfectly clear that the manufacturer defendants' position is that the First Amended Complaint, the City's allegations in the First Amended Complaint assert a unified course of fraudulent conduct. There's no question that they make that

assertion, and, hence, they trigger Rule 9 (b). And they must be alleged with particularity that Rule 9 (b) requires. They don't satisfy the pleading requirements of Rule 9 (b), and, as a result, the First Amended Complaint does not adequately plead either a cause of action, which is necessarily grounded in fraud, and sounds in fraud, nor a basis for punitive damages. So it doesn't succeed by either measure.

THE COURT: Okay.

MR. LOMBARDO: I heard plaintiffs' counsel say that, even if the fraud pleading standard applies, the First Amended Complaint provides specific representations to support the fraud claim.

During my remarks earlier, I said that plaintiffs' counsel will stand up --

THE COURT: Let me make this easier for you. If it comes down to -- taking into account all the other issues you put before the Court, if it comes down to -- if the Court finds the case survives, and that there is an essentially unified course of fraudulent conduct alleged, it's very likely that I would find the allegations don't meet Rule 9. However, the likely result in that scenario would be either to give the opportunity to the plaintiff to amend, or, alternatively, four to six months to attempt to uncover

additional facts which might satisfy it.

So if the Court reaches a conclusion that this really sounds in fraud, even if the fraud claim is not named, it's very likely the Court would find that the level of the factual allegations in the Amended Complaint do not meet the heightened pleading standard.

MR. LOMBARDO: I'll move on then. Thank you.

There was a comment made that only the defendants know what's false in their marketing. And it's not clear to me how the City alleges false and misleading marketing, deceptive marketing, if the City has no basis to allege what is false in the defendants' marketing, and why it is false.

Plaintiffs' counsel argued -- I'm moving now to the statutory public nuisance claim -- argued that it implies a private right of action. It does so under the principles of Baldonado, because the statute does not deny a private cause of action. And that's just not the standard. The standard is the flip of that.

THE COURT: Well, the argument to the Court here sounds a little broad, because that argument might apply in many different contexts, with many different statutes.

On the other hand, we're all dealing with -- you have used the word "novel," a novel factual scenario here. So the Court has to make a determination whether, implied on the

factual allegations here, do we -- does the Court decide by the absence of a direct authorization to bring a private right of action, is that fact alone enough to defeat the opportunity for statutory nuisance claim?

And the defense says: Absolutely, or else you could imply one in every criminal statute, or otherwise.

And the State says -- excuse me -- the City says: Don't do that here. Right?

MR. LOMBARDO: Respectfully, not just the defense, Your Honor. Baldonado and Neville themselves begin with the presumption that, if the statute does not expressly authorize a private right of action, then that is a very strong indication that there is no private right of action.

And then, if you look to define the legislative intent, you can look at legislative history. We've seen or heard no legislative history. You can look at the language of the statute for some legislative intent that the Legislature intended to imply a private right of action.

In Neville, that evidence existed, because there was the right to recover attorney's fees in a private case.

In Baldonado, that evidence did not exist, and the going-in presumption that no private right of action exists is what determined the outcome in Baldonado.

Plaintiffs' counsel mentioned the Coughlin case,

which I neglected to mention in my opening remarks. It's a Federal District Court case here in Nevada. But it's a decision that asks the very question that we're discussing, which is: Is there evidence that the Legislature intended to create a private right of action under the --

THE COURT: Is that the Judge Pro case?

MR. LOMBARDO: Yes.

THE COURT: Okay. I know that case.

MR. LOMBARDO: I won't -- I'll resist the temptation to respond with stories from my own personal experience, and respect that that information is not particularly useful to analyzing the issues that are before the Court today.

What we also heard is, these cases are everywhere. They're all over the country. The suggestion is that, in some sense, this Court is going to step out if it doesn't bow to the suggestion that it should allow the case to go forward.

And the reality is, there are decisions on both sides of these issues all over the country. Counting up wins and losses is really not especially useful to the Court. I know the Court will consider what reasoning is most persuasive and most in line with Nevada legal principles.

But the Court in the City of New Haven case --

THE COURT: I read that decision. The judge there is

a very -- he's a very good writer. He's a deep thinker. He made some interesting observations. Whether they translate to what is before the Court here, I'm still deciding.

MR. LOMBARDO: Right.

THE COURT: What would you like me to know?

Let me tell you something you might find interesting.

Hand me the gavel.

