IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS, et al. **PLAINTIFFS**

VS. **Case No. 18CV-2018-268**

PURDUE PHARMA, L.P., et al. **DEFENDANTS**

PLAINTIFFS' OMNIBUS RESPONSE TO DEFENDANTS' RULE 12 MOTIONS

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INTRODUCTION

Plaintiffs seek to end and remediate the Arkansas Opioid Epidemic caused by Defendants. While they seek to avoid responsibility for their conduct, no Defendant informs the Court that virtually all of their arguments have been rejected by every court that has considered them. Rather than accept the same result that Arkansas law mandates, Defendants make every effort to distort and avoid its straightforward application. This Court should do as other trial courts have done unanimously: Deny Defendants' motions and allow Plaintiffs to prosecute this paramount case.[1]

[1] *See In re Opioid Litig.*, No. 400000/2017, NYSCEF Doc. No. 468 (N.Y. Sup. Ct. Suffolk Cty. July 17, 2018) ("In re Opioid Litigation II") (denying consolidated motions to dismiss by opioid distributors and allowing counties to proceed with state-law claims of common-law public nuisance, and negligence); *Alaska v. Purdue Pharma, Inc.,* No. 3AN-17-09966C1 (Alk. Sup. Ct. July 12, 2018) (denying Purdue's motion to dismiss public nuisance and negligence claims); *Kentucky v. Endo Health Solutions, Inc.*, No. 17-CI-1147 (Ky. Cir. Ct. Franklin Cty. July 10, 2018) (denying Endo's motion to dismiss challenging causation and public nuisance); *In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102 (N.Y. Sup. Ct. Suffolk Cty. June 18, 2018) ("In re Opioid Litigation I") (denying consolidated motions to dismiss by opioid manufacturers and allowing counties to proceed with state-law claims of common-law public nuisance, and negligence); *Staubus v. Purdue Pharma, L.P.*, No. C-41916 (Tenn. Cir. Ct. Sullivan Cty. June 12, 2018) (denying motion to dismiss Drug Dealer Liability Act claim); *Washington v. Purdue Pharma*, No. 17-2-25505-O-SEA (Wash. Sup. Ct. King Cty. May 14, 2018) (denying Purdue's motion to dismiss state's claims for violation of state consumer-protection statute, violation of state public-nuisance statute, common-law nuisance, and negligence, and holding that state claims are not preempted by federal law); *Missouri v. Purdue Pharma*, L.P., No. 1722-CC10626 (Mo. Cir. Ct. April 25, 2018) (denying opioid manufacturers' joint motion to dismiss state's complaint and sustaining state's eight claims for violations of the Missouri Merchandising Practices Act); *South Carolina v. Purdue Pharma, L.P.*, No. 2017-CP-40-04872 (S.C. Ct. Com. Pl. Richland Cty. April 12, 2018) (denying Purdue's motion for judgment on the pleadings); *California v. Purdue Pharma L.P.*, No. 30-2014-00725287-CU-BT-CXC (Cal. Sup. Ct. Orange Cty. Feb. 13, 2018) (denying opioid manufacturers' demurrer on public nuisance claim); *Oklahoma v. Purdue Pharma, L.P.*, No. CJ-2017-816 (Okla. Dist. Ct. Cleveland Cty. Dec. 6, 2017) (finding and ordering that "the State's Petition sufficiently states its claims and those claims should not be dismissed based on preemption or pursuant to the Primary Jurisdiction doctrine or the Court's inherent power."); *City of Everett v. Purdue Pharma L.P.*, No. C17-209RSM, 2017 WL 4236062 (W.D. Wash. Sept. 25, 2017) (slip copy) (denying opioid manufacturer's motion to dismiss city's complaint asserting state-law negligence claim, among other claims, and allowing city 30 days to cure deficiencies regarding public nuisance claim); *West Virginia v. AmerisourceBergen Drug Corp.*, No. 12-C-141 (W.V. Cir. Ct. Boone Cty. Dec. 12, 2014) (denying opioid manufacturers and distributors motions to dismiss on negligence, public nuisance, and causation). The Court of Common Pleas for Ross County, Ohio likewise denied Defendants' motions last week. Catherine Candisky, *Judge says state lawsuit against drug companies can proceed*, The Columbus Dispatch (Aug. 25, 2018), *available at* http://www.dispatch.com/news/20180825/judge-says-state-lawsuit-against-drug-companies-can-proceed. Plaintiffs will provide the Court with copies of these opinions, along with copies of other principal authorities Plaintiffs rely upon in this Omnibus Response.

