

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF RENO,

Appellant,

vs.

TEVA PHARMACEUTICALS USA,
INC.; CEPHALON, INC.; ENDO
HEALTH SOLUTIONS, INC.; ENDO
PHARMACEUTICALS INC.;
ALLERGAN USA, INC.; ALLERGAN
FINANCE, LLC F/K/A ACTAVIS,
INC. F/K/A WATSON
PHARMACEUTICALS, INC.;
ACTAVIS PHARMACY, INC. F/K/A
WATSON PHARMA, INC.; AND
ACTAVIS LLC,

Respondents.

Supreme Court No. 85412

District Court Case No.
CV18-01895

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APPELLANT'S APPENDIX VOLUME 6

Robert T. Eglet, Esq.
Robert M. Adams, Esq.
Cassandra S.M. Cummings, Esq.
Richard K. Hy, Esq.
EGLET ADAMS
400 S. 7th Street, 4th Floor
Las Vegas, NV 89101
Tel: (702) 450-5400
Fax: (702) 450-5451
Email: eservice@egletlaw.com

Bill Bradley, Esq.
Mark C. Wenzel, Esq.
**BRADLEY, DRENDEL &
JEANNEY**
6900 S. McCarren Blvd., Suite 2000
Reno, NV 89509
Tel: (775) 335-9999
Email: office@bdjlaw.com

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

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

1 THE COURT: Thank you very much.

2 MS. WEIL: Thank you.

3 THE COURT: Ms. Salgado.

4 MS. SALGADO: Thank you, Your Honor.

5 Good afternoon, Your Honor.

6 As Miss Weil said, she and I will be splitting the

7 arguments on behalf of the distributor defendants.

8 THE COURT: Excellent.

9 MS. SALGADO: As she said as well, many of the

10 arguments the distributors made are also made by the

11 manufacturers, and were made today in oral argument, and we

12 adopt these very-well-made arguments from the manufacturers,

13 and will endeavor to avoid repetition for the benefit of

14 everyone here.

15 As Miss Weil said, we'll focus instead on what makes

16 distributors different and the claims against distributors

17 and their unique position in the supply chain.

18 THE COURT: Okay. So what makes them different?

19 MS. SALGADO: Well, let's start with the Complaint

20 and see what the Complaint says about the distributors.

21 As Miss Weil said, there are fewer paragraphs

22 dedicated to distributor defendants, but I think it's a

23 little more glaring than that. There actually is one

24 16-paragraph section dedicated to distributors alone, out of

1 308 paragraphs. And that's striking.

2 What those paragraphs say -- the majority of those
3 paragraphs is 138 to 153, entitled, "Duty of distributor
4 defendants and pharmacies as gatekeepers."

5 The first sets of paragraphs describes the duties of
6 distributors, and only the last three of those paragraphs
7 actually allege that distributors did anything wrong.

8 What Miss Weil said and what they allege is that they
9 allege that distributors failed to report and stop suspicious
10 orders. That's it. There's nothing else that says what
11 orders, when, how they should have known they were
12 suspicious, given this 39-fold increase by the DEA from 1993
13 to 2015. But, instead, they just say too many opioids over
14 too much time, despite the fact that doctors were writing
15 those prescriptions.

16 What makes distributors different is that
17 distributors, unlike pharmacies -- excuse me -- unlike
18 manufacturers, do not have contact with doctors or patients,
19 and do not make advertising and marketing.

20 It's true, as Your Honor mentioned, that they sit one
21 step closer to the ultimate end-user in the supply chain.
22 But I think the same intervening causes that preclude
23 liability against manufacturers also preclude liability
24 against distributors, based on what happens after it leaves

1 the hands of distributors. And I'll get into that.

2 Before we get into the public nuisance and proximate
3 cause arguments, I'm going to briefly touch on the Statewide
4 Concern Doctrine, or Dillon's Rule, that was discussed at
5 length.

6 As I mentioned, I'm not going to repeat arguments
7 that were made, but I'd like to just add a couple of things
8 and a couple of notes.

9 The first is that, as we've discussed, it's
10 undisputed that Nevada has adopted Dillon's Rule, which was
11 codified in legislation that we've been discussing today.

12 One of the factors is that, "A matter of local
13 concern cannot concern the regulation of business activities
14 that are subject to substantial regulation by a federal or
15 state agency."

16 I think manufacturers largely covered this, but we're
17 focusing mostly on the regulation on them by the FDA, so I
18 just wanted to make the additional point that distributors,
19 too, are subject to extensive regulations; not by the FDA,
20 since we don't make products, and we don't market those
21 products, but by the DEA, which regulates distributors and
22 everyone in the supply chain: manufacturers, pharmacies,
23 doctors, and everyone else.

24 THE COURT: So how they would be moved, where they

1 would be stored, at what temperature, when they'll be
2 released to whomever buys them, and has a lawful right to
3 them?

4 MS. SALGADO: Precisely, Your Honor. And the
5 distributors' specific regulations, as Your Honor is alluding
6 to, often deal with that physical storage and movement of
7 them, to ensure that medications are moved safely.

8 What distributors' main job is, is to make sure that
9 medications are moved safely to their pharmacy and hospital
10 customers so that, when you, as a patient, go to your
11 pharmacy or end up in the hospital, the medications that you
12 need are there and ready for you, and have been moved there
13 safely, and you know what they are.

14 Distributors make sure that insulin is kept cold.
15 They make sure that medication is sent for next-day delivery,
16 if that's what is needed. It's really a logistics company.

17 THE COURT: Well, the vehicles have trackers on them
18 to make sure they're not going to places they're not supposed
19 to.

20 MS. SALGADO: Exactly.

21 THE COURT: It's temperature-regulated, and there's a
22 bunch of other things. I am aware of that, generally.

23 MS. SALGADO: As relevant to opioids, there's both
24 physical security of opioids and the distribution of them.

1 There's certain regulations that call for a certain thickness
2 of the wall of the vault that actually houses the opioid
3 medications that are stored in distribution centers.

4 And then, in addition to all of those regulations,
5 there's regulations that govern reporting suspicious orders
6 to the DEA, as well as reporting every movement of every
7 opioid medication throughout the supply chain. That means
8 that, when we purchase an opioid from a manufacturer, that
9 gets reported to the DEA. When we sell opioids to a
10 pharmacy, that gets reported to the DEA. They track all of
11 that information, and that's all part of the regulation on
12 distributors and manufacturers.

13 Now, I think the same logic applies that, given the
14 extensive regulatory framework, that this is not a matter of
15 local concern. And we adopt those arguments made by the
16 manufacturers.

17 The other issue that I wanted to note --

18 THE COURT: Wait. Let me make sure I understand
19 this.

20 Not a matter of local concern by virtue of the fact
21 that your client's business activities is regulated by the
22 DEA. End of analysis by the Court. I can stop right there,
23 check the box that says, "This case cannot be brought by the
24 City of Reno." And if somebody thinks otherwise, they better

1 convince two out of three Nevada Supreme Court Justices; is
2 that right?

3 MS. SALGADO: Well, the statute is clear that a
4 matter of local concern cannot concern the regulation of
5 business activities that are subject to substantial
6 regulation by a federal or state agency. That is the
7 statute. I think, to your point, it's not -- that's just one
8 of the issues that makes that not a matter of local concern.

9 THE COURT: You're saying, if I agree with the movant
10 here, it's game over, case dismissed as against -- well, for
11 purposes of this motion, as against the distributors; right?

12 MS. SALGADO: That's correct. If that is met, the
13 statute says that it cannot proceed. That is our opinion.

14 I think what you're getting to is, is this a
15 sufficient regulation of a business that is subject --

16 THE COURT: Well, I mean, is that what you read that
17 to mean? The DEA identifying how controlled substances
18 should be housed and moved and identified and logged in,
19 things like that, is the kind of regulation that Nevada
20 statute is referring to, and common law, Dillon's Rule
21 interpretation. Are we done? Like, are we done here?

22 I realize we're going to proceed with other issues.
23 Of course, as you're aware, the Court may not view it that
24 way. But if the Court does view it that way, the movant

1 believes this case is dismissed as to the distributors. As
2 to the manufacturers, I'm assuming, believe that the Court
3 views it that way, the case is dismissed as to the
4 manufacturers. Is that fair?

5 MS. SALGADO: That's fair. And just to elaborate why
6 this is, I think there's -- it makes sense, and there is
7 logic behind what the statute says, and what the Legislature
8 was doing when it codified this rule.

9 When there is extensive federal and Nevada law that
10 imposes comprehensive regulations, that means the Legislature
11 was intending to occupy that space, and it would not be
12 appropriate for a local government to act, in this case,
13 through litigation, or through legislation, to do something
14 that could be contrary to what a state or federal regulation
15 would require.

16 THE COURT: Let me again hit the pause button.

17 That may resonate -- well, it seems to the Court
18 that, if the relief requested here said, "If the City case
19 goes forward, and the City prevails, we want an order from
20 this Court to issue at some point that changes the manner in
21 which, the amount of which, the temperature at which,
22 delivery times at which controlled substances can be moved in
23 and about the City of Reno."

24 Now, that seems to the Court that would clearly be

1 well over the line of what the authority of a State District
2 Court could -- the kind of relief to give to the City of Reno
3 in lieu of the federal laws and regulations that will apply
4 here.

5 But that's, in the Court's estimation, not exactly
6 what the -- I realize, reading the Complaint, it seems like
7 the argument can be made that the City is asking for a level
8 of relief, by way of either mandatory injunction or
9 regulatory injunction, to change something with the way
10 opioids are delivered to and prescribed and used in this
11 community. And that gives the Court a little bit of pause.

12 But the financial impact to social services and the
13 like, is that also encompassed by Dillon's Rule, and preclude
14 the ability of the City go forward?

15 MS. SALGADO: Well, I think it's both things, the
16 injunctive relief and the punitive. Your Honor alluded to
17 the injunctive relief. They seek broad injunctive relief,
18 which to Your Honor's point could result in an injunction
19 that contradicts how a federal regulation would otherwise be
20 interpreted.

21 The federal regulation requires distributors to
22 report suspicious orders. If Reno interprets suspicious
23 orders differently than Baton Rouge and Washington D. C., we
24 have a problem. This is a highly-regulated industry, and the

1 distributors don't make different decisions based on the
2 states that they distribute those medications to. It needs
3 to be the same standard across the United States. And
4 bringing these sorts of actions is dangerous, because it
5 could -- it could change what that regulation means. We do
6 not believe that's appropriate.