Sixty years ago my grandfather was a judge in Connecticut. This is his gavel. We still use it here in Nevada now.

MR. LOMBARDO: Great.

THE COURT: Connecticut judges are near and dear to my heart. That does not mean that the Court is going to necessarily follow the decision of the judge there merely because I have a gavel that came from somebody he probably worked with. No. Does it mean I will or will not? To be determined.

But, anyway, what were you going to say?

MR. LOMBARDO: Looks like that one was liberally used.

So the judge there, I think, made a very compelling principle. It was a case brought by 37 Connecticut cities, as you know, seeking to recover money for their public services.

And the judge observed that these lawsuits are part of a mixed crowd of cases assembling on courthouse lawns across the country. Some of them are brought by individuals, some by cities, some by states, some by the federal government, some are civil actions, like this one, some invoke regulatory powers, some are criminal. But merely because these cases exist somewhere else doesn't relieve the cities of their burdens here.

The cities can't just join the swelling course calling for justice and shrug off the ordinary civil burdens that apply to civil plaintiffs.

And the Court goes on to say, "It might be tempting to wink at this whole thing and add to the pressure on parties who are presumed to have lots of money, and possible moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the country, but it's bad law. If the courts are to be governed by principles, and not passion, then the ordinary legal principles must apply just as much in hard cases as in easy ones."

That's the only point I wanted to make in response to plaintiffs' remarks.

THE COURT: Thank you very much.

Mr. Guinn, final thoughts.

MR. GUINN: Thank you, Your Honor.

I'll be even more brief than Mr. Lombardo was. He covered several points I was going to address.

I do want to address the chart Mr. Eglet led off with and showed the Court.

The apparent purpose of that was to better illustrate the supply chain of opioids. And I think all it did was add a few more links in the causal chain.

He talked about advertising --

THE COURT: Well, he added a different chain; right?

MR. GUINN: The chain branched off, created a new chain that reconnected to the original chain, as I recall.

So when we're talking about causation, it's not complicated. It's the more links in a causal chain there are, the more remote the injury is, the connection is, between the plaintiff and the original wrong.

Mr. Eglet -- and this is all pled in the Complaint. We're not, you know, guessing at this. Talked about front groups, key opinion leaders, continuing medical education, direct marketing. All those things further blur the connection between the manufacturers originally and the original -- and the harm that the City is now complaining of.

Mr. Lombardo touched on this, but let me just follow up a little bit. On the negligent misrepresentation claim, Mr. Eglet referenced seminars, reading materials,

advertising. He never explained how any of that information was, number one, deceptive or fraudulent or misleading. He never cited a single statement. And he never directly responded to the Court's question about who those representations were made to.

In this case, it would have had to have been made to the City in order to plead an actionable negligent misrepresentation claim.

This broad idea that everything the manufacturers did was irresponsible or misleading or fraudulent does not satisfy even the most minimal pleading standards in the State of Nevada. If there's a false statement, if there's a misrepresentation, tell us what it is, where it is, who made it, and who heard it, and we'll go from there. That is what the standard is. Not just for fraud, but for negligent misrepresentation.

Mr. Eglet talked about the Special Relationship Doctrine. I commented on that earlier today. And it said -- and I have this in quotes -- "that there was false information regarding the efficacy and purpose of opioids."

Fine. What was that false information? Tell us what the statement is.

The advertising is not secret. It's not subject to a protective order. There's been a lot of discovery done in

the MDL on the national level. There's all kinds of information in possession of the plaintiffs that, if they found a false statement, tell us what it is, put it in the Complaint, and we'll respond to it appropriately.

If it rises to the level of fraud, as the Court said earlier, we would expect the Court to hold Mr. Eglet to the fraud leading standard of particularity.

Towards the end of his argument, Mr. Eglet mentioned misrepresentations and the silence about material facts and non-disclosure and wrongful concealment of material facts.

Again, in a broad brush, that's a good starting point. But it doesn't tell us what the claim is with respect to any individual defendant in this case. There are multiple defendants, did multiple things, good, bad, and otherwise, and we need to know what they are, and they need to be in the First Amended Complaint for us to intelligently respond.

We're not holding the plaintiff to the standard of proof at trial. That's not what we're asking the Court to do. We're asking the Court to give us the notice, the short and plain statement, the notice pleading that is required in the State of Nevada. And just painting with a broad brush, and saying, "These defendants are bad, they were deceptive, they were fraudulent, they were misleading, they withheld information" doesn't cut the muster in the State of Nevada.

