### IN THE DISTRICT COURT OF CLEVELAND COUNTY STATE OF OKLAHOMA

STATE OF OKLAHOMA S.S.

INTY

APR 2 4 2019

In the office of the

Court Clerk MARILYN WILLIAMS

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,

Case No. CJ-2017-816

Plaintiff,

Judge Thad Balkman

PURDUE PHARMA L.P., et al.,

v.

William C. Hetherington Special Discovery Master

Defendants.

SUMMARY JUDGMENT MOTION OF DEFENDANTS JOHNSON & JOHNSON AND JANSSEN PHARMACEUTICALS, INC. AND BRIEF IN SUPPORT

### REDACTED VERSION

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Pursuant to 12 O.S. § 2056 and Rule 13 of the Rules for District Courts, Defendants Janssen Pharmaceuticals, Inc. ("Janssen")<sup>1</sup> and its parent company Johnson & Johnson ("J&J"), hereby move this Court for summary judgment on the State's public nuisance claim. In support of this motion, Janssen and J&J submit the following brief.

#### INTRODUCTION

After insisting for the better part of two years that Purdue's introduction of OxyContin in 1996 unleashed an opioid epidemic in Oklahoma, the State's contingency lawyers have pocketed a settlement with Purdue and changed their tune. The State now insists that Janssen was, all along, the actual force behind that epidemic. But the facts do not support the State's newly concocted theory. Janssen introduced the Duragesic fentanyl patch in 1990, and there has never been an opioid-patch epidemic. Janssen introduced Nucynta in 2009 and Nucynta ER in 2011, after opioid prescription deaths in Oklahoma had already peaked. Neither Duragesic nor Nucynta achieved notable market share, constituting just 0.3 percent of opioid prescriptions in the massive sample of prescriptions the State assembled for this litigation. And neither drug has been widely abused.

The State's contention that Janssen should nevertheless pay every penny to remedy abuse of Purdue's drugs, the drugs of many other manufacturers, and illegal street narcotics tramples one settled legal rule after another. In its zeal to collect from an out-of-state manufacturer, Oklahoma has brought a case that is not just novel but radical. The State's unprecedented legal theories shred the bedrock principle that an injury must be actually traceable to the party forced to compensate it. And the State's sweeping new vision for public nuisance, erasing more than a century of Oklahoma precedent and usurping the legislature's authority, would create a virtually limitless source of liability for commercial actors that do business in Oklahoma. No court—not in

<sup>&</sup>lt;sup>1</sup> "Janssen" also refers to Janssen Pharmaceuticals, Inc.'s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

Oklahoma, not anywhere—has ever acceded to what the State asks this Court to entertain, and for good reason. The rule of law is not situational: The State cannot discard it simply to achieve expedient results in high-profile cases.

The State has strayed so far from established caselaw that its lone claim against Janssen relies on a statute that has never had anything to do with product liability. For more than a century, Oklahoma's public nuisance law has been reserved exclusively for disputes involving property or public spaces—to remedy intrusions from, say, an overgrown hedge, or a gas station, or a house teeming with foul-smelling pets. Wrenching public nuisance from its grounding in real property, the State reimagines the tort as a standardless, all-encompassing cudgel that compels *any* party allegedly contributing in *any measure* to a social problem to fund *all* programs that state administrators dream up to address it. That vision violates the Oklahoma Supreme Court's explicit definitions of public nuisance, end-runs settled product-liability rules, and threatens unbounded liability for parties that do business in the State. It also contravenes traditional notions of fairness and due process: In the absence of fair warning, the State has no right to hijack a statute used exclusively to regulate property and public spaces and apply it to extract billions of dollars from an out-of-state manufacturer that had every reason to believe it was operating within the confines of the law.

Further, the State misconstrues Oklahoma's nuisance statue on its face. The State asserts that the "nuisance" in this case is a public health crisis allegedly caused by the defendants. But that is incorrect as a matter of law. The statute expressly defines a "nuisance" as an "act or omi[ssion]" that causes a harm. 50 O.S. § 1. The nuisance is not the harm itself. And the statute only authorizes the state to abate the *nuisance*, *i.e.*, the offending "act or omi[ssion]," *id.*; it does not allow the State to "abate" the alleged *consequences* of that nuisance. Janssen years ago stopped the acts or omissions the State deems wrongful—promotion of opioid pain medications—so no nuisance

remains for the State to abate. In an overstep fatal to its sole remaining claim, the State seeks instead to abate the alleged consequences of that conduct at Janssen's expense. Oklahoma's public nuisance statute does not grant the State that remedy.

Even beyond its dispositive failure to articulate a legally cognizable theory for its public nuisance claim, the State offers no viable evidence that allegedly misleading marketing by Janssen caused the complex social, medical, epidemiological, criminological, and economic phenomenon that it identifies as its injury. Although a chorus of authority requires individualized proof of causation in pharmaceutical-marketing cases, the State has adamantly refused to introduce proof that Janssen's marketing caused a single Oklahoma doctor to write a single unwarranted prescription. Instead, it pledged that it would develop a model that somehow calculated the aggregate effects of Janssen's allegedly misleading promotions—"statistical sampling methods" to measure "how many doctors bought" allegedly misleading messages. But it has not done that either. With no individualized proof, and no method of measuring any impact from Janssen's allegedly wrongful conduct, the State is left with empty assertions that Janssen's allegedly misleading statements must have been a cause of the opioid epidemic. No court has ever accepted such slapdash evidence on the causal effects of drug marketing.

The State overreaches further still in demanding that Janssen pay to remedy any and all opioid abuse for the next 30 years, without regard for basic proximate cause principles. The State would hold Janssen liable for medically *valid* opioid prescription for patients in debilitating pain. It would hold Janssen liable where addiction arises from illegal street drugs trafficked by international drug cartels. It would even hold Janssen liable for addiction caused by the State's own failures to enforce its drug laws. And although Janssen stopped marketing opioid products in 2015, the State demands that Janssen pay every penny to address opioid abuse until 2048. The notion that the marketing of legal prescription drugs in 2009 can proximately cause someone to

become addicted to illegal heroin in 2038 disfigures the concept of proximate cause beyond recognition. But as with its tortured take on Oklahoma's nuisance statute, the State shows a willingness to warp the law and distort logic.

While all of America recognizes the gravity of the opioid problem, the judicial system must still hew to well-developed evidentiary requirements and time-tested bodies of law. At every turn, the State—in its arbitrary quest to secure an astronomical recovery from a single market participant with negligible sales in Oklahoma—has attempted to exceed another boundary and rewrite another rule. The time has come for the Court to draw a line on the State's overreach, and enter summary judgment in Janssen's favor.

#### STATEMENT OF UNCONTROVERTED FACTS

#### A. <u>Procedural History</u>

- 1. The State brought this action in June 2017 against three corporate families of prescription medicine manufacturers: Purdue, Janssen, and Teya.<sup>2</sup>
- 2. The State's Petition alleged that the defendants' marketing of their prescription opioid medications "misrepresented the risks of addiction" and "touted unsubstantiated benefits," resulting in a public nuisance—a "public health crisis" in the form of an "opioid abuse epidemic." Pet. ¶¶ 4, 45-46. The Petition included claims for violating the Oklahoma Medicaid False Claims Act, the Oklahoma Medicaid Program Integrity Act, the Oklahoma Consumer Protection Act, public nuisance, fraud, and unjust enrichment. See Pet. ¶¶ 73-133.

<sup>&</sup>lt;sup>2</sup> The "Purdue Defendants" are Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Frederick Company. Both the "Actavis Defendants" and the "Cephalon Defendants" are in the Teva corporate family. The "Actavis Defendants" are Allergan Plc, Actavis Plc, Actavis, Inc., Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Watson Pharma, Inc., Actavis Pharma, Inc., and Actavis LLC. The "Cephalon Defendants" are Teva Pharmaceuticals USA, Inc., Cephalon, and Teva USA. The "Janssen Defendants" are Janssen Pharmaceuticals, Inc., Johnson & Johnson, Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica Inc. Pet. ¶¶ 13-19.

- 3. This Court dismissed the State's consumer-protection claim on December 6, 2017. Order (Dec. 6, 2017).
- 4. On April 2, 2019, the State settled its claims against Purdue for \$270 million. Settlement Agreement (Apr. 2, 2019).
- 5. After its settlement with Purdue, the State voluntarily dismissed its fraud, Medicaid, and unjust enrichment claims. Notice of Voluntary Dismissal of Certain Claims Without Prejudice (Apr. 4, 2019). All that remains now is the State's public nuisance claim against Janssen and Teva. Apr. 4, 2019 Hr'g. Tr. at 4:16-18.

#### B. <u>Janssen's Opioid Medications</u>

- 6. Janssen developed and manufactured three Schedule II opioid medications: Duragesic, Nucynta, and Nucynta ER. Exhibit 1, Panico Dep., Ex. 17; Exhibit 2, Kuntz Dep., Ex. 4; Exhibit 3, Kuntz Dep., Ex. 5; Exhibit 4, Vorsanger Dep. 17:11-14.
- 7. Duragesic is a prescription transdermal patch that slowly administers a controlled dose of pharmaceutical fentanyl through a patient's skin over a period of days. Exhibit 1, Panico Dep., Ex. 17 at 9-10. It was approved by the FDA and first marketed in 1990. Exhibit 4, Vorsanger Dep. 12:17-13:5. Under its FDA-approved labeling, Duragesic is indicated only for patients who are already opioid tolerant, to treat them for pain "severe enough to require daily, around-the-clock, long-term opioid treatment and for which alternative treatment options are inadequate." Exhibit 1, Panico Dep., Ex. 17 at 1.
- 8. Duragesic was marketed for six years before OxyContin's introduction. Exhibit 5, Gibson Dep. 150:19-20. There is no evidence that opioid prescription rates in Oklahoma increased during that time. Exhibit 6, Kolodny Dep., Mar. 27, 2019, 226:13-23 (noting low level of opioid consumption and opioid overdose deaths in 1994).