7 THE COURT: But even Dillon's Rule, if the Court
8 interprets it the way the defendants are asking the Court to,
9 just says the City couldn't bring this, it would be a State
10 action, if anyone. So we still have a little bit of the same
11 type of concern, I guess.

12 Okay. Please continue.

13 MS. SALGADO: I think, further, to add an additional
14 point, we've been talking about acting through litigation
15 versus legislation. And I want to address that point
16 quickly, Your Honor.

17 THE COURT: Yes.

18 MS. SALGADO: We just wanted to emphasize that the
19 plaintiffs do not cite any authority to make that distinction
20 of legislation versus litigation.

21 And in addition to the authority cited by
22 manufacturers, we've cited additional authority that I wanted
23 to point Your Honor to, that's in our briefs, which is the
24 City of Philadelphia versus Beretta. And in that case, as

1 well, they made the same finding as in another case cited by
2 manufacturers that a City cannot do by litigation what it
3 cannot do by ordinance.

4 There that involved regulating the gun industry and
5 distribution of a lawful product, similar to what we're
6 seeing here.

7 And there the Court said that, "Claims that the gun
8 industry's method for distributing guns are negligent" -- or
9 excuse me. They brought claims that the gun industry's
10 methods for distributing guns were negligent and a public
11 nuisance. But they noted that, "The Supreme Court has
12 recognized that judicial process can be viewed as an
13 extension of a government's regulatory power, and that the
14 City's instant action seeks to control the gun industry by
15 litigation, an end the City could not accomplish by passing
16 an ordinance."

17 We think that case is on all-fours with this, and
18 wanted to cite that additional authority so that Your Honor
19 understands this is not a novel application of Dillon's Rule.

20 THE COURT: Okay.

21 MS. SALGADO: Unless Your Honor has any further
22 questions on Dillon's Rule, I'm going to move to public --

23 THE COURT: Before you move off that, I may have just
24 one more. Please just give me a minute.

1 MS. SALGADO: Sure.

2 THE COURT: Well, you know, I didn't ask this of the
3 manufacturers because, you know, I've just been sort of
4 turning it over in my mind. But Dillon's Rule clearly
5 precludes a municipality from bringing an issue on behalf of
6 a state or seeking damages or relief for injury to the State
7 as a whole.

8 The movants suggest that, if the alleged harm,
9 however, is of statewide concern, as opposed to local
10 concern, the City is precluded from acting as its own
11 enforcer, its own plaintiff; is that right?

12 MS. SALGADO: Well, I believe the statute speaks to
13 that, and states that it must have a local impact, and that
14 means that there is -- quote -- "no significant impact on
15 other cities or counties within the state." So that's what
16 the statute says, yes, Your Honor.

17 I think --

18 THE COURT: Well, so, the State, and the State alone,
19 is the entity that can pursue relief, if any is to be gotten,
20 on behalf of the cities and counties and municipalities
21 within the four corners of its border.

22 MS. SALGADO: That's not, I think, what it states.
23 And I recognize the struggle with this issue, which is
24 difficult. And I think we have other arguments as to why we

1 believe --

2 THE COURT: And the reason, I guess, intellectually,
3 I'm wrestling with you, aside from the fact that you're from
4 another place, is -- I mean, the Legislature cannot
5 anticipate every act that a city or a county would want to
6 take on behalf of its citizens in an effort to ensure further
7 and protect the health, welfare, and peaceful existence of
8 those that live within its jurisdiction; right?

9 MS. SALGADO: Yeah.

10 THE COURT: So the argument from the plaintiff is
11 going to be: This is an example of where the Court has to --
12 or the Court should read into the changes in the common law
13 Dillon's Rule by virtue of the 2015 Legislature, read that as
14 expanding, and moving off of the theretofore fairly
15 conservative view of what governing bodies can do, and this
16 should be used as an example of being more progressive, and
17 not less so.

18 And how would the movants here respond to that?

19 MS. SALGADO: I think, Your Honor, looking at what
20 the statute actually says, and what the Legislature did --

21 THE COURT: There's two different presumptions in the
22 statute; right?

23 MS. SALGADO: Understood. And I think, to the
24 manufacturers' point, we don't get to the presumption that

1 has changed because this is not a matter of local concern.

2 And addressing Your Honor's point about the
3 Legislature being unable to foresee all the issues that would
4 come, a couple things to point out.

5 First, by 2015, according to the plaintiff, the
6 opioid epidemic was full-blown. And so if the Legislature
7 wanted to include something at that point, that was four
8 years ago, it could have put something in there, and it
9 didn't. So I think that actually supports the movant's
10 argument.

11 THE COURT: Okay.

12 MS. SALGADO: Second, I think that, given that -- the
13 point about a local county or city wanting to address
14 something within that affects it is understandable, and I
15 think giving them the freedom to do that is what the
16 Legislature did. But it said: Only in matters of local
17 concern. And the fact that it was so specific, I think,
18 speaks to the Legislature having made a very recent decision
19 on what those powers encompass.

20 THE COURT: But it uses terms like "health, welfare,"
21 and the other term. So --

22 MS. SALGADO: Right. But it also uses terms like it
23 cannot have a significant impact outside of the city or
24 county. And, again, this is an issue that was known to the

1 Legislature at the time. And I think, to the extent they
2 wanted to make some broad exception, they could have. And
3 the fact that they kept what is under -- what is, frankly, a
4 somewhat conservative doctrine, when places like Utah, which
5 plaintiffs have cited have gone otherwise, I think shows that
6 the Legislature knows what it was -- knew what it was doing
7 when it codified this rule, and when it made this specific
8 exception. And this case, we argue, does not fit within this
9 very narrow exception.

10 THE COURT: You're not limiting it to, again, passing
11 of laws, ordinances, things like that. You interpret it to
12 mean also bringing litigation on behalf of the people in your
13 jurisdiction.

14 MS. SALGADO: That's right, Your Honor. Otherwise, I
15 think it would -- you know, any county or city could just
16 circumvent Dillon's Rule by bringing a litigation to do what
17 it could not do by ordinance, which is exactly what the cases
18 we have cited, the manufacturers have cited, have said.

19 Recognizing that there's not a Nevada case on point,
20 we think the fact that a case hasn't been brought where
21 someone has tried to apply Dillon's Rule where it shouldn't,
22 shouldn't preclude this Court from following the logic of
23 those cases where that issue has arisen.

24 THE COURT: Again, just for everyone's -- so you can

1 clarify to the Court, this issue, the issue of Dillon's Rule
2 applicable to opioid-related litigation has not yet made its
3 way to the Nevada Supreme Court because, the one attempt to
4 do so, it was diverted to the MDL. Do I have that right?

5 MS. SALGADO: Yes.

6 THE COURT: So this might be the test case.

7 MS. SALGADO: One last point, talking about the
8 Nevada Supreme Court. While they haven't dealt with this
9 issue specifically, they have had cases involving Dillon's
10 Rule that do provide guidance here. They are in our brief,
11 but I wanted to call your attention to them.

12 One is the Douglas County Contractors case, where the
13 Nevada Supreme Court held that, "Extensive statutory or
14 regulatory framework provides compelling evidence that the
15 Legislature intended to exclusively occupy a particular
16 field."

17 And then in Lamb versus Mirin, the Nevada Supreme
18 Court held that, "Clear legislative intent to occupy the
19 field means that local control over the same subject ceases."

20 THE COURT: Well, do we have that here? Do we have
21 the legislative intent occupying the issues that are before
22 the Court?

23 MS. SALGADO: I think we do. I think we do with
24 regard to federal regulations, and with regard to Nevada's

1 extensive regulatory structure that, again, opioids are a
2 controlled substance, controlled because it's controlled by
3 the government, because these are substances that can be
4 abused, so they must be subject to extensive regulatory
5 rules. And that's what this case is dealing with.

6 THE COURT: Okay.

7 MS. SALGADO: I'll move on to public -- if that's
8 okay with Your Honor.

9 THE COURT: Yes.

10 MS. SALGADO: I'm going to start out with the issue
11 of control, which was the subject of our motion to strike,
12 and which we'll be arguing today.

13 I want to make clear that we reserve to make
14 additional points in response to the late Saturday night
15 submission by plaintiffs in our follow-up writing. Although
16 I'm prepared to address the argument here today, as well.

17 THE COURT: Please do.

18 MS. SALGADO: The City fails to allege distributors'
19 control of the nuisance at the time it caused a nuisance.
20 And that is the standard that applies here.

21 Despite that plaintiffs argue this is not a novel
22 concept, this is one that is recognized across jurisdictions
23 that have evaluated public nuisance claims.

24 We included a lengthy footnote, Footnote 7, in our

1 motion to dismiss, at page 11, where we cited cases across
2 the country that have recognized this prerequisite of public
3 nuisance.

4 Focusing for a moment on the Rhode Island Supreme
5 Court case regarding lead paint, I know plaintiffs have said
6 that that's not an authority on public nuisance. But I
7 encourage Your Honor to read the opinion. It, frankly, is
8 one of the most comprehensive opinions regarding public
9 nuisance, and is essentially a treatise looking back through
10 the history of public nuisance at common law; not just in
11 Rhode Island, but looking at authorities that determine --
12 that have determined what the common law understanding is of
13 public nuisance, that informed this Court.

14 Nevada has said that Nevada law, if -- excuse me --
15 common law is Nevada law in Nevada, unless it has been
16 abrogated. And so I think it is instructive and important to
17 rely on these cases. And the Rhode Island Supreme Court
18 case, in particular, is instructive.

19 In that case, they explained the history of public
20 nuisance law, and why control is a prerequisite. And it
21 makes sense why it is.

22 The principal remedy for public nuisance is
23 abatement, and absent control at the time of the injury,
24 cannot abate the nuisance.

1 Here distributors have no control over how end-users
2 use or misuse medications obtained pursuant to prescriptions,
3 long after they were filled by pharmacies, long after
4 distributors delivered them.

5 Now, the idea that this is not a requirement at
6 common law is one that plaintiffs have just included in their
7 supplemental submission, and, frankly, we don't think that
8 that moves the needle at all.

9 They've cited some out-of-court, out-of-state cases,
10 in particular from California. Now, while California does
11 follow the Restatement on some issues, California has made
12 clear that, with respect to control, it departs from those
13 courts that have followed the Restatement on the control
14 issue.