Thank you, Your Honor.

THE COURT: You're welcome.

All right. This motion is under submission.

The Court will be in recess for approximately --

MR. POLSENBERG: Your Honor, before you take this under submission, could we mark that graph they were showing you as the court's exhibit?

THE COURT: Yes. We will have that marked, and that will be part of the court's file.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: You're welcome.

Mr. Eglet, at your earlier convenience, please approach the court clerk with that.

Let's take about 15 minutes, and then we'll get on to the next matter. If there's something the distributors want to address to the Court with respect to the surreply, bring it to the Court's attention before we start argument.

MR. POLSENBERG: We will.

Thank you, Your Honor.

THE COURT: We'll be in recess approximately 15 minutes.

(Recess.)

THE COURT: We're back on the record.

Please be seated.

The Court will hear now the motion of the manufacturers -- excuse me -- the distributors seeking dismissal of the case.

Who will argue on behalf of the --

MR. POLSENBERG: Well, Your Honor, before we do that, if we could take up our motion to strike the supplemental brief.

THE COURT: Yes.

MR. POLSENBERG: I'll be brief.

There is such a thing as a supplemental brief. I mean, I do appeals. And it's in Federal Rule 26 and State Rule 26.

And when you file a supplemental brief, you file something, and you say, "Here's the issue it refers to. This is the supplemental authority that goes to our point."

It's not a chance to raise arguments that you didn't raise before, especially in a circumstance like this, where we pointed out in our reply to their supplement -- their first supplemental brief that they had not raised the issue. And they still didn't raise it.

There were a couple of times today when you talked about this case being different, or the unique circumstances of this case. And I think that's what we're looking at here.

Here is a party that comes in and tries to raise an

issue that they didn't raise, that they didn't argue. They apparently figured it out on the weekend before the argument, giving us less than a judicial day, and they come in, and one of the things they argue for, in the alternative -- I mean, it's funny. How do you argue in a supplement brief for relief specific to that brief?

So what this really should have been is a motion. And it would have worked better if it were in enough time for us to do something about this.

So what do we do about this? Clearly, this is a violation. The local rule doesn't provide for a surreply or for a supplemental brief. You, through leave of Court, allowed some of this additional briefing, but not this brief. So it's a violation. What do we do?

We have suggested we strike it, because this was at issue. If you come into a Supreme Court argument the day of the argument with a new argument, the Court will ignore it. If you try to raise a new argument that wasn't in your briefing, the Court will ignore it.

So we would move to strike. And that's appropriate under the rules.

Our alternative relief -- we also ask for alternative relief, as they did, but we at least made a motion -- is that you should not let them argue today because they've raised

this too late. Allow us to file a response to their supplemental brief on this issue.

There are two issues, actually. There's control, and there's also the additional citations that they made to their Complaint. And I think they should not be allowed to argue this new issue that they raised today. We should be able to argue it because we did raise it in the motion, and we did raise it in the reply. I think that's an appropriate -- either way is an appropriate way to handle the circumstance.

Thank you, Your Honor.

THE COURT: Thank you.

Respond to what you just heard, Mr. Eglet.

MR. EGLET: Well, it was a mistake. There's no doubt. I'm not going to try to claim it wasn't. You know, I was in trial for nearly the entire month of December, all the way up until the day before Christmas Eve, had a bunch of family in town. I didn't get the opportunity to really start preparing for this argument today and tomorrow until last Friday, Friday and the weekend.

On Friday I discovered this cut-and-paste error, which is what it is, it is a cut-and-paste error. So we decided to file a supplement, and that's what we did.

And I spoke to Mr. Polsenberg and a couple other lawyers regarding this issue first thing this morning. And

we offered to, if they wanted to, we would continue the entire hearing, allow them to file a responsive pleading to it. The other alternative --

THE COURT: And pay for them for their time to come back, for their travel expense.

MR. EGLET: We would, we would pay for that.

And the other option we said is, well, we can go ahead and go forward with the argument, with the understanding that we would be able to make the arguments regarding the control issue we briefed, and they would be able to make whatever arguments they wished on the control issue this morning. But they would have the opportunity, after today's argument, to file a response to our supplement, as long as that response only dealt with the issues raised in our supplement, they don't go outside of that and argue anything else that we're going to be arguing today. If they did that, then we would just simply say that we should have a chance to respond to that, as well.