- 9. Nucynta, approved by the FDA in 2008 and first marketed in 2009, is a prescription opioid pill with a novel active ingredient, tapentadol. Exhibit 2, Kuntz Dep., Ex. 4 at 1; Exhibit 7, Kuntz Dep. 56:20-24; Exhibit 8, Deem-Eshleman Dep., Jan. 25, 2019, 249:23-251:4; Exhibit 9, Deem-Eshelman Dep., Feb. 25, 2019, 1232:3-9. Unlike Duragesic, Nucynta is a short-acting opioid approved and indicated only for the management of acute, not chronic, pain. Exhibit 2, Kuntz Dep., Ex. 4 at 1.
- 10. Nucynta ER, approved by the FDA and first marketed in 2011, is an extended-release formulation of Nucynta. Exhibit 3, Kuntz Dep., Ex. 5 at 1; Exhibit 10, Panico Dep., Ex. 6 at 1; Exhibit 7, Kuntz. Dep. 57:10-12. Like Duragesic, Nucynta ER is indicated only for pain "severe enough to require daily, around-the-clock, long-term opioid treatment and for which alternative treatment options are inadequate." Exhibit 3, Kuntz Dep., Ex. 5 at 1. Nucynta ER was the first FDA-approved opioid to be launched with an FDA-mandated Risk Evaluation and Mitigation Strategy, an educational program designed to reduce adverse outcomes resulting from inappropriate prescribing, misuse, or abuse of extended-release opioid analgesics. Exhibit 10, Panico Dep., Ex. 6; Exhibit 4, Vorsanger Dep. 290:13-292:8.
- 11. The labels for Duragesic, Nucynta, and Nucynta ER prominently warned of the risk of addiction. Exhibit 10, Panico Dep., Ex. 6 at 1-3; Exhibit 11, Krebs Dep., Ex. 12 at 1-2; Exhibit 1, Panico Dep., Ex. 17 at 1-3; Exhibit 2, Kuntz Dep., Ex. 4 at 1-2; Exhibit 3, Kuntz Dep., Ex. 5 at 1-2; Exhibit 12, Samples Dep., Ex. 6 at 1-3.
- 12. Duragesic and Nucynta ER are indicated for chronic non-cancer pain; Nucynta is only indicated for acute pain. Exhibit 1, Panico Dep. Ex. 17 at 1; Exhibit 2, Kuntz Dep. Ex. 4 at 1; Exhibit 3, Kuntz Dep. Ex. 5 at 1.

14. Janssen's opioid medications were abused at lower rates than those of other companies. Duragesic patches are, by nature, more difficult to abuse than opioid pills—they cannot, for instance, be crushed and snorted for a quick high—and reports show that abuse rates for Duragesic have consistently been far lower than for OxyContin and other conventional opioid pills. Exhibit 15, Moskowitz Dep., Jan. 9, 2019, 223:24-224:7. Nucynta and Nucynta ER similarly had far lower abuse rates than OxyContin and other conventional opioid pills. Exhibit 4, Vorsanger Dep., Jan. 17, 2019, 282:3-9; 298:24-299:4. The active ingredient in Nucynta and Nucynta ER, tapentadol, has properties that may make it less attractive to abusers; fewer than 1 percent of patients who took Nucynta in clinical trials reported experiencing euphoria; and post-market surveillance data confirms that abuse of the Nucynta products is extremely low.

16. Janssen stopped promoting Duragesic in 2007 and stopped promoting Nucynta and Nucynta ER in 2015. Exhibit 18, Moskovitz Dep., Aug. 28, 2018, at 51:5-10; 247:23-24. As of

2015, Janssen no longer promotes any opioid medications, in Oklahoma or elsewhere. Id.

#### C. Noramco and Tasmanian Alkaloids

- 17. Noramco is a Georgia corporation that manufactures and sells active pharmaceutical ingredients ("APIs"). See Dep't of Justice, Notice of Registration, Bulk Manufacturer of Controlled Substances Application: Noramco, Inc., 2014 WL 4961853 (Oct. 7, 2014).
- 18. From 1979 to 2016, Noramco was a subsidiary of Janssen. Exhibit 19, Grubb Dep. 23:15-24:1.
- 19. Among the APIs that Noramco manufactured were Schedule II opioid controlled substances including codeine, opium tincture, oxymorphone, noroxymorphone, and fentanyl. Exhibit 19, Grubb Dep. 9:4-9; 24:2-9; Notice of Registration, 2014 WL 4961853. These opioid APIs are used by pharmaceutical manufacturers to create opioid pharmaceutical products. Exhibit 19, Grubb Dep. 19:17-20:21.
- 20. The production of controlled substances for use in opioid pharmaceuticals is "regulated heavily by the DEA." Exhibit 19, Grubb Dep. 51:12-17. The DEA imposes national annual production quotas for each class of controlled substance, and divides those quotas up among API manufacturers and pharmaceutical manufacturers. 21 C.F.R. §§ 1303.11, 1303.12, 1303.21; Dep't of Justice, Notice of Registration, *Bulk Manufacturer of Controlled Substances Application:* Noramco, Inc., 2014 WL 4961853 (Oct. 7, 2014).
- 21. Tasmanian Alkaloids, an Australian corporation and subsidiary of J&J, manufactures narcotic raw material and poppy straw that in turn are used to make APIs for opioid medications. Exhibit 20, Fitzsimons Dep., Ex. 3 at 9; Exhibit 19, Grubb Dep. 24:19-25:1. The transnational supply of narcotic raw material and poppy is straw is strictly regulated by the United Nations and the DEA. Exhibit 19, Grubb Dep. 252:8-14.

#### D. The State's Public Nuisance Claim

- 22. The State's public nuisance claim rests on the theory that defendants "expanded the market for their opioids through a deceptive marketing campaign" involving "misrepresentations and omissions regarding opioids," and that defendants "thereby created an opioid epidemic in Oklahoma that constitutes a public nuisance." Pet. ¶ 118; State's Resps. to Purdue's 1st Set of Interrogs. (Nov. 12, 2018) at 12.
- 23. The State and its experts allege that Janssen participated in a "multifaceted campaign" promoting opioids as a class of drugs rather than specific products, and that this campaign caused increased opioid prescribing, and, in turn, an opioid crisis. State's Resps. To J&J's 1st Set of Interrogs. (Feb. 14, 2018) at 14-15; Exhibit 6, Kolodny Dep., Mar. 27, 2019, at 144:22-147:18, 224:1-10].
- 24. The State identifies two categories of alleged misrepresentations in that "deceptive marketing campaign": (i) representations that "the risks of addiction were overstated and that scientific studies supported a low risk of addiction associated with [defendants'] drugs," and (ii) statements about "unsubstantiated benefits of opioid treatment, including its effectiveness in treating chronic non-cancer related pain." Pet. ¶ 51; State's Resps. to J&J's 1st Set of Interrogs. (Feb. 14, 2018) at 13.

#### 1. The Rise in Opioid Abuse in Oklahoma

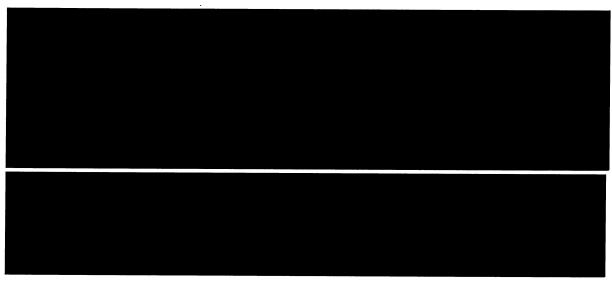
25. According to the State, defendants' marketing efforts caused a public nuisance consisting of (i) increased opioid use and addiction; and (ii) medical and social problems, including overdoses, medical conditions like neonatal abstinence syndrome, and criminal activity. State's Resps. to Purdue's 1st Set of Interrogs. (Nov. 12, 2018) at 11-15; Exhibit 6, Kolodny Dep., Mar. 27, 2019, 225:19-226:5.

#### E. The State's Evidence on Causation

- 26. Yet the State has not produced individualized proof of the causes of increased opioid prescribing in Oklahoma or of the harms the State attributes to an opioid crisis: Neither the State nor its experts have identified any prescription for an opioid medication that was written in Oklahoma as a result of any allegedly misleading marketing by Janssen. Exhibit 6, Kolodny Dep., Mar. 27, 2019, 108:23-109:5; Exhibit 21, Stone Dep. 126:11-127:13.
- 27. Instead, the State has repeatedly stressed that it will "prove this case on an aggregate model" and "show damages on an aggregate scale." Nov. 29, 2018 Hr'g. Tr. 50:23-25; see Jan. 17, 2019 Hr'g Tr. 162:2-4 ("And this is an aggregate level proof type case. We've said it over and over again[.]").
- 28. Despite those assurances, the State's experts have not conducted a statistical analysis—or any other kind of scientific analysis—to determine the causes of increased opioid prescribing or the harms the State attributes to an opioid crisis in Oklahoma. Exhibit 6, Kolodny Dep., Mar. 27, 2019, 156:8-10; Exhibit 5, Gibson Dep. 306:20-25; Exhibit 21, Stone Dep. 182:16-18; Exhibit 22, Fugh-Berman Dep. 99:3-16; Exhibit 23, Krebs Dep. 261:18-262:4; Exhibit 24, Ruhm Dep. 19:12-14.

#### F. The State's Proposed Abatement Remedy

29. The "abatement" remedy sought by the State is a payment to fund government programs purportedly required not to abate what the State alleges to be wrongful conduct by Janssen or any other manufacturer,



#### ARGUMENT AND AUTHORITY

#### I. SUMMARY JUDGMENT STANDARD

Under 12 O.S. § 2056 and Rule 13 of the Rules for the District Courts of Oklahoma, the Court must grant a motion for summary judgment where there is no genuine issue of material fact and the moving party is entitled to summary relief as a matter of law. 12 O.S. § 2056(c); Beach v. Oklahoma Dep't of Pub. Safety, 2017 OK 40, ¶11, 398 P.3d 1, 5; Will v. Jones, 1969 OK CIV APP 16, ¶5, 463 P.2d 702, 704. Summary judgment should be granted where the evidentiary materials filed with the Court establish that the non-moving party cannot "reasonably persuade the trier of fact in his favor on the issue in dispute." Davis v. Leitner, 1989 OK 146, ¶15, 782 P.2d 924, 927. So long as there is no genuine issue of material fact, and "the law favors the movant's claim or liability-defeating defense," summary judgment is proper. State v. One Thousand Two Hundred Sixty-Seven Dollars, 2006 OK 15, ¶24-25, 131 P.3d 116, 125.

In responding to a motion for summary judgment, the non-moving party "may not rely merely on allegations or denials in its own pleading" but rather has the burden of showing evidence is available that would justify trial of the issue. 12 O.S. § 2056(E); *Buckner v. GMC*, 1988 OK 73, ¶29, 760 P.2d 803, 812; *Runyon v. Reid*, 1973 OK 25, ¶11-16, 510 P.2d 943, 946.