15 In the case that we cite elsewhere in our brief,
16 which is the ConAgra case, 227 California Reporter 3D499, the
17 California court was dealing with the issue of control, where
18 the defendants in that case brought up the same cases that we
19 brought up here, including the Rhode Island Supreme Court
20 case, the New Jersey case, and others -- excuse me, Your
21 Honor -- that describe how control is a requirement at common
22 law.

23 The California case said that California departs and
24 does not follow what those courts have done, which

1 acknowledge that those courts followed the Restatement in the
2 finding that control is a requirement.

3 California has a narrow exception for what they call
4 representative public nuisance claims, where the case only
5 seeks abatement, and not damages, and says in those cases
6 California has made an exception, and doesn't require
7 control.

8 That's not the case here. Reno does --

9 THE COURT: That's not the relief requested here.

10 MS. SALGADO: Exactly. Not the relief requested.

11 More important than that, Nevada has not carved out
12 that exception, and common law controls.

13 Now, with respect to control, the question is: What
14 is the nuisance? And how is it caused? The plaintiffs --
15 excuse me -- the plaintiffs, the City, claims that the
16 nuisance is the opioid epidemic in Reno, and they say that
17 the purported nuisance was created in part by the
18 distribution of opioid products.

19 So let's unpack how opioid distributors could have
20 had control over the instrumentality of the nuisance, based
21 on what they're saying the nuisance is.

22 There's two problems with the argument that they say
23 we had control. First, the pills that they say we
24 distributed, the pills themselves do not cause harm. They

1 cause harm, if at all, of course, only when they're used, or
2 at most cases, misused.

3 And there's no dispute that distributors do not
4 control pills when they are ingested, let alone when anyone
5 decides to misuse them, or uses enough to become addicted or
6 cause some sort of economic harm to the City.

7 But, second, even if we say pills -- the issue is
8 pills in the community at large, what they've said is, too
9 many pills in Reno, the numbers are just too high,
10 distributors don't control them at that point, either.

11 Again, the key question is: Who controlled the
12 instrumentality at the time of injury?

13 Again, distributors' role is that we buy from
14 manufacturers in bulk and sell to our pharmacy, hospital,
15 hospice customers. We deliver only to DEA-registered and
16 licensed entities.

17 Once a distributor delivers the medications, they
18 have no control over who they are dispensed to, and no
19 control over what a patient does with those medications,
20 whether that patient uses them as directed, gives it to
21 family and friends, sells it, or leaves it unprotected in a
22 medicine cabinet. In fact, privacy laws prohibit
23 distributors from even seeing who receives what medications
24 at the pharmacies they serve.

1 Now, I want to emphasize that point. I don't think
2 that that's abundantly clear. But distributors, because of
3 HIPAA laws, cannot see what happened to the medications they
4 give pharmacies once they've dropped off those medications.

5 THE COURT: Well, according to plaintiff, you can see
6 who is ordering, how much you're ordering, how much is being
7 ordered, and how it relates to prior orders; right?

8 MS. SALGADO: We can see the pharmacy is ordering.

9 THE COURT: Right.

10 MS. SALGADO: We cannot see who, what patient --

11 THE COURT: Right. I understand.

12 MS. SALGADO: Precisely. But, and then again, the
13 pharmacies --

14 THE COURT: Hold on.

15 MS. SALGADO: Go ahead.

16 THE COURT: We're both talking at the same time.

17 You can see how much of the product your clients are
18 ordering, with what regularity, and how it relates to prior
19 orders, both in amount, timing, percentage, things like that;
20 right?

21 MS. SALGADO: That's correct, Your Honor.

22 THE COURT: Those three paragraphs out of 16 total
23 paragraphs, out of 284 and a half total paragraphs, speak to
24 that, do they not?

1 MS. SALGADO: They say in general terms that we
2 failed to report suspicious orders. They don't say how many,
3 where, when, what. That's it. And, frankly, what a
4 suspicious order is, they don't say anything about it.

5 And for our purposes here, it's important to
6 understand the difference between a pharmacy order and what
7 the patients are ordering at the pharmacy counter.

8 The pharmacies order in bulk from distributors. It
9 wouldn't make sense if I were to go in to get a Penicillin
10 medication, and they have to order it from the distributor
11 every time. Instead, they place a bulk order before a
12 patient brings in the prescription.

13 THE COURT: To anticipate the needs of their --

14 MS. SALGADO: Exactly.

15 THE COURT: -- customers.

16 MS. SALGADO: Precisely. And that's the case with
17 controlled substances and non-controlled substances.
18 Although it's possible to order on an emergent basis, if
19 needed.

20 But what I'm saying is that distributors don't have a
21 window into what patients are -- why they're getting their
22 medications, when, and how much. All they see is the bulk
23 orders from their pharmacy, hospital, hospice customers.

24 Yes, those have gone up over time, but as Miss Weil

1 said, so did the DEA's quota on what is needed for legitimate
2 medical supply in the United States. That's the standard for
3 how the DEA sets its quota about how many opioids are
4 legitimately needed across the country. So it's not
5 suspicious. When orders match that DEA quota, it makes
6 sense.

7 Based on what the plaintiffs have alleged about the
8 medications -- or about the prescriptions going up every
9 year, you just can't get to the point to say that what
10 distributors did was unlawful.

11 But focusing here on control, while we can see what
12 pharmacies order, the key is control at the time of the
13 injury. And again, after a distributor has sent the
14 medications to a pharmacy, they don't have control over what
15 happens next.

16 And the only way harm can occur is, after
17 distribution, after pharmacies dispense the pills, and after
18 individual use or misuse. And only then do we get to the
19 harm, long after the distribution. So if the nuisance is the
20 pills in the community overall, defendants lack control over
21 the instrumentality.

22 THE COURT: Well, that suggests an interesting
23 question to the Court. You know, when does the harm occur?
24 And this is really a rhetorical question. If you want to

1 respond to it, you can, and the plaintiff or anyone else
2 addressing the Court. But when does the harm occur here?

3 Does it occur when somebody is taking the eleventh
4 pill, when they're only prescribed 10? Or when they take the
5 twenty-fifth pill that a physician prescribed? Because they
6 need 25 now, instead of 15, like they needed a month ago? I
7 mean, when does the harm occur?

8 Because you're saying they can't allege, or they
9 haven't, nor could they properly allege control by the
10 distributors at the time the harm occurred. So where on the
11 continuum does the harm occur for purposes of this motion? I
12 guess.

13 MS. SALGADO: Regardless of where exactly for misuse
14 it may occur, it's long after distributors have control of
15 the pills themselves. Distributors have it under lock and
16 key when they send it to the pharmacies. And pharmacies only
17 dispense --

18 THE COURT: Any moment in time after it's released
19 from your custody, care, and control, that's on somebody
20 else?

21 MS. SALGADO: I'm saying that the common law requires
22 that, if someone is to be able to abate a nuisance, they have
23 to have control when the harm occurred.

24 THE COURT: I understand.

1 MS. SALGADO: And since distributors do not have any
2 control, and are, in fact, prohibited from even seeing what
3 happens after they have distributed these bulk orders --

4 THE COURT: As a matter of law, they cannot be found
5 liable for public nuisance.

6 MS. SALGADO: Correct.

7 THE COURT: For that reason, the simple reason
8 that -- assuming Dillon's Rule doesn't -- isn't dispositive,
9 the second issue is, you don't have control under the law
10 such that the Court -- there could be no relief granted here
11 even if the factual allegations are accurate with respect to
12 the harm that occurred downstream.

13 MS. SALGADO: Precisely, Your Honor. And this
14 doctrine has been applied in similar circumstances. As we
15 said, the Lead Industries case involves lead being -- suing
16 those who had control originally of the paint. But when they
17 don't have control later, that was the basis for the Supreme
18 Court's ruling in Rhode Island that there was no control,
19 and, thus, no public nuisance liability.

20 The North Dakota case that was cited by the
21 manufacturers, again, one of the bases was a lack of control
22 in that case by a manufacturer after its product enters the
23 market. And in that case found that that was dispositive, as
24 well. And we argue the same logic applies here.

1 THE COURT: Okay.

2 MS. SALGADO: The next issue as to public nuisance
3 is, we contend that the City fails to plead interference with
4 a public right.

5 This is an issue that also was covered by the
6 manufacturers, so we'll just emphasize a few points, and add
7 a few others.

8 As the manufacturers explained, public rights are
9 rights to use common goods or resources. It's the right to
10 have access to things like water, land, and air. And so
11 public rights are at stake where, for example, a public road
12 or right-of-way is obstructed, or air and water is polluted,
13 or explosives or fireworks stored in the middle of the city.

14 THE COURT: Well, that's the easy case. Everyone can
15 see that. This is not the easy case. This is a case where
16 there's something new, some alleged harm, some public wrong
17 is being alleged by the plaintiffs here. So we all agree
18 this isn't the slime coming off the hill, this isn't somebody
19 putting cyanide in the water. This is different.

20 So the question is: Is it close enough to
21 interference with a public right to be free of this type of
22 an epidemic, as alleged? And I'm not taking sides here.

23 MS. SALGADO: Understood.

24 THE COURT: But we need to -- we -- it seems to the

1 Court that, in a case like this, you know, we have to ask
2 ourselves collectively: What's the goal here in a claim like
3 this? What is the law trying to do in imposing these
4 elements for claims like this?

5 And, so, yes, we can all agree that this doesn't look
6 like the cases that have typically been litigated, been
7 decided, made it up to appellate court, and had a decision
8 published. But what do we do with what is alleged here?

9 MS. SALGADO: Yes, Your Honor. I think I'll address
10 that by addressing the issue of public health, and how
11 plaintiffs say that, because this is an issue of public
12 health, it is --

13 THE COURT: That that's all you need.

14 MS. SALGADO: That that's a matter of public right.
15 We think that's incorrect.

16 THE COURT: Why?

17 MS. SALGADO: So the first issue is, they quote --
18 they miscite a portion from the Restatement that I would like
19 to point out to the Court.

20 Restatement 821 (b), Subsection (1), lists what a
21 public nuisance is, and those are the two elements we've been
22 talking about, which is interference with the public right,
23 and that that interference with the public right be
24 unreasonable.

1 So the argument today is about whether there's a
2 public right to begin with, whether there's an interference
3 with that public right. It's a separate question about
4 whether the interference is unreasonable.

5 Now, Subsection (2) of the Restatement contains a
6 list of circumstances where an interference with a public
7 right may be unreasonable. Included in that list is where an
8 interference with a public right involves a significant
9 interference with a public health, public safety, public
10 peace, et cetera.