It was a mistake. But it was a mistake they knew was a mistake, because we made these arguments in both the Clark County case, and we made them -- we responded to their control arguments in both the Clark County case, and gave the citations, as well as the State's case.

The State's case for the distributor was just argued

last month, on December 2nd. We argued that case. The next day I started this trial that I was telling the Court about.

So they knew that those were in our briefs. They knew it was a cut-and-paste. In fact, they pointed that out, "This is a cut-and-paste job." And it was an error by my office that I didn't catch until Friday, and I thought that the only thing to do was appropriate.

I don't think it would be fair and appropriate. Because the law they cite with respect to, you know, the issues are conceded, is not the law in Nevada. The law in Nevada is --

THE COURT: Well, hold on. Now we're starting to argue on the merits. Let's just talk about process here.

MR. EGLET: Process, look, I'm willing to --

THE COURT: Here's the way the Court is inclined to approach this.

In a case like this, you know, I'm going to state the obvious. I'm not loving the way that this was presented to the Court, especially the filing of the supplement, the request -- I mean, it is what it is.

So to the movants here, to the distributors, I guess I would suggest you decide as among A and B.

A is that we proceed with the argument, the Court makes no decision on this until you have 15 days from today

to file a written response to the surreply, which the Court will consider. I will not allow plaintiffs to respond to your reply, as long as it meets squarely the issues that are newly raised. And I will not decide this until that time. That is option one.

Option two is that we proceed with the hearing now. Option two is we postpone the hearing, we come back after you've had an opportunity to, at that time, have responded in writing. And I'll allow those that are inconvenienced by this to be reimbursed their reasonable travel expenses, and, you know, for each -- up to, say, three counsel, up to three hours of their legal time for being inconvenienced.

So I'll give you a moment to think about that, and then you can tell me which one you'd like to do: Proceed, with a written response within 15 days, the matter will be submitted at that time; or come back, and we'll argue it after, sometime in the next 30 days.

MR. POLSENBERG: Having talked with my co-counsel, I know they'll want to know: Will we not argue, under option one --

THE COURT: We'll argue now.

MR. POLSENBERG: Not argue control, though. Because we said on page 3 -- intentional or not, this is an ambush.

THE COURT: See, that's the problem. That's why

really we should postpone this hearing, come back after you've had an opportunity to respond, and we will argue as though each side has briefed the issue, and control will be heard.

MR. POLSENBERG: How about if we just skip control today, and do the response to their brief?

MR. EGLET: We have to be able to argue.

THE COURT: Yeah, I agree.

MR. POLSENBERG: All right.

THE COURT: We have to argue. So take a few minutes.

MR. POLSENBERG: If I might have a few minutes.

THE COURT: Go ahead. I'll come back in about five minutes.

MR. POLSENBERG: Thank you, Your Honor.

(Recess.)

THE COURT: All right. We're back on the record.

Have you had a chance to discuss among the distributors how people would ask the Court to proceed?

MR. POLSENBERG: Yes. And thank you, Your Honor, for that opportunity.

THE COURT: Sure.

MR. POLSENBERG: We will go with option one.

THE COURT: Which is to proceed, and you can have 15 days from today to file a brief in response to the surreply,

after which the matter will be submitted for me to make a decision.

MR. POLSENBERG: Exactly right.

THE COURT: That's acceptable to the Court, as well.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: Please proceed.

MS. WEIL: Your Honor, with the Court's permission, Miss Salgado and I are going to share this argument.

THE COURT: Permission granted.

MS. WEIL: Good afternoon.

Again, Your Honor, may it please the Court.

My name is Rachel Weil.

As I said, along with Suzanne Salgado, I will be arguing on behalf of the defendant -- of the distributor defendants.

THE COURT: Thank you.

MS. WEIL: I'm delighted to be in your beautiful city. And I'm not blaming it for my cold, so I apologize in advance for that.

THE COURT: All right.

MS. WEIL: With Your Honor's permission, I'm just going to make a preparatory statement and set the stage; and then Ms. Salgado will argue some of the over-arching issues, including proximate causation and nuisance; and then I'll

finish up, if that's okay with Your Honor.

THE COURT: It is?

MS. WEIL: Now, Your Honor just heard arguments at some length by the manufacturers, and the City has alleged all of the same claims against the distributors, so might be a good question: Why do we have to do this? Why do we have to do this all again?

And I will tell Your Honor that, with the excellent job that Mr. Lombardo and Mr. Guinn did, we will endeavor not to repeat the exact same things that they said.