### II. THE STATE'S PUBLIC NUISANCE CLAIM FAILS AS A MATTER OF LAW

# A. Oklahoma's Public Nuisance Statute Regulates Real Property—Not Product Sales

The State's lone claim against Janssen relies on a statute that has nothing to do with marketing or prescription drugs or product liability—a statute that, for more than a century, has been used exclusively for property-based disputes over the likes of loud businesses, illegal dumping, and foul-smelling pets. Public nuisance is not and has never been a magic bullet for social problems allegedly traceable to the sale of goods or services. Rather, courts have long applied Oklahoma's nuisance statute exclusively to the misuses of real property and public spaces, or the interferences with others' use and enjoyment of their real property. The State now proposes using that statute for the first time to regulate public health problems allegedly traceable to the sale of lawful, highly regulated, non-defective products. That radical invitation violates the Oklahoma Supreme Court's explicit definitions of public nuisance. And it makes no sense: A set of rules developed to police obnoxious neighbors is not up to the challenge of effectively regulating product sales or fairly apportioning liability for state-wide public health problems. Even if the Supreme Court's cases left room for doubt, basic principles of fairness and due process preclude imposing billions of dollars of liability based on an unprecedented expansion of a statute that courts have narrowly and consistently applied for a century.

#### Under Oklahoma Law, Nuisance Liability Is Limited To Harms Related To Real Property Or Public Spaces

Although the Oklahoma statute defining nuisance, 50 O.S. § 1, is broadly worded, the Supreme Court has clarified that nuisance "is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person or entity of property lawfully possessed." *Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 9, 702 P.2d 33, 36. Oklahoma courts have ruled accordingly time and again. In *Laubenstein v. Bode Tower, L.L.C.*, 2016 OK 118, ¶¶10-12, 392 P.3d 706, 710, the

Supreme Court explained "that a nuisance 'arises from an unreasonable, unwarranted, or unlawful use' of property," and in turn "demands evidence of substantial interference with the use and enjoyment of property." Similarly, in *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, ¶8, 933 P.2d 272, 276, the Court found that the statute "encompasses the common law's ... public nuisance concepts," which it described as "a field of tort-like liability which allows recovery of damages for wrongful interference with the use or enjoyment of rights or interests in land." Those are just recent examples in a long line of cases stating this limitation on nuisance liability.<sup>3</sup>

This limitation applies to public and private nuisances alike: "A nuisance, public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another." Fairlawn Cemetery Ass'n v. First Presbyterian Church, U. S. A. of Okla. City, 1972 OK 66, ¶14, 496 P.2d 1185, 1187. The only difference between public and private nuisance under the statute is that "[a] public nuisance ... affects at the same time an entire community or neighborhood, or any considerable number of persons." 50 O.S. § 2. The Oklahoma Supreme

<sup>&</sup>lt;sup>3</sup> See, e.g., Morain v. City of Norman, 1993 OK 149,  $\P14$ , 863 P.2d 1246, 1249-50 ("[I]n order to find City liable for nuisance, the flooding to the plaintiffs' properties must have been caused by City using lawfully possessed property in an unreasonable, unwarranted or unlawful manner (misfeasance) or failing to perform some duty (nonfeasance)" (emphasis added)); Dobbs v. City of Durant, 1949 OK 72, ¶5, 206 P.2d 180, 182 ("No princip[le] is better settled than that where a business is conducted in such a manner as to interfere with the reasonable and comfortable enjoyment by others of their property or which occasions material injury to the property, a wrong is done to the neighboring owners for which an action will lie[.]"); McPherson v. First Presbyterian Church of Woodward, 1926 OK 214, 248 P. 561, 562 ("Though every one has the right to the reasonable use and enjoyment of his own property, he may not so use it as to unreasonably deprive an adjacent owner of the lawful use and enjoyment of his property, one using his property in an unwarrantable manner, and thereby injuring the comfort, health, and safety of another, creates a 'nuisance,' which may be abated at the suit of the person so injured."); McCormick v. Halliburton Co., No. 11-1272-M, 2014 WL 1328352, at \*3 (W.D. Okla. Mar. 31, 2014) ("It is clear under Oklahoma law that a nuisance claim may be stated based upon wrongful interference with the use or enjoyment of a person's rights or interests in land."); Escott Rentals LLC v. Canadian Hills Wind, LLC, No. 12-582-C, 2012 WL 2995701, at \*1 (W.D. Okla. 2012) (a public nuisance "transgresses the just restrictions upon use or conduct which the proximity of other persons or property imposes" (quoting Briscoe, 1985 OK 43, ¶9, 702 P.2d 33, 36)).

Court's public nuisance cases have uniformly involved harms related to real property or public spaces. See, e.g., Smicklas v. Spitz, 1992 OK 145, ¶¶3-4, 846 P.2d 362, 364-65 (maintenance of earthworks affecting owners of property along river); Mackey v. State ex rel. Harris, 1972 OK 37, 495 P.2d 105, 108 (operation of saloon declared a nuisance because "the location chosen by the respondent in this case is such that it annoys the neighborhood, a residential area"); Crushed Stone Co. v. Moore, 1962 OK 65, 369 P.2d 811, 813 (operation of quarry impacting nearby landowners); Boudinot v. State ex rel. Cannon, 1959 OK 97, ¶1, 340 P.2d 268, 269 (keeping dozens of cats on residential property caused noise and odor impairing the enjoyment of nearby homes); McPherson v. First Presbyterian Church of Woodward, 1926 OK 214, 248 P. 561, 566 (construction of gas station emitting noise and odor harming nearby church); Cummings v. Lobsitz, 1914 OK 382, ¶1 142 P. 993, 994 (building in unsafe condition on major thoroughfare); Updegraff v. City of Norman, 1955 OK 195, ¶6, 287 P.2d 909, 911 (hedge on landowner's yard was overgrown and obstructed public alley); Dobbs v. City of Durant, 1949 OK 72, ¶2, 206 P.2d 180, 181 (mule barn located "within a block or two of fourteen cafes and sandwich shops, twelve grocery stores, two drug stores, two fruit stands, one bakery, three hotels and a bus station"); Wood v. City of Chickasha, 1927 OK 77, ¶8, 257 P. 286, 287 ("disagreeable odors and noises" from poultry plant "affected many people living in the immediate neighborhood"); McNulty v. State, 1923 OK 509, ¶1, 217 P. 467, 467 (presence of dog-racing park "rendered the life, peace, and quietude of the citizens of the community unbearable and uncomfortable"); Mackey v. Aycock, 1921 OK 354, ¶2, 201 P. 365, 366 (inaccessible highway abutting plaintiff's land prevented ingress and egress); Revard v. Hunt, 1911 OK 425, ¶1, 119 P. 589, 589 (fencing around lots blocked access to streets and alleys).4

<sup>&</sup>lt;sup>4</sup> In its Omnibus Response to Defendants' Motion to Dismiss for Failure to State a Claim, the State noted that the "Oklahoma Legislature has identified a variety of specific types of danger

Here, the State attempts to shoehorn a sprawling case about marketing claims, drug addiction, and epidemiology into the narrow and well-defined boundaries of a tort that "arises where a person uses his own property in such a manner as to cause injury to the property of another." Fairlawn Cemetery Ass'n, 1972 OK 66, ¶14, 496 P.2d at 1187. Try as the State might, its case simply does not fit. Courts have regularly refused to transform public nuisance into a product-liability tort. For example, in Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997), Texas sued tobacco companies under a number of theories, including public nuisance, seeking just the kind of recovery Oklahoma seeks here: "costs incurred in providing medical care and other benefits to its citizens ... as the result of the citizens' use of cigarettes and smokeless tobacco products" based on the companies' "manufacturing, advertising, distributing and selling tobacco products." Id. at 960-61, 973. The court refused to "accept the State's invitation to expand a claim for public nuisance beyond its grounding in real property." Id. at 973.

Rightly so. The sales and marketing of lawful products is already regulated by "well-developed bodies of law covering strict products liability, negligence, and warranty theories." Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 744 (2003). Oklahoma courts have often considered legal challenges to the sales and marketing of medical products under those causes of action. *See, e.g., Edwards v. Basel Pharm.*, 1997 OK 22, 933 P.2d 298; *In re Okla. Breast Implant Cases*, 1993 OK 11, 847 P.2d 772; *McKee v. Moore*,

and injury to the public as public nuisances per se." MTD Resp. at 48 & n.129. The State has not identified any nuisance per se lacking a connection to real property or public spaces; in any event, doing so would provide no support for its novel nuisance claim. Under longstanding Oklahoma law, while the "location" of an activity the legislature has deemed a nuisance per se "is immaterial," whether any other act or omission is a nuisance "depends upon its location and surroundings[.]" McPherson, 1926 OK 214, 248 P. at 564; see also Maryland Ref. Co. v. City of Hobart, 1925 OK 479, ¶10, 237 P. 857, 858 (distinguishing nuisances per se from "those which ... may become so by reason of their locality, surroundings, or the manner in which they may be conducted" (emphasis added)). The State does not and cannot contend that Janssen's marketing was a nuisance per se.

1982 OK 71, 648 P.2d 21; Tansy v. Dacomed Corp., 1994 OK 146, 890 P.2d 881. Product-liability law includes extensive protections, developed over decades, to ensure that courts mete out liability proportional to a manufacturer's liability fault. See, e.g., McNair v. Johnson & Johnson, 818 S.E.2d 852, 861 (W. Va. 2018) ("branded manufacturers cannot be held strictly liable for failure to warn of another[] manufacturer's product").

Public nuisance law, which evolved to address hazards like loud businesses and leaky oil wells, unsurprisingly lacks similar protections. Recognizing this crucial difference, courts have rightly "enforced the boundary between the well-developed body of product liability law and public nuisance law" for fear of turning nuisance law into "a monster that would devour in one gulp the entire law of tort." *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 97 (N.Y. App. Div. 2003). "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Id.* at 96.

The implications of extending broadly worded nuisance rules to encompass harms from product sales would be "staggering." In re Firearm Cases, 126 Cal. App. 4th 959, 991 (2005). "General Motors could be sued by someone who was hit by a Corvette that had been stolen by a juvenile. The plaintiff would allege that General Motors knew that cars that can greatly exceed the speed limit are dangerous, and through advertising ... it increased the attractiveness of the car ... and thus increased the likelihood that a juvenile would steal a Corvette and operate it in an injurious manner." Id. (quoting Ileto v. Glock, Inc., 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting from denial of rehearing en banc)). Imaginative plaintiffs' lawyers have brought such claims against oil producers, including Oklahoma corporations, on the theory that they misled the public about the risks of climate change. See, e.g., County of San Mateo v. Chevron Corp., 294 F.