11 This is something that plaintiffs have repeatedly
12 cited as supposed authority that the Restatement says that
13 interference with a public health -- excuse me -- the word
14 "public" here -- that interference with the public health
15 means interference with a public right. But that's simply
16 incorrect.

17 The portion of the Restatement that they're citing
18 speaks only to that second element. Once you've already
19 found a public right, when you're asking "Is the interference
20 unreasonable?" that's when you look to that portion of the
21 Restatement.

22 THE COURT: You're saying the Court shouldn't even
23 get there?

24 MS. SALGADO: Precisely. And that the Restatement,

1 that does not say what plaintiffs say it says, which is that
2 does not support the idea that interference with the public
3 health is de facto public nuisance, because that's not what
4 it says. And I think, logically, that doesn't make sense,
5 either.

6 We can all agree that there are some issues that
7 impact public health that are public nuisances. For example,
8 a contagious disease that could be spread, that's a classic
9 nuisance.

10 But if you think about what public health concerns
11 are, the CVC has a list of top 10 public health concerns.
12 And included on those are things like teen pregnancy and
13 obesity. Those are not public rights. You do not have a
14 public right that is implicated by those public health
15 issues.

16 And opioid abuse is on that list. And we contend
17 it's the same thing. It implicates individual rights of the
18 user or person affected. And the Restatement makes clear
19 that, no matter how many people are affected, that does not
20 convert what would be an aggregation of individual rights
21 into a public right.

22 And so, while this is a novel issue, and one that
23 impacts a lot of people, the Restatement makes clear that
24 courts are not to convert something that would otherwise be

1 an individual right just because it impacts lots and lots of
2 people. That's Restatement 821 (b), comment G.

3 And it says that, "Conduct does not become a public
4 nuisance merely because it interferes with individual rights
5 of a large number of persons." So we think that that is
6 important.

7 Further, this issue was dealt with again in the Rhode
8 Island Supreme Court case, which, as we said, is a lengthy
9 treatise on public nuisance law. That case is particularly
10 important on this issue because the Court expressly
11 recognized the difference between a public health crisis and
12 a public right.

13 And make no mistake. The lead poisoning issue was a
14 huge public health crisis. But there the Court said, "Just
15 because there's a public health crisis does not mean there's
16 a public right."

17 The Court went through a lot of facts to explain that
18 lead poisoning was a public health crisis, and explain all
19 the ways that the Legislature was dealing with it, all the
20 cases that had been brought. But the Court ultimately found
21 that, if you would look at the law and what is required, that
22 does not constitute a public right as to an individual. It
23 was a collection of individual rights. And that logic
24 applies with equal force here.

1 I'd also like to address the cases that plaintiffs
2 cite with regard to unlawful practice of medicine being found
3 to be a public nuisance.

4 They cite two out-of-state cases where that's an
5 issue, but those cases are distinguishable. Those cases
6 concerned the unlawful practice of medicine and the State's
7 ability to regulate the practice of medicine.

8 As one of those cases cited, the Compeer case, out of
9 New Mexico, the concern at issue was the prevention of the
10 spread of communicable disease through unskilled
11 practitioners. And that, again, is a classic nuisance
12 example. It has no bearing on whether there's a public right
13 here to be free from, in this case, the over-supply of a
14 lawful drug.

15 Now, building on this issue of what can be brought as
16 an issue in a public nuisance claim, I separately wanted to
17 address the issue of this being an expansion of what the
18 Nevada Supreme Court has recognized to be public nuisance.

19 Now, the history of Nevada cases, a tradition of
20 public nuisance law here is more limited, and common law
21 public nuisance cases are not found very often in Nevada law.

22 Where claims have been upheld, they've involved
23 interference with or misuse of property, public resources, or
24 public highways, as we've discussed.

1 But to your point, the question is: Okay. But what
2 about this new kind of case? Should we consider it?

3 And I would submit to Your Honor the cases that have
4 dealt with this issue and wrestled with it and given it the
5 most thoughtful analysis have found that it should not be a
6 cause of action. And we submit that that's the same here.

7 The City -- excuse me -- the trend across the
8 country, as the manufacturers discussed, is not to recognize
9 public nuisance claims when there's a lawful product at
10 issue.

11 I won't re-argue what the manufacturers already
12 stated about that opening the floodgates, but Your Honor can
13 understand why that would be a problem if all of those kinds
14 of cases could be public nuisance cases.

15 I would just direct Your Honor to a footnote,
16 Footnote 9, in our motion to dismiss, at page 13, where we
17 cited cases throughout the country that have refused to
18 recognize products-based public nuisance claims.

19 And, again, I think it's important to note that these
20 are states that follow the Restatement, like Nevada does, and
21 follow common law nuisance; and that those issues are
22 controlling, absent any abrogation of common law in Nevada.

23 Now, on, Your Honor, to the remedies that the
24 plaintiffs seek.

1 The City's public nuisance claims also fail because
2 the remedies they seek are not available. The manufacturers
3 covered this issue as to the statute, and made clear that the
4 statute limits recovery to penalties and injunctive relief.
5 And penalties of not more than \$5,000, I think is what it
6 states.

7 And I just want to address the point made by the
8 City, which is that the defendants don't cite to anything
9 limiting remedies to what is stated. But I submit the
10 statute is what is controlling, and the statute does limit
11 any remedies, again, to civil penalties of not more than
12 \$5,000 and injunctive relief. And it's the City that does
13 not submit any additional authority that the Court can award
14 remedies based on -- I'm not sure what, to be honest.

15 As to common law, the money damages that they seek
16 are also not available at common law.

17 Excuse me.

18 The money that they seek relates to past costs
19 incurred in treating addiction. Abatement is a perspective
20 remedy, and is limited to the costs of eliminating or
21 removing the conduct or condition that is interfering with
22 the public's right.

23 So it doesn't include paying to treat all
24 consequences of the alleged nuisance. It's just limited to

1 costs of removing the thing that is interfering or creating
2 the nuisance in the first place.

3 So here we submit that they cannot recover money
4 damages for past injury that they may have suffered, and that
5 abatement should be limited only to that which is the
6 over-supply of opioids.

7 Next, Your Honor, I have the statutory issue, which
8 is that this is not authorized by statute. But we adopt the
9 arguments made by the manufacturers here.

10 THE COURT: Okay.

11 If there are no further questions on public nuisance,
12 I'll move on to proximate cause.

13 THE COURT: Please do.

14 MS. SALGADO: There's no proximate cause for the
15 City's claims against the distributor defendants, for
16 multiple reasons, and I'll discuss these in turn.

17 The first is that the City seeks to recover costs for
18 providing healthcare services to its citizens, including the
19 cost of treatment for opioid addiction and overdose. And
20 citing its spending on these issues, the City alleges it's
21 been harmed.

22 These arg -- excuse me -- these alleged injuries that
23 the City claims it incurred are derivative injuries, and are
24 precluded as a matter of law.

1 Having an alleged injury does not mean you have a
2 direct injury. Every alleged financial claim that the
3 City -- excuse me -- financial harm that the City complains
4 of from payment of medically unnecessary prescriptions, to
5 increased law enforcement costs, to increased social services
6 costs are all derivative of the injuries suffered by users of
7 opioids.

8 Now, the issue is that a city or a third-party payor
9 of some sort of benefits cannot bring a case like this unless
10 it's a subrogation claim. The City does not purport to have
11 a subrogation claim here, and, indeed, it couldn't. Instead,
12 it seeks to abate the defenses that would be available, if
13 the actual individuals who were injured brought suit, and,
14 instead, aggregate them, and suggest that it's able to
15 recover for its injuries that are plainly derivative of those
16 of its citizens.

17 Now, the City --

18 THE COURT: What did the judge in Oklahoma say about
19 that? Didn't he, in his order, involve the State of Oklahoma
20 bringing a claim in the derivative for the expenses that it
21 incurred by virtue of what he found to be wrongful conduct?

22 MS. SALGADO: The judge in that case only awarded
23 forward-looking-perspective abatement damages, and so I'll
24 need to get back to Your Honor about whether those were

1 derivative. But it was a very limited ruling, only allowing
2 one year's worth of abatement damages, because the judge only
3 found that's what was proven by the State as to injuries it
4 would incur.

5 THE COURT: Okay.

6 MS. SALGADO: The issue is, the City doesn't argue
7 that there's no derivative injury rule in Nevada. And it
8 applies here.

9 As we've discussed, common law is the law of the
10 land, unless it has been abrogated. And it's a widely
11 recognized common law rule. There's no direct cause of
12 action in tort against one who injures the provider's
13 beneficiary.

14 Now, unable to argue that this rule has been
15 abrogated, the City conflates this requirement with direct
16 injury, with the requirement to plead foreseeability.

17 Now, those are two distinct concepts, both of which
18 must be pled by the plaintiff. But the issue of direct
19 injury is one that is plainly not met, and we think is a
20 threshold issue that plaintiffs cannot get around.

21 Moving on to the rest of the proximate cause --

22 THE COURT: I just want to talk about that for a
23 minute.

24 MS. SALGADO: Sure.

1 THE COURT: Direct injury versus derivative injury --
2 MS. SALGADO: Again, unless Your Honor has --
3 THE COURT: Well, no. I'm just trying to wrap my
4 head around that. Because when I first took a look at this,
5 it seemed clear what the issue was, but now -- the City says
6 there's an exception here, and the City's finances have been
7 impacted by the use of its people and resources, time,
8 energy, and injuries. That is, in effect, a direct injury to
9 the City, not to other people that we had to respond to;
10 "we," the City, had to respond to.
11 And you say that common law says: No, that doesn't
12 do it. That's somebody else's injury. If they have a claim,
13 they can bring it, if they think they were over-prescribed,
14 or the medicine didn't work like it was supposed to, or
15 otherwise. But that's not your claim. That's what you're
16 suggesting to the Court; right?
17 MS. SALGADO: That is, Your Honor. Unless there's a
18 subrogation claim that enables --
19 THE COURT: That's not what's alleged here.
20 MS. SALGADO: That's correct.
21 THE COURT: That's really not -- there's no scenario
22 where that could really be the case.
23 MS. SALGADO: Right. But I think that's important,
24 because if it's not the case that you could have a

1 subrogation claim, that the City could bring the claim and
2 stand in the shoes of those injured, then why should it be
3 able to avoid the defenses that would be made, if it did, and
4 if those injured actually did bring the suit?