THE COURT: Of course, using Mr. Eglet's flow chart, you're one step closer to the alleged harm, alleged against the manufacturers.

MS. WEIL: Your Honor, we'll certainly talk about our perception of that, as well.

THE COURT: Okay.

MS. WEIL: Why is our argument different from the manufacturers'? And what that has to do with, as Your Honor suggests, is how the distributors' role in the opioid supply chain differs from the manufacturers' roles in the opioid supply chain.

The easiest way to explain what distributors do is to start out by explaining what they don't do. Distributors don't develop opioid drugs. They don't work with the FDA to

get new drugs approved. They don't have any role in creating warnings that accompany drugs, or modifying warnings that accompany drugs. They don't manufacture the opioid drugs.

And most importantly for the purposes of the claims in this lawsuit, they don't advertise drugs or market them to doctors or to patients. And I think that's conceded. I don't think the City is going to dispute that.

Distributors are essentially middlemen, Your Honor, which means that they pick up drugs that the manufacturers have already manufactured, and they take them to a warehouse, where they keep them safe and secure under highly-regulated conditions, and then they deliver them to retail pharmacies. Then the retail pharmacies, in response to prescriptions, dispense them to the public.

And that's -- excuse me, Your Honor. I'm sorry.

THE COURT: That's all right.

MS. WEIL: And that is what distributors do.

THE COURT: Hold on.

Do you want me to turn the air-conditioning off? Because it was getting warm in here, so we directed the air to come down a little bit.

MS. WEIL: No, I'm good. Thank you. I appreciate that.

THE COURT: Keep it around 71 or so.

MS. WEIL: This is fine. This is just a cold.

THE COURT: Okay.

MS. WEIL: The City admits that this is what distributors do, Your Honor.

Paragraph 67 of the Complaint states, in its entirety, "Distributor defendants purchased opioids from manufacturers, including the named defendants herein, and distributed them to pharmacies throughout Reno and the State of Nevada."

And then the paragraphs 86 through 130 of the Complaint talk about other aspects of what distributors do and talk about the distributors' role in the supply chain.

Now, as Your Honor is aware, the City's theory is that the opioid manufacturers engaged in a deceptive marketing campaign that effectively changed the standard of care for the prescribing of opioid medications for long-term and chronic pain.

And according to the City, the result was that the doctors wrote more and more opioid prescriptions over the years, and lots of opioids flooded into Nevada, and everywhere else in the country.

But the City doesn't allege -- and it can't allege, and it concedes that it can't allege -- that the distributors were involved in a deceptive marketing campaign, because they

weren't. Because it's undisputed that distributors do not market opioids to doctors or to patients.

Instead, Your Honor, the gist of the City's claims against the distributors is that distributors shipped too many opioids in response to what they call "suspicious orders." It's true. It can't be disputed that over the years distributors' shipments of opioids in Nevada and into Nevada have increased and increased.

Why is that? Well, that's because Nevada doctors wrote more and more prescriptions, which caused pharmacies to place larger orders with the distributors, and distributors filled them. And there was nothing suspicious about that.

And the Federal Drug Enforcement Agency, the DEA, which is charged with regulating the distribution of controlled substances, like opioids, obviously didn't think it was suspicious, either, because between 1993 and 2015 the DEA authorized a 39-fold increase in the number of opioids that the manufacturers of opioids -- that the manufacturers were allowed to produce. And that was based on the DEA's determination that there was an increasing legitimate medical need for the medications.

And so distributors shipped orders to the pharmacies that ordered them to meet this new demand. And distributors will talk about this a little bit later, as well. Miss

Salgado will address this in more detail in the causation portion of the argument. But distributors' control over opioids ends when they're shipped out.

Any criminal diversion, anything that happens down the line that the City alleges resulted in its injuries happened after distributors had relinquished control of the opioids.

Now, why does that matter? It matters, as Your Honor will hear, because, as a result of that, the City's claims against the distributors fail as a matter of law.

Among other issues, it means that the City can't prove the proximate causation element of any of the claims against the distributors.

It is fatal to the City's ability to sustain -- to satisfy the elements of its nuisance claim. It is totally intertwined with the foreseeability argument in the negligence claim. And it also means that the City can't survive dismissal of its negligent misrepresentation claim or its unjust enrichment claim.

So with the stage set, and against that backdrop, Your Honor, Ms. Salgado will begin by explaining several of the over-arching reasons why the six claims against the distributors fail as a matter of Nevada law, and then I will be back to talk to Your Honor again later.