Supp. 3d 934, 937 (N.D. Cal. 2018) (remanding public nuisance action against oil and energy companies "seek[ing] abatement of greenhouse gas emissions"), appeal docketed, No. 18-15502 (9th Cir.). They have targeted lead-paint manufacturers for decades-old advertisements that allegedly led to contemporary health hazards. See In re Lead Paint Litig., 924 A.2d 484, 486-87 (N.J. 2007). They have even sued cellular phone manufacturers alleging they cause accidents from distracted driving. See Modisette v. Apple Inc., 30 Cal. App. 5th 136, 141-42 (2018).

Courts across the country have expressed concerns about such all-encompassing liability when rejecting public nuisance claims that target manufacturers for the sale of lawful products:

- In Ashley County v. Pfizer, Inc., 552 F.3d 659, 671-72 (8th Cir. 2009), the court rejected a public nuisance claim challenging sales of cold medicine, explaining that it was "very reluctant to open Pandora's box to the avalanche of actions that would follow if we found this case to state a [public nuisance] cause of action under Arkansas law."
- In District of Columbia v. Beretta U.S.A. Corp., 872 A.2d 633, 646-51 (D.C. 2005), a firearms case, the court found that adopting a "a right of action for public nuisance applied to the manufacture and sale of guns generally" could lead to "a proliferation of lawsuits 'not merely against these defendants[] but ... against other types of commercial enterprises' manufacturers, say, of liquor, anti-depressants, SUVs, or violent videogames."
- In Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428, 456 (R.I. 2008), a case about lead paint, the court ruled that public nuisance law "never before has been applied to products, however harmful."
- In Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001), a firearms case, the court highlighted the "boundary between the well-developed body of product liability law and public nuisance law."
- In Detroit Board of Education v. Celotex Corp., 493 N.W. 2d 513, 521 (Mich. Ct. App. 1992), an asbestos case, the court noted that nuisance law "is fraught with conditional rules and exceptions that turn on the facts of individual cases, and the cases almost universally concern the use or condition of property, not products."

The State's attempt to extend the tort of public nuisance beyond its basis in real property to the marketing of lawful products flies in the face of controlling guidance from the Oklahoma

Supreme Court, over a century of Oklahoma precedent, and the refusal of courts across the country to apply nuisance law to products suits. This Court should heed the Supreme Court's teaching that public nuisance "arises from an unreasonable, unwarranted, or unlawful use ... of property," *Briscoe*, 1985 OK 43, ¶9, 702 P.2d at 36, and reject the State's public nuisance claim.

## 2. Due Process Further Requires Judgment In Janssen's Favor On The State's Public Nuisance Claim

Due process requires a "fair warning ... that intelligibly communicates the parameters of conduct to be proscribed" prior "to imposition of penalty, civil or criminal." State ex rel. Okla. Bar Ass'n v. Minter, 2001 OK 69, n.55, 37 P.3d 763, 774; see Sessions v. Dimaya, 138 S.Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) ("if the severity of the consequences counts when deciding the standard of [vagueness] review, shouldn't we ... take account of the fact that ... civil laws regularly impose penalties far more severe than those found in many criminal statutes?"). That standard requires strict construction of Oklahoma's public nuisance statute, which authorizes the State to "enforce[] ... public wrong[s]." So-Lo Oil Co., Inc. v. Total Petroleum, Inc., 1992 OK 71, ¶8, 832 P.2d 14, 18-19. And it requires rejection of the State's attempt to hijack statutory language to impose billions of dollars in liability on a theory completely unmoored from a century of public nuisance caselaw.

Longtime precedent limiting public nuisance to land-use interferences, coupled with the elusive wording of the nuisance statute (targeting conduct that "annoys ... others" and "[o]ffends decency," for example), deprived Janssen of fair notice that Oklahoma's public nuisance statute might subject it to in abatement liability for prescription drug marketing. To

<sup>&</sup>lt;sup>5</sup> Oklahoma's public nuisance statute also qualifies as penal because it authorizes criminal indictment in addition to civil actions. *See* 50 O.S. §§ 2, 8; *Quinn v. City of Tulsa*, 1989 OK 112, ¶44, 777 P.2d 1331, 1339 (statute is penal if it "imposes a penalty and punishment for an offense of a public nature").

safeguard due process, Oklahoma courts do not extend the reach of statutes "by implications or equitable considerations." Walker v. Dugger, 1962 OK 88, ¶13, 371 P.2d 910, 913. Rather, "[i]f there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the person against whom enforcement of the statute is sought." Samson Res. Co. v. Cloud, 1991 OK CIV APP 55, ¶8, 812 P.2d 1378, 1381. Explicit Oklahoma caselaw tying the nuisance statute to property rights establishes far more than "fair doubt," id., about whether that statute reaches the marketing of FDA-approved medications or any other lawful product. See supra at 12-18. Invoking the statute's all-encompassing terms to impose massive liability on Janssen for such conduct would therefore violate Janssen's due process right to fair notice.

Due process aside, the State's repackaging of nuisance liability as a sweeping product-liability cause of action is a drastic expansion of tort liability properly reserved for the legislature. In Oklahoma, judicially imposed "[c]hanges in the common law are done in an incremental fashion." *Hedges v. Hedges*, 2002 OK 92, n.19, 66 P.3d 364, 369. While judges may "interstitially fill[] a gap in the law," *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶21, 77 P.3d 1042, 1062-63, principles of judicial restraint require that wholesale changes to a cause of action be reserved for the legislative branch, *see, e.g, Heintz v. Trucks For You, Inc.*, 1999 OK CIV APP 64, ¶8, 984 P.2d 255, 257 ( "The courts must defer to the legislature's wisdom and refrain from extending the tort of bad faith for the delay in paying benefits that is occasioned by an appeal of an award to the three-judge panel."). Those principles preclude this Court from erasing long-settled limits on public nuisance to create a virtually limitless source of liability for commercial actors. The policy judgments required to deviate from "unwavering precedent" and effect such "a substantial change in the law is one most appropriate for the ... legislature." *Beam v. Concort Hosp., Inc.*, 920 F. Supp. 1165, 1168-69 (D. Kan. 1996); *see* T. Merrill, *Is Public Nuisance a Tort?*,

4 J. TORT L. 1, 6 (2011) ("the legislature must speak before courts use public nuisance to adjudicate lawsuits targeting controversial social harms").

# B. <u>Because Janssen No Longer Markets Opioid Medications, There Is No Public Nuisance for the State to Abate</u>

The State not only asks for this Court to ignore more than a century of precedent and reinterpret Oklahoma's public nuisance statute—it also demands a remedy dramatically different from that which the statute authorizes. The Oklahoma nuisance statute provides the State with a single remedy: "abat[ing]" the "public nuisance." 50 O.S. § 11. It likewise makes plain that the "nuisance" the State can "abate" is the defendant's conduct—not the allegedly resulting harms: "A nuisance consists in unlawfully doing an act, or omitting to perform a duty." Id. § 1 (emphasis added). Here, the State does not seek to abate any "act" or "omi[ssion]" by Janssen. If it did, it could seek only to enjoin Janssen from its allegedly misleading marketing of opioid medications—a moot point, as Janssen stopped promoting opioid products in 2015. Instead, the State seeks to —that is, to address the harms allegedly resulting from Janssen's actions. But the opioid epidemic is not conduct by Janssen and, under Oklahoma law, cannot constitute a nuisance; it is the "injury" or "damage" allegedly resulting from such conduct. Briscoe, 1985 OK 43, ¶9-11, 702 P.2d at 36. Because Oklahoma law does not grant the State authority to collect for such injuries, the Court should grant summary judgment in Janssen's favor.

# 1. The State's Only Permissible Remedy Is Abatement of the Public Nuisance

Oklahoma law gives the State a single civil remedy in a public nuisance suit: abatement of the nuisance itself. Title 50, Section 8 of the Oklahoma Statutes states that "[t]he remedies against nuisance are: 1. Indictment or information, or, 2. A civil action, or, 3. Abatement." The

sections that follow spell out who is entitled to pursue those remedies, and under what circumstances:

- Indictment or Information. Section 9 instructs that "the remedy by indictment or information is regulated by the law on crimes and punishment and criminal procedure."
- Civil action. Section 10, titled "Civil action," provides that "[a] private person may maintain an action for a public nuisance if it is specially injurious to himself but not otherwise."
- Abatement. Section 11 states that "[a] public nuisance may be abated by any public body or officer authorized thereto by law." And Section 12 directs that a private individual can abate a nuisance "which is specially injurious to him."

That is the sum total of the nuisance statute's remedies for public nuisance. And, as Section 10 allows only private persons to bring civil actions, public entities have just two options: They can pursue "indictment or information" under Section 9, or they can "abat[e]" the "public nuisance" under Section 11. There is no third way.

That limitation lines up with longstanding public nuisance principles. Under the common law, "[t]he remedies usually available [for public nuisance] are those of criminal prosecution and abatement by way of an injunctive decree or order." Keeton & Prosser, Prosser and Keeton on the Law of Torts § 90, at 643 (5th ed. 1984); see In re Lead Paint Litig., 924 A.2d 484, 498 (N.J. 2007) ("the public entity, as the modern representative of the sovereign in public nuisance litigation, has only the right to abate"). Oklahoma cases embody this principle: In more than a century of Oklahoma public nuisance cases, no court has ever granted the State any remedy other than indictment or abatement. Quite the contrary, public entities consistently request—and courts consistently grant—only injunctive relief to abate the public nuisance itself. See, e.g., State ex rel. Field v. Hess, 1975 OK 123, ¶1-3, 540 P.2d 1165, 1167; Curlee v. State ex rel. Edmondson, 1957 OK 72, ¶¶1-4, 309 P.2d 1064, 1064-65; State ex rel. Whetsel v. Wood, 1952 OK 175, ¶¶1-3, 248

P.2d 612, 613; State ex rel. King v. McCurdy, 1935 OK 412, ¶¶1-2, 43 P.2d 124, 124; State ex rel. King v. Friar, 1933 OK 501, ¶¶1-4, 25 P.2d 620, 621.

# 2. The State Impermissibly Seeks to Abate an Injury, Rather than a Public Nuisance

The State's theory that Janssen's actions caused a public nuisance fatally misunderstands nuisance law. Under Oklahoma law, a nuisance is not an injury or condition *caused by* an action—a nuisance is the action *itself*. An opioid crisis simply does not fit that definition of a "public nuisance." 50 O.S. § 1. As described by the State, the crisis is not an action but the harm that allegedly flows from Janssen's actions: the marketing of legal, FDA-approved opioid medications, which Janssen ceased in 2015. With no nuisance to abate, the State is left seeking to remedy harms—and Oklahoma law does not allow it to do so.