5 There's a reason for this requirement, and that's
6 because, without it, you can avoid those defenses that would
7 be applicable. And Nevada has a long line of cases that
8 preclude an individual from recovering for these types of
9 injuries. So why is it that the City should then just be
10 able to obtain derivative injuries, when the individuals
11 themselves couldn't do so?

12 Again, we're one further step removed. We're talking
13 about a completely derivative injury. And this is an issue
14 that other cases have dealt with.

15 If you look at the Eleventh Circuit case we cited,
16 the United Food and Commercial Workers Union case, it did a
17 lengthy look at common law principles. This was an employee
18 health plan that sued tobacco manufacturers and distributors
19 to recover costs for tobacco-related illnesses.

20 Again, these are costs that the employee health plan
21 incurred similar to the costs that Reno is seeking that Reno
22 alleges it incurred.

23 Now, the health plan's costs went up when its
24 employees suffered more injuries due to the tobacco, but,

1 nonetheless, the Court upheld the grant of a motion to
2 dismiss because there was no proximate cause. There was no
3 direct cause of action against one who injures the provider's
4 beneficiary. And they cited multiple courts dismissing
5 similar actions in those circumstances for the Second
6 Circuit, Third Circuit, Fifth Circuit, Seventh Circuit, and
7 Ninth Circuit.

8 This is a well-established rule that has been applied
9 in similar cases. And just because there is an injury to the
10 provider of benefits, such as Reno, or, in this case, such as
11 the health plan, because it's a completely derivative injury,
12 it's precluded as a matter of law.

13 MS. SALGADO: Moving on -- unless Your Honor has
14 further questions.

15 THE COURT: I don't.

16 MS. SALGADO: Even putting aside that threshold
17 issue, the City has not and cannot plead proximate cause as
18 to the distributor defendants.

19 Stepping back again to distributors' role in the
20 supply chain is important when we talk about proximate cause.

21 Plaintiffs generally have two theories of liability
22 in their Complaint. Their first theory, which underlies the
23 bulk of their Complaint, as we've discussed, is their theory
24 against the manufacturer defendants.

1 Now, these are allegations by plaintiffs. And they
2 say that, in the '90s, there was a view that opioids should
3 be used for very few people, for short duration, and in
4 limited doses. And that's because the medical establishment
5 knew that opioids were addictive. Now, that is what doctors
6 believed. And prescribing habits were consistent with that.

7 Then they allege that the manufacturers came in and
8 created this multi-faceted, multi-pronged marketing campaign
9 to get the message across that opioids could and should be
10 used for chronic pain.

11 Again, these are the things plaintiffs referred to
12 earlier about the advertising, key opinion leaders,
13 continuing medical education. And the theory by plaintiffs
14 is that that's what changed how doctors understood opioids.
15 So new doctors were trained to use these drugs to treat pain
16 on a wide scale, and that more people should get them, and
17 get them for longer term and higher doses.

18 Plaintiffs allege -- excuse me -- the City alleges
19 that, as a result, the prescriptions and opioid use went up.
20 And that brings us again to the DEA even being convinced that
21 more opioids should be used, and increasing that quota every
22 year 39-fold.

23 Now, that whole theory of liability about marketing
24 and the change of the standard of care has nothing to do with

1 distributor defendants. We don't influence doctors to
2 prescribe, and we can't keep them from prescribing. Our role
3 is to fill those bulk orders we talked about from our
4 pharmacies, hospitals, and hospices.

5 Now, again, the Complaint only dedicates that
6 16-paragraph bloc to us, and those three paragraphs of
7 allegations against what distributors did. But distributors
8 are not part of the first theory. So what do they allege as
9 to distributors?

10 Excuse me, Your Honor.

11 Their second theory that relates to distributor
12 defendants is one of diversion. They accuse us of having
13 not -- excuse me -- of having not adequately prevented
14 diversion.

15 Now, what is diversion? It's the diversion -- it's
16 when a drug that has been legally prescribed, it's diverted
17 to an illegal use, or when it goes outside of the legal
18 supply chain. The diversion could include something like
19 someone stealing the truck that the distributor is using to
20 ship to its pharmacy. But that's not what is at issue here.

21 What is at issue is what happens after an end-user
22 gets a lawful prescription, misuses the drug, or gives it to
23 someone else who misuses it.

24 Now, they claim that distributors fail to detect and

1 report suspicious orders that they should have known were
2 likely to be diverted -- again, multiple steps down the
3 chain -- and that we should not have shipped those orders.
4 But, again, diversion requires the transfer of these legally
5 prescribed drugs from the pharmacies to another person for
6 misuse. So, in other words, it requires a subsequent
7 unlawful act that constitutes a superseding intervening
8 cause, such that distributors cannot be the proximate cause
9 of the resulting harm, if any, that occurs.

10 Even if a distributor failed to report or stop a
11 shipment of drugs, as the City alleges, no harm could occur
12 without the intervening acts of third parties.

13 We could send lots and lots of shipments to a
14 pharmacy, but they would just sit on the shelves and cause no
15 harm, unless a doctor prescribed them, the pharmacy dispensed
16 them, and then a user misused them.

17 Now, the City has no answer to that other than to say
18 there's no single cause, and distribution of opioids is one
19 of them. But we still have to be a legal cause. And I
20 submit that we cannot be based on these superseding
21 intervening causes. And their argument regarding a role in
22 the supply chain only proves our point.

23 The City fails to address the long line of precedent
24 in the Nevada courts that comes up in the alcohol sales

1 context. The Nevada Supreme Court has repeatedly reaffirmed
2 the common law rule that consuming an intoxicating substance
3 and not furnishing it is the proximate cause of the
4 third-party -- any third-party-related injuries.

5 The Nevada Supreme Court first adopted this rule in
6 the Ham case, in 1969, and has continued to apply and follow
7 this rule, expanding its application in multiple published
8 opinions in the Nevada Supreme Court.

9 Now, this --

10 THE COURT: Different than other states.

11 MS. SALGADO: Yes, Your Honor.

12 THE COURT: But that's the law here.

13 MS. SALGADO: That's the law here.

14 And as Your Honor has stated, regardless of what
15 other cases have found, this Court is bound by the laws in
16 this state. And here the Nevada Supreme Court has been
17 clear. And the logic underlying these decisions I would
18 argue applies with even more force to a case like this.

19 We discussed the role of distributors in the supply
20 chain, and how, again, they are prohibited by law from seeing
21 or knowing who the patients are that fill the prescriptions,
22 that place the bulk orders from the pharmacy -- excuse me --
23 from the distributor. And we certainly can't know whether
24 that person obtained the prescription legally, or whether a

1 legal prescription will be misused or used by someone else.

2 Now, in these tavern keeper cases that we see, there
3 are cases that have arisen where there are allegations where
4 the tavern keeper actually did have knowledge that someone
5 was going to go for a long drive after being drunk -- after
6 drinking at the bar, or that someone was underage, and the
7 tavern keeper knew that. Even in those cases the Nevada
8 Supreme Court has said it doesn't matter, because it's the
9 consuming of the beverage that is a superseding intervening
10 cause, and not the furnishing.

11 Here we can't -- we not only don't know what happens
12 to the prescription once it's out of our hands, we can't know
13 what happens to it. And it would not be appropriate to hold
14 a distributor liable of an opioid -- of distribution of
15 opioids, when furnishing an alcoholic beverage means there's
16 no liability.

17 And I would just like to point to the plaintiffs'
18 example. I think it was a personal example of his experience
19 of the driver being under the influence of Oxycodone. Which
20 is horrible. But I think this is an interesting example
21 because, if it were alcohol at issue there, the furnisher of
22 alcohol could not be held liable; but because it was driving
23 under the influence of a drug, arguably, here, under
24 plaintiffs' logic, they could hold a distributor or a

1 manufacturer liable, or the pharmacy, when that wouldn't be
2 the case for alcohol. And that logic just doesn't hold
3 water, Your Honor.

4 In other words, another way that we framed this, and
5 that other courts have looked at it, is that proximate cause
6 is absent because the connection between distributors'
7 alleged wrongful conduct and the expenditures, in this case,
8 of the City, is just too attenuated.

9 Now, the Court in Connecticut, as the manufacturers
10 explained, looked into this issue, and this -- and wrote its
11 opinion based on this proximate cause issue that we've been
12 discussing. And we would argue that is based on common law
13 principles that apply with equal force to this case here.

14 The Court went into great detail to explain the many
15 steps between the conduct of distributors and harm to the
16 cities there. And, again, those cause -- excuse me -- that
17 causal chain was just too long, and it's too remote, which is
18 the same issue that the Nevada Supreme Court has found with
19 regard to this issue, and too many superseding causes for
20 there to be proximate cause.

21 Now, I expect the City will say that, even if there
22 was intervening conduct, that was foreseeable. But what was
23 foreseeable? And to whom, and when? What order should have
24 been stopped and reported? And how did any particular

1 conduct by any defendant lead to any specific harm in Nevada?

2 We have none of that. We just don't know. So they
3 cannot say in the abstract that we should have foreseen this
4 cause, this harm that they claim happened to them after
5 multiple steps in the chain, when they can't even tell us
6 what orders we shouldn't have shipped, and anything that we
7 have should have done differently.

8 All they can say is that opioid prescriptions, and,
9 therefore, opioid distributions went up over time. But of
10 course it did, because, as we said, the DEA authorized it
11 based on legitimate medical need. And, again, that's not
12 suspicious. We think it's just common sense.

13 So with that, Your Honor, unless there are any other
14 questions, I'll turn it over to Miss Weil.

15 THE COURT: I have no further questions. Thank you.

16 MS. SALGADO: Thank you, Your Honor.

17 THE COURT: Mr. Eglet, do you wish you had objected
18 to Ms. Salgado's pro hac vice admission this morning?

19 MR. EGLET: No, not at all.

20 MR. POLSENBERG: Don't miss a great chance to offer a
21 compliment.

22 MR. EGLET: She did a fine job. I have no objection
23 as to her. I don't agree with what she said, but I have no
24 objection to her.

1 MS. SALGADO: I'm going to take no position.

2 THE COURT: Bad attempt at a little levity here.

3 Ms. Weil.

4 MS. WEIL: Thank you, Your Honor.

5 First of all, I wanted to correct something I said

6 earlier. I said something -- I had a note on my papers about

7 paragraphs 86 to 130. I couldn't read it. I still don't

8 know what I meant to say. But I think what I did say is that

9 they are related to distributors' conduct. And they do not.