Oklahoma law distinguishes between a nuisance and its consequences. A "nuisance consists in unlawfully doing an act, or omitting to perform a duty." 50 O.S. § 1. By contrast, ""[d]amage' or 'injury', as ordinarily used in nuisance cases is the *result* of the nuisance." *Briscoe*, 1985 OK 43, ¶9, 702 P.2d at 36. Put another way, "[n]uisance is a wrong, and damage is the result." *Oklahoma City v. Page*, 1931 OK 764, ¶10, 6 P.2d 1033, 1036.

The State's authority to abate a public nuisance, then, begins and ends with stopping the conduct that constitutes the nuisance. The Oklahoma Supreme Court made that clear in Magnolia Petroleum Co. v. Wright, 1926 OK 196, ¶2, 254 P.2d 41, 42, where it explained that a government body's power to "abate and remove" "a nuisance" is the "power [to] prevent any act or omission of any duty ... which act or omission ... annoys, injures, or endangers the comfort, lives, health, or safety of others." Id. (emphasis added). That power does not include the right to seek redress for the conduct's consequences. See Atchison, Topeka & Santa Fe Ry. Co. v. Kelly, 1928 OK 256,

¶10, 266 P. 775, 776 ("The defendant might abate its nuisance, but could not, by so doing, restore plaintiff's premises.").

That eviscerates the State's claim. The State can demand only that Janssen stop or start some particular conduct, yet it has not done so. For good reason: Janssen stopped promoting opioids when it divested its Nucynta franchise in 2015. Exhibit 18, Moskovitz Dep., Aug. 28, 2018, 51:5-10; 247:23-24. No "act or omission" remains for the State to abate. 50 O.S. § 1. Instead, the State advances an "abatement plan" that simply proposes having Janssen pay for a grab bag of proposed programs that the State promises will "target[]" the opioid crisis over the next 30 years. Exhibit 27, White Dep. 271:2-8; Exhibit 26, Hawkins Dep., Mar. 6, 2019, 54:5-10; Exhibit 25, The State's experts concede that this plan does not ask Janssen to stop doing (or do) anything. Exhibit 26, Hawkins Dep., Mar. 6, 2019, 231:8-17; Exhibit 27, White Dep., 252:20-23.

This demand for cash exposes the State's "abatement plan" for what it really is: a straightforward attempt to recover nuisance damages—damages Oklahoma law does not permit the State to seek. Indeed, the State's experts acknowledge that its "abatement plan" attempts to address the *injuries* it believes Janssen caused: "[T]he defendants caused the opioids crisis and, therefore, ... should pay the cost to abate the opioid crisis." Exhibit 27, White Dep. 258:13-16. But the "damage" or "injury" that is "the *result* of the nuisance," is *not* a nuisance. *Briscoe*, 1985 OK 43, ¶9, 702 P.2d at 36. And so the State's demand for monetary recovery to address such alleged injuries is not an action to "abate" a "public nuisance," 50 O.S. § 11, but a demand for damages, *see*, *e.g.*, *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1029 (10th Cir. 2007) (applying Oklahoma law) ("one aspect of damages the victim of a temporary nuisance can recover is the cost of restoring the land to its former condition") (internal quotation marks omitted); *Briscoe*, 1985 OK 43, ¶13, 702 P.2d at 37 ("costs of restoring the temporary abatable injury to the

well site" are "damages"); Thompson v. Andover Oil Co., 1984 OK CIV APP 51, ¶19, 691 P.2d 77, 83 ("Damages adjudged in an action predicated on a nuisance theory may include clean-up costs") (internal quotation marks omitted). Because Janssen no longer promotes opioids, there is no remotely conceivable public nuisance for the State to abate—and because Oklahoma law allows the State to seek such abatement only, it has nothing left to ask for.

# III. THE STATE HAS FAILED TO ESTABLISH A TRIABLE ISSUE OF CAUSATION

Even if the State were permitted to recover damages to address harms caused by a purported public nuisance (which it is not), no reasonable factfinder could conclude that Janssen caused an opioid epidemic—especially given the State's failure to develop meaningful causation evidence.

"[T]he mere possibility" that a defendant's conduct "might have caused [a plaintiff's] injury is not enough." Kirkland v. GMC, 1974 OK 52, ¶29, 521 P.2d 1353, 1363. Rather, the State can recover from Janssen only "for such injury ... as was the direct and proximate result of its wrongful act, if any." Atchison, Topeka & Santa Fe Ry. Co., 1928 OK 256, ¶6, 266 P. at 776. Causation "consists of both 'cause in fact' and 'legal cause." Nelson v. Enid Med. Assocs., Inc., 2016 OK 69, n.4, 376 P.3d 212, 216. Cause in fact, or "but-for causation," requires proof that the plaintiff's injury "would not have occurred but for [the defendant's] conduct." McKellips v. St. Francis Hosp., Inc., 1987 OK 69, ¶9, 741 P.2d 467, 471. By contrast, legal cause requires proof that defendant's conduct caused the defendant's injuries "in a natural and continuous sequence, unbroken by any independent cause." Butler v. Okla. City Pub. Sch. Sys., 1994 OK CIV APP 22, 871 P.2d 444, 446.

The State cannot come close to making those required showings. Having first disavowed the kind of individualized causation evidence that court after court has required for

pharmaceutical-marketing cases, the State has now reneged on its promise to provide aggregate causation evidence in its place. It thus is left with no evidence even purporting to trace changes in opioid prescribing patterns or other social harms to *Janssen's* allegedly misleading marketing. And even if such evidence existed, it could not fix the fundamental flaw infecting State's causation theory: The State's claimed injuries, today and over the next thirty years, result from countless intervening events for which Janssen cannot be held responsible.

Because there is "no legally cognizable causal connection between [Janssen's] conduct and the injuries suffered by the [State] ... the issue of causation becomes a question of law, and [Janssen] is entitled to summary judgment." *Nelson, Inc.*, 2016 OK 69, ¶9, 376 P.3d at 216.

#### A. The State Cannot Prove But-For Causation

The State presents not a shred of viable evidence to support its unprecedented theory of causation <sup>6</sup>: that allegedly misleading marketing by Janssen caused a sea-change in opioid prescribing practices, which in turn caused a complex social, medical, epidemiological, criminological, and economic phenomenon—an opioid crisis. MTD Resp. at 1-3. Courts have consistently required plaintiffs with far less ambitious pharmaceutical-marketing claims to prove that marketing caused harm to individual patients; and they have rejected attempts to prove causation only in aggregate. Here, the State makes no attempt to show individualized causation, yet it backtracks on its commitment to produce aggregate evidence instead. Whatever the State and its experts may believe about opioid marketing in general, its twin failures leave it with no evidence about the only issue that matters here: the specific impact, not of marketing in general, but of allegedly *misleading* marketing *by Janssen*.

<sup>&</sup>lt;sup>6</sup> Causation is an element of the State's public nuisance claim. See, e.g., Twyman v. GHK Corp., 2004 OK CIV APP 53,  $\P$ 51-52, 93 P.3d 51, 61; Safeway Stores, Inc. v. Billings, 1959 OK 8,  $\P$ 5, 335 P.2d 636, 639; Kirk v. City of Muskogee, 1938 OK 526,  $\P$ 9, 83 P.2d 594, 597.

In case after case, plaintiffs challenging drug marketing have tried to avoid presenting individualized evidence on causation, and courts have consistently rejected the attempt. In the leading case of *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010), plaintiffs presented statistical analyses purporting to calculate how a drug manufacturer's promotions caused them to reimburse unnecessary prescriptions. *Id.* at 135. The Second Circuit found that aggregate evidence insufficient to establish causation: "[T]he nature of prescriptions," the court concluded, "thwarts any attempt to show proximate cause through generalized proof." *Id.* The court explained that doctors might not rely on a manufacturer's marketing claims at all. *Id.* And if they do, they consider numerous other factors as well, including a "patient's diagnosis," "past and current medications being taken by the patient, the physician's own experience," and the "physician's knowledge regarding the [medication's] side effects." *Id.*; see also id. at 136 ("individual physicians prescribing [the drug] may have relied on [the] alleged misrepresentations to different degrees, or not at all").

Courts across the country have repeated the Second Circuit's reasoning in a raft of similar cases—including cases where plaintiffs offered substantially more than conclusory assertions of causation. Each time, a plaintiff claims that a manufacturer's fraudulent marketing caused physicians to write improper or excessive prescriptions. And each time, a court rules that the plaintiff cannot establish causation without an "inquiry into the specifics of each doctor-patient relationship implicated by the lawsuit." *Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP*, 585 F. Supp. 2d 1339, 1344 (M.D. Fla. 2008). Absent such an inquiry, courts cannot "determine what damages were caused by [the manufacturer's] alleged fraudulent conduct, as opposed to what damages were caused by the physician's independent medical judgment." *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prod. Liab. Litig.*, 2010 WL 3119499, at \*7 (S.D. III. 2010); accord In Southeast Laborers Health & Welfare Fund v. Bayer Corp., 655 F.

Supp. 2d 1270, 1281 (S.D. Fla. 2009) ("Doctors are presumed to go beyond [the] advertising"); In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 2012 WL 3154957, at \*7 (N.D. Cal. 2012) ("Because 'at least some doctors were not misled by Defendants' alleged misrepresentations ... general proof of but-for causation is impossible." (quoting Eli Lilly, 620 F.3d at 135)); In re Vioxx Prod. Liab. Litig., 2010 WL 11570867, at \*7 (E.D. La. 2010) ("In this case ... it is not sufficient for Plaintiff to generally assert that Merck's misrepresentations led to the prescription of Vioxx. Each decision by each doctor and each patient was different.").

Disregarding this broad consensus, the State has insisted that it would "prove this case on an aggregate model." Nov. 29, 2018 Hr'g. Tr. 50:23-25. And it justified that departure by committing to the Court that it would develop a method to determine the causal effects of Janssen's alleged misrepresentations. In the hearing on defendants' motion to dismiss, the State represented that it would "be able to show [the Court], especially through statistical sampling methods" "how many doctors bought into" allegedly misleading messages from drug manufacturers. Dec. 5, 2017 Hr'g Tr. 136:24-137:2. Counsel for the State added: "[S]tatistical evidence in cases like this is appropriate, and I think we can prove it." *Id.*, 137:4-5.

A year and a half later, the State has broken that promise. The only statistical evidence it has produced in this litigation was an extrapolation that purported to determine how many medically unnecessary prescriptions Oklahoma Medicaid reimbursed—not "how many doctors bought into" allegedly misleading marketing statements by Janssen. *Id.*, 136:24-25. The State has since abandoned even that effort, announcing that, following its dismissal of every claim besides public nuisance, "there's no statistic sampling anymore." Apr. 4, 2019 Hr'g Tr. 14:4. After refusing to present individual proof on causation, the State has offered nothing to replace it.

The State's causation burden requires it to prove that *misleading* marketing by *Janssen*—as opposed to Janssen's lawful marketing or the marketing activities of other manufacturers—was

a but-for cause of its injuries. See Atchison, T. & S.F. Ry. Co., 1928 OK 256, ¶6, 266 P. at 776 ("this defendant was liable for such injury only as was the direct and proximate result of its wrongful act, if any"). But its lack of both individualized and aggregate proof precludes it from satisfying that burden: The State cannot show even one prescription written because of allegedly misleading marketing by Janssen, much less can it show that Janssen's wrongful conduct caused the sort of fundamental shift in prescribing practices necessary to catalyze a statewide crisis. For that reason, too, Janssen is entitled to summary judgment.

### B. The State Cannot Turn to Lawful, Legally Protected Conduct to Establish Causation

Recognizing that it cannot prove causation from the small subset of Janssen's statements that it challenges as misleading, the State has throughout this litigation tried to expand its theories to sweep in a range of legally protected activity. This Court should reject the effort. A defendant can "only" be held "liable for such injury ... as was the direct and proximate result of its wrongful act." *Atchison, Topeka & Santa Fe Ry. Co.*, 1928 OK 256, ¶6, 266 P. at 776. The State

<sup>&</sup>lt;sup>7</sup> The State maintains that all it needs to support its demand for joint and several liability is to show that Janssen was "a cause—not the cause" of its injuries. State's Combined Reply re: Briefing on the Legal Authority to Sever Claims and Consolidate Actions (Apr. 2, 2019) at 3-4. But whether a defendant is even "a" cause of the State's injury requires a but-for analysis. See McKellips v. Saint Francis Hosp., Inc., 1987 OK 69, 741 P.2d 467, 470 ("The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct.") (quoting Prosser and Keeton, The Law of Torts 263 (5th ed. 1984)); Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013) ("It is ... textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it."") (quoting Prosser and Keeton, supra, at 265). The Oklahoma Supreme Court has long held that joint and several liability attaches to actions of concurrent wrongdoers only where "the injury would not have occurred but for each [wrongdoer's] act." Oklahoma City-Ada-Atoka Ry. Co. v. Crabtree, 1952 OK 302, 249 P.2d 445, 446; see Green v. Sellers, 1966 OK 65, 413 P.2d 522, 528 ("Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes.") (emphasis added).

cannot prove causation by pointing to conduct that far from being "wrongful," was legally protected.

Noramco and Tasmanian Alkaloids.

That theory fails for two reasons.

First, Oklahoma law does not recognize tort liability for a component supplier that has no role in making the finished product. Such a supplier has no duty to warn the finished product's end-user about the component's risks, and can be held liable "only ... when [it] substantially participates in the design of the final integrated product." Swift v. Serv. Chem., Inc., 2013 OK CIV APP 88, ¶21-22, 310 P.3d 1127, 1133. The drug manufacturers that bought API from Noramco "made a substantial change in the way the [API] was packaged and distributed, and in instructing how [it] should be used." Id. The activities of Noramco and Tasmanian Alkaloids as suppliers are therefore non-tortious as a matter of Oklahoma law, and cannot be used to prove causation. Id.

In addition, the federal Controlled Substances Act ("CSA") affirmatively authorized Noramco's sales of raw materials to drug manufacturers. The CSA directs the Drug Enforcement Agency ("DEA") to strike a balance between ensuring the "necessary" supply of controlled substances that have a "useful and legitimate medical purpose ... to maintain the health and general welfare of the American people," and, on the other hand, combatting their "improper use." 21 U.S.C. § 801(1)-(2). To that end, the DEA sets annual quotas for the production and purchase of controlled substances, including active ingredients for opioid medications. *See* 21 C.F.R. §§ 1303.11-1303.12, 1303.21-1303.27. In full compliance with that scheme, Noramco held DEA production quotas that authorized it to manufacture and sell API for opioid medications. *See* 21 C.F.R. §§ 1303.21-1303.27; Exhibit 19, Grubb Dep. 19:1-8. And the manufacturers that purchased

raw material from Noramco held DEA procurement quotas authorizing them to do so. See 21 C.F.R. § 1303.12; Exhibit 19, Grubb Dep. 46:22-47:18, 48:7-13, 55:7-17. Federal law likewise authorized Tasmanian Alkaloids' importation of raw poppy materials. See, e.g., 21 C.F.R. §§ 1304.31, 1312.13. Because they were sanctioned by a complex federal statutory scheme, Noramco's raw-material sales fall under the Oklahoma nuisance statute's safe harbor, see 50 O.S. § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."), and any attempt to impose tort liability for them would fatally conflict with federal law, see Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001) (where state tort-law claims "skew[]" the federal government's "delicate balance of statutory objectives," the state law claims are preempted). The State cannot establish causation on the basis of these fully lawful federally authorized activities.

First-Amendment-Protected Association. The First Amendment blocks the State's effort to premise causation on Janssen's constitutionally protected association with industry and advocacy groups. See MTD Resp. at 23-32; State's Resp. to J&J's 1st Set of Interrogs. at 13-14. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." In re Asbestos Sch. Litig., 46 F.3d 1284, 1294 (3d Cir. 1994). Those protections forbid holding donors and members liable for an advocacy group's wrongful conduct absent evidence that they "specifically intended to further such wrongful conduct." Id. at 1289-90. The State has never identified a speck of evidence that Janssen harbored specific intent to mislead the public through advocacy groups; it therefore cannot cite the activities of those groups to support its causation case. See id. (holding lawsuit imputing trade organization's misleading messages to asbestos manufacturer was a "clear and indisputable" First Amendment violation where there was "simply no evidence" of specific intent to "further [group's] wrongful conduct").

Pain Advocacy. Nor can the State go beyond the specific statements it alleges were misleading to target general statements encouraging doctors and patients to be more vigilant to pain as a health issue. The State has targeted numerous communications advocating for greater awareness of pain, including:

■ The Joint Commission's 2001 endorsement of the concept of pain as a "fifth vital sign"—a medical value judgment about treatment priorities. MTD Resp. at 4, 27.

Not one word of those statements is even arguably misleading or false—quite the contrary, expression about medical treatment priorities is core First Amendment speech about matters of public concern. See Nair v. Oakland Cty. Cmty. Mental Health Auth., 443 F.3d 469, 479 (6th Cir. 2006). The First Amendment thus forecloses the State from injecting such statements into the case and relying on them to show causation. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926 (1982) (monetary penalties for core protected speech unconstitutional).

Promotion Consistent With FDA-Approved Label. The State can get no further pointing to promotional statements that are consistent with the FDA-approved labels of Janssen's drugs. For example, although the State contends that Janssen and other manufacturers improperly marketed opioids for chronic non-cancer pain, see, e.g., Exhibit 6, Kolodny Dep. 131:12-16; Exhibit 31, Pohl Dep. 291:7-13; Exhibit 22, Fugh-Berman Dep. 230:15-21, that use falls within the indication for which the FDA approved Duragesic: the "management of persistent, moderate to severe chronic pain," Exhibit 11, Krebs Dep., Ex. 12 at 1. Similarly, the State faults Janssen for

allegedly disseminating the concept of "pseudoaddiction"—drug-seeking behavior arising from inadequate pain treatment—but the FDA-approved label for Duragesic continues to acknowledge that while "[d]rug seeking' behavior is very common in persons with substance use disorders ... [p]reoccupation with achieving adequate pain relief can be appropriate behavior in a patient with poor pain control." Exhibit 1, Panico Dep., Ex. 17 at 33.

By including language about chronic pain and the concept of pseudoaddiction "in the drug labeling, the FDA has determined that the information complies with its rules and regulations." *DePriest v. AstraZeneca Pharm., L.P.*, 351 S.W.3d 168, 177 (Ark. 2009). And under federal law, that determination "serves as the basis for product promotion." FDA, Professional Product Labeling, 60 Fed. Reg. 52,196 (Oct. 5, 1995); *see* 21 C.F.R. § 202.1(a)(4) (drug advertising must be consistent with FDA-approved label). Accordingly, promotional statements consistent with its products' FDA-approved labels fall within the Oklahoma nuisance statute's authorized-activities safe harbor, 50 O.S. § 4, and cannot serve as a basis for liability or causation. *See, e.g., DePriest*, 351 S.W.3d at 176-77 (holding that "advertising ... supported by the FDA-approved labeling" falls within safe harbor for "conduct that is permitted under laws administered by a federal agency").

First-Amendment-Protected Lobbying. Nor can the State establish causation by pointing to constitutionally protected petitioning.

Those allegations are factually baseless, but more importantly, they too trench on core First Amendment activity. The Petition Clause strictly safeguards efforts to influence state and federal government officials to pass favorable legislation or take favorable action. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). This protection, known as the Noerr-Pennington doctrine,

extends to lobbying the legislature, the judiciary, and "all departments of the Government," including administrative agencies. See Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). It therefore forecloses any attempt by the State to premise liability or causation on Janssen's alleged lobbying activities. See Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris, Inc., 196 F.3d 818, 826 (7th Cir. 1999) ("To the extent the [tobacco] manufacturers' [alleged misstatements] were designed to influence Congress—to get favorable laws and ward off unfavorable ones—they cannot be a source of liability directly under the Noerr-Pennington doctrine.").

In its quest to paint a picture of

or legally protected conduct that cannot support a finding of causation. Janssen's liability must rise and fall not based on the lawful and federally authorized activities of its subsidiaries, constitutionally protected associations with industry groups, or non-misleading speech, but on whether specific allegedly misleading statements by Janssen caused the prescribing paradigm shift that the State blames for the opioid crisis. The State has no evidence addressing that narrow question, and no reasonable factfinder could find its burden of proof satisfied.

#### C. The State Cannot Prove Legal Causation

Even if the State had developed viable causation evidence, proximate cause principles foreclose holding Janssen liable for a far-reaching social phenomenon fueled by a multitude of factors—including physicians' independent medical judgment, widespread criminal conduct, and governmental failures—that have nothing to do with Janssen. Indeed, the State demands that Janssen foot the costs of addressing opioid addiction and abuse in Oklahoma for the next thirty years—to treat individuals who may become addicted today, years after its stopped promoting

opioids, and to treat those who may become addicted many years in the future, including even future addicts not yet born.

The "proximate cause of an event must be that which in a natural and continuous sequence, unbroken by an independent cause, produces the event[.]" *Gaines v. Providence Apartments*, 1987 OK 129 ¶4, 750 P.2d 125, 126-27. Here, rather than a "natural and continuous sequence" connecting Janssen's marketing to the State's alleged injuries, there is a chasm separating the two.