10 They are preparatory factual allegations that relate

11 essentially to the manufacturer.

12 THE COURT: I understand.

13 MS. WEIL: Just for the record.

14 THE COURT: Thank you.

15 MS. WEIL: At this point, I'd like to turn to the

16 negligence claim.

17 Now, it's Horn Book law there are four elements to a

18 negligence claim. I think the case we cited is the Turner

19 versus Mandalay Sports. But it's all over the law.

20 The elements of a negligence claim in Nevada, there

21 has to be a duty of care that the defendant owes to the

22 plaintiff.

23 Now, that's important. There can't just be a duty

24 out there somewhere. The duty has to be running from the

1 defendant to the plaintiff. That means, in this case, the
2 distributors have to owe a duty of care to the City for
3 this -- and the City -- at this stage, the City has to plead
4 that adequately to sustain the negligence claim. The
5 distributors have to breach the duty. There has to be
6 causation, which Miss Salgado just talked about. And there
7 has to be damages.

8 So let's focus on duty. The gravamen of the City's
9 claim against the distributors, as this Court is aware, is that
10 the distributors failed to monitor and report suspicious
11 opioid orders.

12 Now, this is an obligation -- I'm going to avoid the
13 word "duty" -- this is an obligation that is embodied in the
14 federal Controlled Substances Acts, the federal CSA.
15 It is an obligation, a reporting obligation that runs from
16 distributors to the federal Drug Enforcement Agency.

17 In the Nevada CSA, there is no analogous reporting
18 obligation to any authority in Nevada. And that was somewhat
19 clumsy, but what I mean is, distributors don't have an
20 obligation to report suspicious orders to anyone in Nevada.
21 And so this is a federal statutory or regulatory obligation.

22 So, again, we kind of come up against a private right
23 of action question. I'm not going to spend a lot of time on
24 it, because I don't think the City disputes this. I think it

1 is well-established that there is no right, private right of
2 action that allows the City to enforce the provisions of the
3 federal Controlled Substances Act through a civil tort suit.

4 And we have a footnote in our brief about that law, a
5 string cite of cases that all say that. I don't think the
6 City seriously disputes it.

7 There's also no explicit private right of action, no
8 express private right of action to enforce any of the
9 provisions of the Nevada Controlled Substances Act.

10 And under the -- again we are back to Baldonado.
11 Under the Baldonado standard, there is also no basis for the
12 Nevada courts to find an implied private right of action to
13 enforce the provisions of these statutes. So what you're
14 faced with is an obligation that arises under a federal
15 regulation, a federal implementing regulation of the federal
16 CSA.

17 And Nevada courts have determined that you can't have
18 a common law negligence lawsuit based on a statutory
19 violation when there's no private right of action.
20 Once again, I don't think the City is arguing with me on
21 that. I think they've conceded it.

22 The case that -- one of the cases that says it is
23 Allstate Insurance versus Thorpe. It's a Nevada Supreme
24 Court case, in which medical providers were suing for

1 recovery under a prompt payment statute, which did not have a
2 private right of action. The Court said they couldn't do it.
3 And there are a couple of other cases in our papers, as well,
4 but, once again, I don't think this is a serious dispute.

5 So given that -- I'm losing my page -- because the
6 City can't base its negligence claim on a statutory
7 violation, the State -- the negligence claim fails, unless
8 there is a common law duty of care running from the City --
9 from the distributors to the City that allows the City to
10 pursue a negligence claim against the distributors.

11 The City says: Oh, well, there is. There's a common
12 law duty of reasonable care. The distributors are bound by a
13 common law duty of reasonable care.

14 Well, I'll talk about this a little more in a second.
15 Of course, everybody is bound by a common law duty of
16 reasonable care. But there's no common law duty of
17 reasonable care to report suspicious opioid orders.
18 The term "suspicious orders" doesn't even exist at common
19 law. That is a term that is defined in the federal statutes.
20 It doesn't exist in Nevada law. It doesn't exist at common
21 law. So there's no common law duty of care to do that to
22 report suspicious orders.

23 Do we have common law duties of care? Sure. We have
24 to make sure that we take good care of the merchandise and

1 that we, you know, abide by good business practices, or
2 whatever. But we don't have -- and there's no obligation
3 that we've breached any other common law duty of care.
4 There's no allegations. Excuse me. The allegation is that
5 we breached --

6 THE COURT: Failed to report.

7 MS. WEIL: Correct. And --

8 THE COURT: And --

9 MS. WEIL: I'm sorry. Didn't mean to interrupt.

10 THE COURT: No. Just to articulate it further,
11 common law duty to report suspicious orders, because the
12 failure to do so would lead to harm to the community.

13 MS. WEIL: Exactly. And there is no such common law
14 duty. There is no authority for it. The City does not
15 identify any authority for such a duty.

16 But this is what they say. They say: Well, it's a
17 duty -- there's a duty because the harm is foreseeable. They
18 say: We can bring a claim under the common law -- we can
19 bring this claim under a common law negligence theory,
20 because the harm we are complaining of was foreseeable to
21 you, distributors.

22 And what the paragraph -- what the Complaint says --
23 and we have been through this now in a bunch of contexts --
24 in hundreds and hundreds of paragraphs of the Complaint, and

1 in the brief, what the City actually says is that there were
2 too many opioids in Nevada. That's what the thrust of the
3 whole Complaint is, is that too many opioids were coming into
4 Nevada.

5 And it includes -- the Complaint includes paragraph
6 after paragraph of allegations about how the manufacturers'
7 marketing campaign changed the standard of care. And we have
8 talked about this over and over.

9 Now, we, as distributors, don't take a position as to
10 whether those allegations against the manufacturers are true.
11 But if that's the case, and if the medical standard of care
12 in the United States and in Nevada changed because of the
13 manufacturers' marketing campaign, that all of a sudden
14 doctors here, doctors in other parts of the country were
15 prescribing more and more opioids, and pharmacies were
16 ordering more and more opioids to meet the prescriptions,
17 then distributors were simply supplying what was ordered.

18 And that not only that, they were supplying, as we've
19 now said a bunch of times, what the DEA said they were
20 allowed to supply, under quotas established by the DEA, to
21 meet legitimate medical needs.

22 So the DEA is saying: This is a legitimate medical
23 need. And prescribers in Nevada are saying: This is a
24 legitimate medical need. Our patients need this.

1 Distributors don't have any part in the story. We
2 are supplying medications that are ordered, and that have
3 been determined by others to be in response to a legitimate
4 medical need.

5 Now, the opposition -- what I suspect is probably a
6 cut-and-paste error -- but the opposition says something to
7 the effect -- I think I have the page. Yeah, here it is.
8 Here it is. In the opposition -- and this is a quote from
9 the reply brief, but it's quoting the City's opposition at
10 page 18.

11 It says, "Distributors created opioid medications,
12 which are controlled substances classified as dangerous
13 drugs. They determined how these drugs would be introduced
14 into the market. They determined what type of marketing
15 should be conducted," and on and on.

16 This is the justification in the City's opposition
17 for why it was foreseeable to distributors that there would
18 be these effects down the road.

19 Well, obviously, those allegations -- that argument
20 has nothing whatever to do with distributors. That argument
21 that someone created the drug that decided how the drug would
22 be introduced --

23 THE COURT: That's not you.

24 MS. WEIL: It's not us. It's the manufacturers.

1 So the allegations that the City said made it
2 foreseeable to the distributors that there would be these
3 harms at the end of the road don't relate to distributors.
4 They relate to the manufacturers. It's undisputed that we
5 didn't do any of those things.

6 So even if those functions, those actions, rendered
7 the City's alleged harm foreseeable to the manufacturers --
8 and once again, that's not our argument to make or to
9 dispute -- they couldn't have rendered the harm foreseeable
10 to the distributors. They have nothing to do with the
11 distributors. And the City doesn't make any argument
12 otherwise.

13 So let's move on. Let's say the City's arguments
14 include the fact that it was foreseeable, and that's how they
15 can impose a common law duty, because the harm was
16 foreseeable.

17 The other thing that the City says is that we're
18 wrong when we say that there is no duty, because we didn't
19 have a duty to prevent the conduct of the third parties who
20 illegally divert opioids after they leave our control.

21 Now, you've heard this in several different contexts.
22 That in the absence of a special relationship with the City,
23 or perhaps with the third-party actors, we have no obligation
24 to control them. We have no obligation to prevent the harm

1 that they are creating. Without the opportunity for control,
2 without a special relationship, we don't have any duty to
3 prevent that harm.

4 And the City says: No, no, no, no, no. That's the
5 wrong argument. We're not saying that you should have
6 prevented the harm. We're saying it's your own conduct that
7 created this harm.

8 Well, Miss Salgado just did a very good job
9 explaining why that's not true. That if distributors do what
10 distributors do, and it stops there, what happens is that the
11 drugs, the opioids, sit in boxes in a warehouse, and then
12 they sit on a pharmacy shelf. If a doctor doesn't prescribe
13 the drug, if a patient doesn't fill a prescription, and then
14 if somewhere down the road there's not some sort of illegal
15 conduct or improper conduct that results in diversion of the
16 drug, there's no harm. If the distributors do only what the
17 distributors do, there is no harm. So it cannot be the case
18 that its distributors' conduct, without third-party actions,
19 that is responsible for the harm.

20 And the City's argument on that is actually that it
21 holds no water.

22 Finally, I want to go back to something I said
23 before. We're talking about duty here. And you can't just
24 say, you know: You're distributors. It's your duty to be

1 sure of anything. What you have to say: To sustain a
2 negligence claim, you have to allege a duty that runs from
3 the defendant to the plaintiff.

4 So the City has to allege that the common law
5 reporting duty that they say we breached ran to them. To the
6 extent that we have a duty to report suspicious opioid
7 orders, it does not run to the City. It runs exclusively to
8 the federal government. And more than that, it is a strictly
9 confidential set of data that is reported, and the City
10 doesn't even have access to it, and can't access to it, and
11 isn't allowed to have access to it. So basically --

12 THE COURT: Wait. Hold on. The City doesn't get the
13 data. But as I understand the City's argument, had the
14 reporting occurred as it was supposed to, suspicious orders
15 been properly flagged, somebody would have done something
16 that would have abated the level of opioids entering this
17 community and being misused, misprescribed, overly
18 prescribed, causing harm. You're saying that that legally
19 doesn't get them to where they want to be.

20 MS. WEIL: Well, it doesn't, Your Honor. This is
21 why. There's an enforcement mechanism built into the federal
22 regulatory scheme. When the reporting -- when distributors
23 discharge their reporting obligations, it is up to the
24 federal government to respond. And if there is -- if there

1 is a failure to report, it is the federal government's
2 obligation to remedy it. It's not a common law tort crime.
3 And so if this is a reporting obligation that does not run to
4 the City, there's no common law duty that runs to the City to
5 report suspicious orders, the City has no right to sue us, to
6 sue the distributors for failure to report suspicious opioid
7 orders. Which is what they're doing under the guise of a
8 common law negligence case.

9 This is an alleged statutory violation, and the
10 remedy is a statutory regulatory one, with which the United
11 States Government is charged, and with which the City of Reno
12 is not involved. And it's as simple as that, Your Honor.

13 THE COURT: Okay.

14 MS. WEIL: We have some comments in our papers about
15 the failure to allege breach, but I'm going to rely on our
16 papers for that.

17 So Mr. Guinn talked about the negligent
18 misrepresentation claim as it applied to the manufacturers.
19 I'm going to talk a little bit about the negligent
20 misrepresentation claim as it applies to the distributors.

21 THE COURT: Let me make a comment, before you move to
22 that subject.

23 The order of business this afternoon has to be this.
24 After the final arguments by Ms. Weil on the motion, we're

1 going to call it a day. It's been a long day. Many of you
2 may have traveled either this morning or last night, and
3 probably didn't get your best night's sleep. Then we will
4 start as soon as my criminal justice calendar is over
5 tomorrow morning, approximately 10:00 a.m.

6 For those of you that are interested, you can come on
7 in here anytime after 9:00 and sit in the back and watch how
8 justice is administered here in Department 8. But if you
9 would rather not, I understand completely. And there will be
10 a few-minute gap between the criminal justice calendar
11 ending, and we'll resume at that time with opposition from
12 the City to the distributors' motion to dismiss.

13 MR. EGLET: Your Honor, if I could just -- I'm sorry.
14 Are you saying we're going to start at 10:00, or sometime
15 after 9:00?

16 THE COURT: 10:00. Here's the answer. It's part
17 art, part science. The science is, we're starting at 10:00.
18 The art is, it's the Court's job to make sure we're done
19 shortly before 10:00, so we can have a few minutes to get
20 fresh air, start at 10:00.

21 MR. EGLET: Understood, Judge.

22 THE COURT: Like I said, if you're bored, or just
23 interested, you're welcome to come in and watch.

24 Please proceed.

1 MS. WEIL: Thank you, Your Honor.

2 THE COURT: You're welcome.

3 MS. WEIL: So we were talking about -- I was talking
4 about the negligent misrepresentation claim that the City has
5 alleged against the distributors.

6 And as I believe Mr. Guinn said, the elements of the
7 negligent misrepresentation claim, the key ones for this
8 purpose are a false or misleading statement made in the
9 context of a business transaction between the plaintiff and
10 the defendant, which is justifiably relied upon by the
11 plaintiff.

12 THE COURT: But didn't the plaintiff suggest to the
13 Court -- and, obviously, I brought it up a few times, so the
14 Court is a little bit struggling with this claim here. But
15 can it not be made to a third party? I mean, aren't there
16 exceptions to the general rule that have to be made to the
17 aggrieved party?

18 MS. WEIL: Well, I'll talk about it in a second. I
19 think the short answer is, I'm not sure, because the City
20 didn't cite any authorities for that proposition. But even
21 if the representations could be made to a third party, they
22 still have to be in the context of a business transaction in
23 which the plaintiff and the defendant are involved. And
24 that's Horn Book law. That's right in the negligent

1 misrepresentation elements all over Nevada law.

2 So that would be -- that's my threshold answer. I'll
3 talk about it a little more in a minute, if Your Honor would
4 permit.

5 THE COURT: Of course.

6 MS. WEIL: The first point is that, regardless of the
7 context, the City has not identified any false or misleading
8 statement by the distributors. They identified what they say
9 are false -- although, you know, the manufacturers have made
10 a good argument that this is not pled with specificity that
11 gives anyone notice of anything. But, regardless, the only
12 statements that are identified at all are statements by the
13 manufacturers.

14 The claim is pled, as most of the Complaint is, in
15 terms of defendants. But the allegation only relates to the
16 manufacturers. The allegations says -- and this is paragraph
17 8 of the Complaint, of the First Amended Complaint --
18 "Defendants, who, through deceptive means, and through one of
19 the biggest pharmaceutical marketing campaigns in history,
20 carefully engineered and continue to support a dramatic shift
21 in the culture of prescribing opioids by falsely portraying
22 both the risk of addiction and abuse, and the safety and
23 benefits of long-term use."

24 That's not us. So the allegation that -- the

1 threshold allegation of the First Amended Complaint that the
2 City says supports the notion that there were
3 misrepresentations about opioids is directed -- although it's
4 phrased in terms of "defendants," it addresses conduct that
5 the City says was on the part of the manufacturers. That's
6 all through the City's Complaint. I don't think the City can
7 dispute that.

8 Then the sections of the Complaint entitled,
9 "Defendants' fraudulent marketing, and defendants'
10 misrepresentations," once again they've described the
11 manufacturers' alleged advertising, marketing, and promotion
12 of opioids. They have nothing to do with anything the
13 distributors did. You know, that's right on the face of the
14 Complaint, Your Honor.

15 What we're doing here is talking about whether they
16 pled the claim on the face of this Complaint just -- you
17 wouldn't even have to go any further, because the threshold,
18 the very basic requirement, is that there be a false
19 representation of some sort by the defendant. And the City
20 has not pled that.

21 Now, the other issue is that there has -- it has to
22 be in the context of a business transaction. And if you look
23 at the -- there's a case that we've cited in our papers, Your
24 Honor. It's Barmettler versus Reno Air, Incorporated. And

1 another one, Bill Stremmel Motors. And these cases stand for
2 the proposition that, if the conduct does not fit squarely
3 within a business or commercial transaction, it is not the
4 subject -- it cannot be the subject of a negligent
5 misrepresentation claim.

6 Now, what the City says is, every time we failed to
7 stop a suspicious order, it's a business transaction. But
8 that's not true. We made our business transactions, the
9 distributors' business transactions -- and this is
10 undisputed; the City says it -- our business transactions are
11 with pharmacies. There's no allegation that we made any
12 representation or omission of information with respect to
13 anything involving our business transactions with anybody.

14 So even if our representations in the course of
15 business transactions with third parties could support the
16 claim, there's no allegation that we did. It's not even --
17 it's not in the Complaint anywhere.

18 And what the City says, it's pled misrepresentation
19 by nondisclosure by -- per the Restatement Second of Torts.

20 And I'm looking now at -- this is page 3 of the
21 opposition brief. Okay. This is their brief. And it says,
22 "A defendant may be liable for negligent misrepresentation by
23 nondisclosure if the defendant fails to disclose a fact to
24 the plaintiff that the defendant knows may induce the

1 plaintiff to behave in a certain way in a business
2 transaction."

3 There's no allegation of that.

4 And it says -- then it goes on to say that, "Silence
5 about material facts basic to the transaction, when combined
6 with a duty to speak, is the functional equivalent of a
7 misrepresentation."

8 No allegation of that.

9 So then it goes on and says -- and this addresses
10 Your Honor's point -- "Reno's negligent misrepresentation
11 claim can be based on misrepresentations made to third
12 parties."

13 And I've just told you what authority is cited for
14 that. There isn't any.

15 And then it goes on to say, "The negligent
16 misrepresentation claim can also be based on distributors'
17 concealment of facts from a third party, which resulted in
18 the City not having notice of the distributors' potential
19 liability and potential legal claims."

20 Well, it's a lovely argument, if it were true, and if
21 there were any opportunities to support it -- and if there
22 were any authorities to support it.

23 The City cites nothing. And I can only assume that,
24 given that, there is nothing. We've certainly found nothing

1 to support the notion that this sort of generic
2 misrepresentation that somehow disabuses the City of a level
3 of comfort about the absence of legal claims supports a
4 negligent misrepresentation claim. A negligent
5 misrepresentation claim is a specific thing. It requires an
6 affirmative misrepresentation or an omission in the context
7 of a business transaction.

8 I believe that the only authority for this
9 proposition talks about this is the business transaction
10 being between the plaintiff and the defendant.

11 Even if the City could have been misled by statements
12 we made in our business transactions with someone else,
13 that's not what they allege.

14 And so this claim is flat out not pled, Your Honor.
15 And that's what we're doing here today, is talking about
16 whether they've adequately pled a claim.

17 With respect to the negligent misrepresentation
18 claim, they have it. The only thing they pled, if they've
19 pled anything at all, they have pled misrepresentation by
20 someone else. They have not pled a thing with respect to the
21 distributors.

22 My last charge is to talk to Your Honor about the
23 unjust enrichment claim. Then I'll move on to that, if I
24 may.

1 THE COURT: You may.

2 MS. WEIL: I think Mr. Guinn also talked a bit about
3 the unjust enrichment claim.

4 Under Nevada law, unjust enrichment is an equitable
5 doctrine that provides a remedy when the defendant accepts
6 and retains the benefit that should belong to the plaintiff,
7 and appreciates that it received that benefit.

8 Once again, it's just not pled.

9 As a threshold matter, Your Honor, there is law in
10 Nevada that -- and these are District of Nevada cases, I'll
11 tell you -- that when the unjust enrichment claim is just
12 duplicative of other claims, that it's based on the same
13 conduct, it seeks the same remedies as other claims in the
14 Complaint, it can be dismissed just because it's duplicative.

15 We have two cases cited for that. One is United
16 States ex rel Benitez, and the other one is McFarland.
17 They're both District of Nevada cases, and they are both in
18 our papers.

19 So we would submit this claim doesn't even belong in
20 the Complaint. It doesn't do anything that everything else
21 doesn't do. And it is duplicative of everything else.

22 Now -- and the City, by the way, doesn't even dispute
23 that. But even --

24 THE COURT: Well, I'm not sure they agree exactly

1 with the way you phrased it.

2 MS. WEIL: Well, they didn't dispute it in their
3 papers.

4 Even if they do -- and you're probably right. They
5 will.

6 MR. ADAMS: We will.

7 MS. WEIL: Even if they do -- I'm not surprised.
8 They can't satisfy the elements of the claim. This Complaint
9 does not satisfy the elements of the claim.