Courts have long applied commonsense proximate cause limits to preclude holding manufacturers responsible for the misuse and criminal diversion of their legal products. Firearms, for instance, are involved in tens of thousands of U.S. deaths every year—but courts have repeatedly declined to hold gun makers responsible for each one. See, e.g., D.C. v. Beretta, U.S.A., Corp., 872 A.2d 633, 642 (D.C. 2005); People ex rel. Spitzer v. Sturm, Ruger & Co., 309 A.D.2d 91, 95, (N.Y. App. Div. 2003); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 129-30 (Conn. 2001). Cars are likewise associated with tens of thousands of fatal crashes annually, but car companies are not held liable for speeding drivers, much less respiratory disease from air pollution. See, e.g., In re Firearm Cases, 126 Cal. App. at 959. And alcohol—an addictive product widely marketed for its social, romantic, and celebratory attributes—also inflicts substantial public health costs, yet courts reject suits against beverage manufacturers for the costs of drunk driving, lost productivity, or damaged livers. See, e.g., Bertovich v. Advanced Brands & Importing, Co., 2006 WL 2382273, at \*11 (N.D. W.Va. 2006) ("it is unforeseeable that the marketing practices of the Defendants would lead to the illegal purchase or sale of alcoholic beverages to minors").

Courts do not hold these product manufacturers liable because there are too many steps—too many independent decisions by too many separate and autonomous individuals at too many different junctures—between the marketing or sale of the product and its misuse. The same is true here.

Decisions of Prescribing Physicians. At the outset, the State's theory of causation ignores the medical validity of the vast majority of opioid prescriptions written by Oklahoma doctors. Chronic pain remains a major public health challenge, and opioids, like every pain treatment, carry risks as well as benefits. Those risks include addiction and overdose—which Janssen's FDA-approved labels prominently warned about. Exhibit 11, Krebs Dep., Ex. 12 at 1-2; Exhibit 2, Kuntz Dep., Ex. 4 at 1-3; Exhibit 3, Kuntz Dep., Ex. 5 at 1-3. As a learned intermediary, a physician has a duty "to inform himself of the qualities and characteristics of those products which he administers or prescribes for use of his patients, and to exercise his judgment, based on his knowledge of the patient as well as the product." McKee v. Moore, 1982 OK 71, ¶8, 648 P.2d 21, 24.

A doctor's choice to write a medically proper opioid prescription for a patient in chronic pain breaks the chain of causation—even if the known risk of addiction or abuse materializes. See Tortorelli v. Mercy Health Ctr., Inc., 2010 OK CIV APP 105, ¶27, 242 P.3d 549, 560 (bone putty manufacturer not liable for patient's allergic reaction where manufacturer "warned of the risk of an antigenic reaction from using its product, [the physician] ... decided it was [nevertheless] appropriate to use the bone putty based upon her experience with bone putty and Plaintiff's needs, and the Plaintiff had an antigenic reaction").

Criminal Third Parties. The State's attempt to pin blame for the entire opioid crisis on Janssen similarly skips past criminal parties' well-documented contribution to current rates of

opioid abuse and misuse. Even today, illegal "[d]iversion of pharmaceutical drugs, the transfer of legal prescription drugs for illegal use, continues to increase in Oklahoma." Exhibit 32, Stewart Dep., Ex. 22 at 5. Dr. Bruce Bagley, an expert in drug trafficking and organized crime, testified that "one of the major drivers in the current opioid crisis in Oklahoma" is "the illegal activities of key transnational criminal organizations in Mexico and Columbia that are the principal suppliers of heroin, illicit fentanyl, [and] counterfeit pills that are often laced with fentanyl." Exhibit 33, Bagley Dep. 99:17-24; see also Exhibit 34, Bagley Disc. at 6 (noting that "China-based individuals and entities are the principal source of illicitly manufactured fentanyl found in the illicit drug market"); Exhibit 35, Edminsten Dep. 30:9-32:1. Janssen could not have reasonably foreseen the evolution of criminal drug trafficking over three decades—its promotion of Duragesic in the early 1990's and Nucynta in the late 2000's cannot be considered proximate causes of pill mills, illicit Chinese fentanyl, and imported heroin in 2018. See Lefthand v. City of Okmulgee, 1998 OK 97, ¶8, 968 P.2d 1224, 1226 ("the act of a third person in committing an intentional tort or crime is a supervening cause which relieves the initial ... actor from liability for resulting harm or injuries").

Governmental Failures. Nor could Janssen have foreseen that federal and state lawmakers would abdicate their responsibility to combat these illegal enterprises. The schedule II opioids Janssen marketed were subject to a strict regulatory regime, including federal and state monitoring and reporting requirements for all entities in the supply chain, backstopped by strict criminal penalties for illegal sales and diversion. See, e.g., 21 C.F.R. § 1301.71 (security requirements); § 1301.74(b) (suspicious order monitoring requirements); § 1301.19 (reporting requirements for online pharmacies); Okla. Admin. Code § 310:661-6-5(g) (storage and accounting requirements for pharmacies); 63 O.S. § 2-401 (criminal penalties for distribution). But for nearly two decades, the State and federal governments did little to address rampant criminal conduct. The Oklahoma State Board of Pharmacy's Chief Compliance Officer, for example, testified that from 2008 to

2017 "a night break-in where over a thousand [opioid] tablets are stolen" was a "fairly common occurrence." Exhibit 36, Hamilton-Fain Dep. 62:1-8.

The DEA has likewise acknowledged that the failure of law enforcement to interdict illicit opioids that originate outside the United States has been an important driver of the opioid crisis. Exhibit 33, Bagley Dep. 137:5-138:4.

As a manufacturer of highly regulated medicines illegal to possess without a prescription, Janssen is just one small part of a broader regulatory and distribution ecosystem—it relies on other participants, including government authorities, to take reasonable and necessary steps to combat illegal diversion of its products and the broader illegal drug trade. When those entities abdicate their duties, Janssen cannot be held liable for the resulting addiction and overdoses. *See Egervary v. Young*, 366 F.3d 238, 250-51 (3d Cir. 2004) (government actor's failure "to properly apply the governing law and procedures ... must be held to be a superseding cause, breaking the chain of causation").

Lapse in Time. The substantial passage of time that has passed since Janssen's allegedly misleading marketing dilutes proximate cause further still. It strains credulity to suggest that a "continuous" and "unbroken" sequence connects allegedly misleading marketing by Janssen in 2009 to an Oklahoman who becomes addicted to opioids in 2019. Gaines, 1987 OK 129, ¶4, 750 P.2d at 126-27. But the State's theory doubles and even triples down on that unsupportable claim:

Exhibit 25, Ruhm Supp. Disc., Ex. S-1 at 4. Proximate cause principles exist to foreclose precisely this sort of limitless liability for remote injuries: The marketing of an FDA-approved opioid medication in the late 2000's and early 2010's cannot be a *proximate* cause of a heroin addiction developed in 2028, or a fentanyl overdose in 2045. See Graham v. Keuchel, 1993

OK 6, ¶13, 847 P.2d 342, 349 ("Lapse of time ... may cause the duty to prevent harm to another, threatened by the original actor's negligent conduct, to shift from that actor to [a] third person. When this happens the third person's failure to prevent the threatened harm may be a supervening cause.").

These concerns about the yawning gap between Janssen's alleged misrepresentations and the public costs of the opioid crisis led a Connecticut court to dismiss a similar lawsuit against opioid manufacturers earlier this year. See City of New Haven v. Purdue Pharma, L.P., 2019 WL 423990, at \*6-11 (Conn. Super. Ct. Jan. 8, 2019). The court concluded that the alleged connection between the marketing of opioids and the municipalities' alleged harms was "too attenuated" to satisfy the proximate causation standard. Id. at \*3-4. Other courts, too, have voiced the same concerns in refusing to hold sellers of lawful products-from firearms to mortgage-backed securities—liable for indirect downstream harms allegedly caused by their products. See, e.g., In re Firearm Cases, 126 Cal. App. 4th at 991 ("Plaintiffs['] public nuisance claim fails for lack of any evidence of causation. Their complaint attempts to reach too far back in the chain of distribution when it targets the manufacturer of a legal, non-defective product that lawfully distributes its product only to those buyers licensed by the federal government."); Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1069 (D.C. Cir. 2001) (tobacco) ("we agree with the other circuits that the alleged injuries of the third-party payors are too remote to have been proximately caused by the defendants' alleged conduct"); City of Cleveland v. Ameriquest Mortg. Secs., Inc., 615 F.3d 496, 506 (6th Cir. 2010) (rejecting public nuisance suit against mortgage-backed securities sellers because other factors contributing to neighborhood decline "ma[d]e it impossible ... to plead proximate cause under Ohio law").

This Court should follow that unbroken line of authority and recognize that, as a matter of law, Oklahoma's entire opioid epidemic, as it exists today and as it will unforeseeably evolve over

the next thirty years, is not a proximate product of allegedly misleading statements by a company that held a miniscule share of the State's opioid market.

## **CONCLUSION**

This Court should enter summary judgment in favor of Janssen and Johnson & Johnson.

Respectfully submitted,

Benjamin H. Odon OBA No.

John H. Sparks OBA No. 156

Michael W. Ridgeway, OBA 70. 15657 David L. Kinney, OBA No. 10875

ODOM, SPARKS & JONES, PLLC

Suite 140

HiPoint Office Building

2500 McGee Drive

Norman, OK 73072

Telephone: (405) 701-1863 Facsimile: (405) 310-5394

Email: odomb@odomsparks.com Email: sparksj@odomsparks.com Email: ridgewaym@odomsparks.com Email: kinneyd@odomsparks.com

Larry D. Ottaway, OBA No. 6816 Amy Sherry Fischer, OBA No. 16651 Andrew Bowman, OBA No. 22071 Jordyn L. Cartmell, OBA No. 31043 Kaitlyn Dunn, OBA No. 32770 FOLIART, HUFF, OTTAWAY & BOTTOM 12<sup>th</sup> Floor

201 Robert S. Kerr Avenue

Oklahoma City, OK 73102

Telephone: (405) 232-4633 Facsimile: (405) 232-3462

Email: larryottaway@oklahomacounsel.com Email: amyfischer@oklahomacounsel.com Email: andrewbowman@oklahomacounsel.com Email: jordyncartmell@oklahomacounsel.com

### Of Counsel:

Charles C. Lifland
Wallace Moore Allan
Sabrina H. Strong
O'MELVENY & MYERS, LLP
400 S. Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Email: clifland@omm.com
Email: tallan@omm.com
Email: sstrong@omm.com

Stephen D. Brody
David Roberts
O'MELVENY & MYERS, LLP
1625 Eye Street NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
Email: sbrody@omm.com
Email: droberts2@omm.com

ATTORNEYS FOR DEFENDANTS
JANSSEN PHARMACEUTICALS, INC.,
JOHNSON & JOHNSON, JANSSEN
PHARMACEUTICA, INC. N/K/A JANSSEN
PHARMACEUTICALS, INC., AND
ORTHO-MCNEIL-JANSSEN
PHARMACEUTICALS, INC. N/K/A/
JANSSEN PHARMACEUTICALS, INC.