10 The very threshold element of an unjust enrichment
11 claim is that the plaintiff conferred a benefit on the
12 defendant. And it's required -- the plaintiff is required to
13 allege that it conferred a benefit directly on the defendant.

14 Okay. And that's -- we have a number of cases -- a
15 couple of cases cited for that. One is the Union America
16 case. One is Tropicana Entertainment. And these are cases
17 where the claim was dismissed because it was not alleged that
18 a direct benefit was conferred by the plaintiff on the
19 defendant.

20 Certainly we had no business relationship with the
21 City.

22 THE COURT: Well, do you have to know the defendant
23 to be conferred on you?

24 MS. WEIL: You do. And that's an element that's

1 coming up down the road. You're right. One of the things --
2 the other key element of the Complaint -- of the claim is
3 that the defendant must -- I'm getting my parties mixed up.

4 THE COURT: Appreciate, or something like that.

5 MS. WEIL: The defendant must be aware of and
6 appreciate that the plaintiff has conferred a benefit on it.
7 And I'll get to that.

8 But as a very threshold, way at the top of the list
9 of things that knock this claim out of the Complaint is the
10 fact that there's no allegation that the City conferred any
11 benefit on the distributors. They can't allege that, Your
12 Honor. They had no business relationship with us. They paid
13 no money to us. They had no transactions with us. And so to
14 have directly conferred a benefit on us, there would have to
15 be one of those relationships. They don't allege that they
16 did. And we'll get to what they do say in the alternative.
17 Because they can't say that they did. They didn't.

18 So what they say instead -- and Mr. Guinn talked
19 about this a little bit -- they tried to circumvent this
20 element, and they say that they paid for externalities that
21 were caused by the distributors' conduct. And so that is how
22 they indirectly conferred a benefit, because they -- things
23 that the distributors did cost them money, and they paid the
24 money, and so that conferred an indirect benefit on the

1 distributors. And they call it "externalities."

2 Now, tracing a cost incurred by the City to the
3 distributors' activities does not mean that the City
4 conferred a benefit on the distributors in any fashion. And
5 it certainly doesn't mean that it directly conferred a
6 benefit on the distributors, as the law requires that it do.

7 There is no Nevada opinion -- and the plaintiffs have
8 cited none, if I'm not mistaken -- that a benefit -- that a
9 plaintiff can confer a benefit on a defendant by paying for
10 externalities it says were caused by conduct in which the
11 defendant engaged.

12 Now, even if there were, there are a couple problems.
13 And we'll get back to this in a second. But even if there
14 were law, and even if this were colorable, the City doesn't
15 connect these so-called externalities to the distributors.
16 They --

17 Siri is talking.

18 MR. EGLET: It's your iPad talking.

19 THE COURT: Please continue.

20 MS. WEIL: The Complaint alleges only that the
21 manufacturers, not the distributors, misrepresented the
22 benefits and risks of opioid medication. It doesn't allege
23 that distributors played any role in the prescribing of
24 opioids. And so externalities related to what happens to

1 people after they take opioids that were prescribed for them
2 is not adequately connected to the distributors, in any
3 event.

4 Now -- and this all -- it all does circle back around
5 to the causation point, because there's a causation element
6 here, too. And anything that the City -- injuries that the
7 City says it suffered are so far removed from any conduct by
8 distributors, that whether you call it "externalities" or
9 anything else, you can't connect the dots to lay that at the
10 feet of the distributors.

11 The City says: Now, we actually saved -- the reason
12 that we conferred a benefit on you is that we saved you money
13 by paying these externalities. But that's not true. They
14 didn't save us money. Because in order to have saved us
15 money by paying for these so-called externalities, these
16 would have to have been expenses that we would have paid, if
17 they didn't pay. And that's just not true.

18 We don't -- obviously private distributors do not
19 purchase services -- social services and other services,
20 addiction services, whatever -- for residents of the City of
21 Reno. And so the City didn't save us money by paying for
22 these so-called externalities.

23 THE COURT: Let me tell you what I understood when I
24 reviewed the City's response.

1 Admittedly, again, this claim might be a bit
2 troubling to the Court. Their actions conferred a benefit
3 because it allowed the distributors to continue doing your
4 thing -- right? -- uninterrupted, and increasing, over time,
5 to your net profit. I mean, that's the gist of what I was
6 getting here.

7 You're saying: That's sort of illegal. So what?

8 MS. WEIL: Well, you know, Your Honor, I'm not even
9 sure that's really what they're saying. In fact, I would
10 submit that that's not what they're saying.

11 What they're talking about in conferring a benefit on
12 distributors -- and I believe this is right in their
13 papers -- is not that distributors made profit off of their
14 businesses. What they're saying in their papers is that the
15 benefit they conferred in this unjust enrichment context was
16 in the form of payments it -- City -- made for services to
17 city residents that, I guess, otherwise the distributors,
18 they say they saved us money. That means they're suggesting
19 that we would have made those expenditures. That's how I
20 read those papers.

21 And the case they rely on is a case called "White
22 versus Smith and Wesson," and a couple of cases that are its
23 progeny, out of the District of Ohio.

24 A lot of problems with that. First of all, it's in

1 Ohio. It's not binding on this Court.

2 THE COURT: I went to school in Ohio.

3 MS. WEIL: Oh, I'm sorry. No criticism of Ohio, Your
4 Honor. I'm sure it's a lovely state.

5 THE COURT: Not lovely enough to keep me there. But,
6 okay.

7 MS. WEIL: This case is not binding on this Court.

8 Even if it were, the Ohio Supreme Court effectively overruled
9 it.

10 The White case was in 2000. And in 2005, in a case
11 called Johnson versus Microsoft, which we talked about in our
12 papers, the Ohio Supreme Court said that, "For a plaintiff to
13 confer a benefit on a defendant, an economic transaction must
14 exist between the parties."

15 And White has been criticized by other courts, as
16 well. The Eleventh Circuit has criticized it several times.

17 And one of the cases in the Eleventh Circuit was the
18 City of Miami versus Bank of America Corporation, which is a
19 2015 Eleventh Circuit case.

20 And it says, "White failed to cite to a single Ohio
21 state court case in its unjust enrichment analysis."

22 It's just flawed. It doesn't exist. It's a great
23 exercise of imagination. And as this is a novel context, and
24 as there aren't causes of action necessarily to support what

1 the City is trying to do, I get that what they're trying to
2 do is come up with something that circumvents the elements of
3 the claim.

4 At the motion to dismiss stage, that's exactly what
5 they're not allowed to do. They have to plead the elements
6 of the claim. And they don't plead it in this case.

7 And the other thing that they don't plead, Your
8 Honor, at least adequately -- well, there's two things. They
9 don't allege that distributors sought the benefit from the
10 City.

11 And so there's a case -- there's a District of Nevada
12 case in October of 2017 called "Cox versus PNC Bank. And
13 that dismissed an unjust enrichment claim, again, because the
14 defendant didn't request this so-called benefit.

15 THE COURT: You can't just get a gratuitous benefit
16 and call that good.

17 MS. WEIL: No. Unjust enrichment. They did not
18 request it.

19 And, finally, as Your Honor alluded to before, the
20 Complaint doesn't adequately allege that the distributors
21 were aware of and appreciated the benefit that was allegedly
22 conferred on them.

23 There's some vague allegation -- there's an
24 allegation in the Complaint that says, "Defendants are aware

1 of this obvious benefit." Well, obviously, that's entirely
2 conclusory.

3 There's a case called "Ocwen" -- I think is how you
4 say it -- O-c-w-e-n -- "Loan Servicing," a District of Nevada
5 case from June of 2017, that we cite in our papers, that says
6 that's not enough. There has to be some factual allegation
7 supporting the element -- this element of the claim, that the
8 distributor -- that the defendant appreciated that the
9 plaintiff conferred a benefit on it.

10 And so what do we have? No allegation of a direct
11 benefit to distributors. That's not -- I think that's not in
12 dispute. I could be wrong. We'll find out.

13 The so-called externalities are costs that they can't
14 connect through any proximate cause analysis to the
15 distributors. The distributors didn't ask the City to
16 provide the services. There's no allegation, no adequate
17 allegation that the distributors appreciated the benefit that
18 was allegedly conferred on them. And there's no argument
19 that the distributors would or could have provided the
20 services, if the City did not. There's no duty. They don't
21 have a duty to do that. They don't even have the ability to
22 do that. And so the notion that they were saved money, and
23 that's their unjust enrichment is just not supported by
24 anything in the facts of the law.

1 So, bottom line, the Complaint doesn't plead unjust
2 enrichment. And we submit, Your Honor, that this one is an
3 easy one, and this claim should be dismissed.

4 With the Court's permission, I will rest on our
5 papers with respect to the Economic Loss Doctrine. I think
6 the manufacturers did a really good job on that.

7 And the manufacturers -- there are two different
8 names for the same doctrine. The manufacturers call it the
9 Municipal Cost Recovery Rule. It's also called the Free
10 Public Services Doctrine. We call it the latter in our
11 papers, but it's the same argument, and we will adopt the
12 arguments that the manufacturers made on that.

13 So unless the Court has any questions, I will sit
14 down.

15 THE COURT: I don't. Thank you very much.

16 MS. WEIL: Thank you, Your Honor.

17 THE COURT: Okay. Ladies and gentlemen, we'll call
18 it a day here in just a moment.

19 Excellent presentation of each side's respective
20 positions. Tomorrow morning, as close to 10:00 o'clock as we
21 can, we will resume with response from the plaintiffs to the
22 distributor's motions to dismiss.

23 Until then, we'll be in recess.

24 Thank you very much.

1 (Recess.)
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1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

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4 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, do hereby certify:

7 That I was present in Department 8 of the
8 above-entitled court on Tuesday, January 7, 2020, at the hour
9 of 9:00 a.m. of said day, and took verbatim stenotype notes
10 of the proceedings had upon the matter of CITY OF RENO,
11 Plaintiff, versus PURDUE PHARMA, et al., Defendants, Case No.
12 CV18-01895, and thereafter reduced to writing by means of
13 computer-assisted transcription as herein appears;

14 That the foregoing transcript, consisting of pages 1
15 through 269, all inclusive, contains a full, true and
16 complete transcript of my said stenotype notes, and is a
17 full, true and correct record of the proceedings had at said
18 time and place.

19 Dated at Reno, Nevada, this 10th day of January,
20 2020.

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/s/ Isolde Zihn
Isolde Zihn, CCR #87