## **CERTIFICATE OF MAILING**

Pursuant to Okla. Stat. tit. 12, § 2005(D), and by agreement of the parties, this is to certify on April 23, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

Mike Hunter

Attorney General for

The State of Oklahoma

Abby Dillsaver

Ethan Shaner

General Counsel to

The Attorney General

313 NE 21st

Oklahoma City, OK 73105

Telephone:

(405)521-3921

Facsimile:

(405) 521-6246

Email: mike.hunter@oag.ok.gov

Email: abby.dillsaver@oag.ok.gov

Email: ethan.shaner@oag.ok.gov

Michael Burrage

Reggie Whitten

J. Revell Parrish

WHITTEN BURRAGE

Suite 300

512 North Broadway Avenue

Oklahoma City, OK 73102

Telephone:

(405) 516-7800

Facsimile:

(405) 516-7859

Email: mburrage@whittenburragelaw.com

Email: rwhitten@whittenburragelaw.com Email: rparrish@whittenburragelaw.com

Bradley Beckworth Jeffrey Angelovich Lloyd Nolan Duck, III Andrew Pate Lisa Baldwin Brooke A. Churchman Nathan Hall NIX, PATTERSON, LLP Suite 200 512 North Broadway Avenue Oklahoma City, OK 73102 Telephone: (405) 516-7800 Facsimile: (405) 516-7859 Email: bbeckworth@nixlaw.com Email: jangelovich@nixlaw.com Email: tduck@nixlaw.com Email: dpate@nixlaw.com Email: lbaldwin@nixlaw.com Email: bchurchman@nixlaw.com

Robert Winn Cutler Ross Leonoudakis Cody Hill NIX, PATTERSON, LLP Suite B350 3600 North Capital of Texas Highway Austin, TX 78746

Telephone: (512) 328-5333 Facsimile:

Email: nhall@nixlaw.com

(512) 328-5335

Email: winncutler@nixlaw.com

Email: rossl@nixlaw.com Email: codyhill@nixlaw.com

## Glenn Coffee

GLENN COFFEE & ASSOCIATES, PLLC 915 North Robinson Avenue Oklahoma City, OK 73102 Telephone: (405) 601-1616 Email: gcoffee@glenncoffee.com

# ATTORNEYS FOR PLAINTIFF

Sanford C. Coats

Joshua D. Burns

CROWE & DUNLEVY, PC

Suite 100

Braniff Building

324 North Robinson Avenue

Oklahoma City, OK 73102

Telephone:

(405) 235-7700

Facsimile:

(405) 272-5269

Email: sandy.coats@crowedunlevy.com Email: joshua.burns@crowedunlevy.com

### Of Counsel:

Sheila Birnbaum

Mark S. Cheffo

Hayden A. Coleman

Paul A. LaFata

Lindsay N. Zanello

Bert L. Wolff

Mara C. Cusker Gonzalez

Jenna C. Newmark

DECHERT, LLP

Three Bryant Park

1095 Avenue of Americas

New York, NY 10036-6797

Telephone:

(212) 698-3500

Facsimile:

(212) 698-3599

Email: sheila.birnbaum@dechert.com

Email: mark.cheffo@dechert.com

Email: hayden.coleman@dechert.com

Email: paul.lafata@dechert.com

Email: lindsay.zanello@dechert.com

Email: bert.wolff@dechert.com

Email: maracusker.gonzalez@dechert.com

Email: jenna.newmark@dechert.com

Benjamin F. McAnaney

Hope S. Freiwald

Will W. Sachse

Chelsea M. Nichols

Cory A. Ward

Meghan R. Kelly

Nicolas A. Novy

DECHERT, LLP

2929 Arch Street

Philadelphia, PA 19104

Telephone: (215) 994-4000 Facsimile: (215) 655-2043

Email: benjamin.mcananey@dechert.com Email: hope.freiwald@dechert.com

Email: will.sachse@dechert.com
Email: chelsea.nichols@dechert.com
Email: cory.ward@dechert.com
Email: meghan.kelly@dechert.com
Email: nicolas.novy@dechert.com

Erik W. Snapp DECHERT, LLP Suite 3400 35 West Wacker Drive Chicago, IL 60601 Telephone: (212)849-7000

Facsimile: (212) 849-7100 Email: erik.snapp@dechert.com

Jonathan S. Tam
Jae Hong Lee
DECHERT, LLP
16<sup>th</sup> Floor
One Bush Street
San Francisco, CA 94104
Telephone: (415) 262-4500
Facsimile: (415) 262-4555

Email: jonathan.tam@dechert.com

Email: jae.lee@dechert.com

William W. Oxley
DECHERT, LLP
Suite 4900
US Bank Tower
633 West 5<sup>th</sup> Street
Los Angeles, CA 90071
Telephone: (213) 808-5760
Facsimile: (213) 808-5760
Email: william.oxley@dechert.com

Lindsey B. Cohan
DECHERT, LLP
Suite 2010
300 West 6<sup>th</sup> Street
Austin, TX 78701-2961

Telephone:

(212) 394-3000

Facsimile:

(512) 394-3001

Email: lindsey.cohan@dechert.com

Britta E. Stanton

John D. Volney

John T. Cox, III

Eric W. Pinker

Jared D. Eisenberg

Jervonne D. Newsome

Elizabeth Yvonne Ryan

Andrea MeShonn Evans Brown

Ruben A. Garcia

Russell G. Herman

Samuel B. Hardy, IV

David S. Coale

Alan Dabdoub

LYNN PINKER COX & HURST, LLP

Suite 2700

2100 Ross Avenue

Dallas, TX 75201

Telephone: (214) 981-3800 Facsimile: (214) 981-3839 Email: bstanton@lynnllp.com Email: jvolney@lynnllp.com

email: tcox@lynnllp.com Email: epinker@lynnllp.com

Email: jeisenberg@lynnllp.com Email: jnewsome@lynnllp.com

Email: eryan@lynnllp.com

Email: sbrown@lynnllp.com

Email: rgarcia@lynnllp.com Email: rherman@lynnllp.com

Email: shardy@lynnllp.com Email: dcoale@lynnllp.com

Email: adabdoub@lynnllp.com

Robert S. Hoff WIGGIN & DANA, LLP 265 Church Street

New Haven, CT 06510

Telephone: (203) 498-4400

Facsimile: (203) 363-7676 Email: rhoff@wiggin.com Michael T. Cole
Nelson Mullins Riley & Scarborough, LLP
Suite 600
151 Meeting Street
Charleston, SC 29401
Telephone: (843) 853-5200

Facsimile: (843) 722-8700

Email: mike.cole@nelsonmullins.com

ATTORNEYS FOR DEFENDANTS PURDUE PHARMA, LP,
PURDUE PHARMA, INC., AND THE
PURDUE FREDERICK
COMPANY, INC.

Robert G. McCampbell Nicholas V. Merklev Ashley E. Quinn Leasa M. Stewart Jeffrey A. Curran Kyle D. Evans GableGotwals 15<sup>th</sup> Floor One Leadership Square 211 North Robinson Oklahoma City, OK 73102-7255 Telephone: (405) 235-5567 Email: rmccampbell@gablelaw.com Email: nmerkley@gablelaw.com Email: aquinn@gablelaw.com Email: lstewart@gablelaw.com Email: jcurran@gablelaw.com

### Of Counsel:

Steven A. Reed
Rebecca J. Hillyer
Evan J. Jacobs
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2321
Telephone: (215) 963-5000
Email: steven.reed@morganlewis.com
Email: rebecca.hillyer@morganlewis.com
Email: evan.jacobs@morganlewis.com

Email: kevans@gablelaw.com

Harvey Bartle, IV Mark A. Fiore Morgan, Lewis& Bockius, LLP 502 Carnegie Center Princeton, NJ 08540-6241 Telephone: (609) 919-6600

Email: harvey.bartle@morganlewis.com Email: mark.fiore@morganlewis.com

Brian M. Ercole Melissa M. Coates Martha A. Leibell Morgan, Lewis & Bockius, LLP Suite 5300 200 South Biscayne Boulevard Miami, FL 33131

Email: brian.ercole@morganlewis.com Email: melissa.coates@morganlewis.com Email: martha.leibell@morganlewis.com

Steven A. Luxton Morgan, Lewis & Bockius, LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004 Telephone: (202) 739-3000

Facsimile: (202-739-3000

Email: steven.luxton@morganlewis.com

Tinos Diamantatos Morgan, Lewis & Bockius, LLP 77 West Wacker Drive Chicago, IL 60601 Telephone: (312) 324-1000

Facsimile: (312) 324-1000

Email: tinos.diamantatos@morganlewis.com

Collie F. James, IV Morgan, Lewis & Bockius, LLP Suite 1800 600 Anton Boulevard Costa Mesa, CA 92626 Telephone: (714) 830-0600 Facsimile: (714) 830-0700

Email: collie.james@morganlewis.com

ATTORNEYS FOR DEFENDANTS CEPHALON, INC., TEVA PHARMACEUTICALS USA, INC., WATSON LABORATORIES, INC., ACTAVIS, LLC, AND ACTAVIS PHARMA, INC. F/K/A WATSON PHARMA, INC.

Benjamin M. Vdom, OBA No. 10917

John H. Sparks, OBA No. 5661

Michael W. Ridgeway, OBA No. 15657

David L. Kinney, OBA No. 10875 ODOM, SPARKS & JONES, PLLC

Suite 140

HiPoint Office Building

2500 McGee Drive

Norman, OK 73072

Telephone: (405) 701-1863 Facsimile: (405) 310-5394

Email: odomb@odomsparks.com
Email: sparksj@odomsparks.com
Email: ridgewaym@odomsparks.com

Email: kinneyd@odomsparks.com

ATTORNEYS FOR DEFENDANTS JANSSEN PHARMACEUTICALS, INC., JOHNSON & JOHNSON, JANSSEN PHARMACEUTICALS, INC. N/K/A JANSSEN PHARMACEUTICALS, INC. N/K/A/JANSSEN PHARMACEUTICALS, INC. N/K/A/JANSSEN PHARMACEUTICALS, INC.