SUMMARY OF THE ARGUMENT

Defendants attack Plaintiffs' allegations and causes of action almost exclusively by either applying legal doctrines that do not exist in Arkansas or distorting Arkansas law beyond recognition. This Response demonstrates that Plaintiffs' causes of action are substantively sound in that the SAC: (1) states a valid claim for negligence, including rampant breaches of Defendants' duties of ordinary care that caused foreseeable harm to Plaintiffs; (2) states a valid claim for common law public nuisance, including interference with public rights in the public health and safety; (3) contains robust allegations supporting proximate cause, including foreseeable third party acts that do not break the causal chain; and (4) states statutory claims under the Crime Victims' Statute and Drug Dealer Liability Act for Defendants' abject violations of Arkansas's Uniform Narcotic Drug Act, Controlled Substances Act. Likewise, Plaintiffs' claims are procedurally sound because (1) the State of Arkansas has standing to bring its suit through Prosecuting Attorney Scott Ellington by clear statutory authority; (2) venue is proper in Crittenden County; (3) this Court has personal jurisdiction over Defendants; (4) the SAC comfortably satisfies Arkansas pleading requirements; (5) a more definite statement is unnecessary; (6) Rule 9's heightened pleading requirements do not apply because Plaintiffs state no fraud claim; (7) the SAC is not barred on its face by any statute of limitations; and (8) Plaintiffs' claims are not preempted because there is no conflict with federal law.[2]

[2] Seven Defendants have provided Plaintiffs information demonstrating they are not proper parties to this lawsuit, and Plaintiffs have voluntarily nonsuited them under ARK. R. CIV. P. 41. These Defendants are BioDelivery Science International, Inc.; Daiichi Sankyo, Inc.; Vernalis Therapeutic, Inc.; Vertical Pharmaceutical, LLC; Akorn, Inc.; Mallinckrodt Pharmaceuticals; and Egalet Corporation. Plaintiffs also intend to voluntarily nonsuit Rhodes Technologies, Inc. and Rhodes Technologies, LP, either contemporaneously with this Response or shortly thereafter. Therefore, Plaintiffs have not responded to motions filed by these Defendants. Plaintiffs' manifest willingness to voluntarily nonsuit Defendants at this early stage demonstrates that Plaintiffs are not taking a "shotgun" approach to this litigation or seeking to hold innocent parties responsible for the opioid epidemic in Arkansas. To the contrary, Plaintiffs are eager to learn and prove the scope of each Defendant's culpability and release those who have none.

STANDARD OF REVIEW

When reviewing the SAC under a Rule 12(b)(6) motion to dismiss for failure to state facts upon which relief can be granted, the Court should treat as true the facts alleged in the SAC and view them in the light most favorable to Plaintiffs. *See Kelley v. Johnson*, 2016 Ark. 268, 13, 496 S.W.3d 346, 356. In testing the sufficiency of the SAC, "all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed." *Id.* "[I]t is unnecessary that a complaint set out the evidence relied upon or a history of transactions leading up to the essential facts, [but] it is necessary that substantive or issuable facts be alleged[.]" *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 590, 510 S.W.2d 555, 560 (1974) (citing cases).

The fact-pleading standard is well-established in Arkansas. *See Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). Under ARK. R. CIV. P. 8(a), a complaint must contain: "(1) a statement in ordinary and concise language of facts showing . . . that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled." *Id.* Rule 8 also requires that a complaint "shall be liberally construed so as to do substantial justice." *Id.*

Defendants' Rule 12 motions test the sufficiency of the pleadings. However, "a motion to dismiss is converted to a motion for summary judgment when matters outside of the pleadings are presented to and not excluded by the court." *Fegans v. Norris*, 351 Ark. 200, 204, 89 S.W.3d 919, 923 (2002). Plaintiffs object to any of Defendants' exhibits that are improper for consideration under ARK. R. CIV. P. 56(c). If the Court intends to consider those matters, then Plaintiffs request that it continue the motions while Plaintiffs conduct discovery to develop the factual record for summary judgment. *See* ARK. R. CIV. P. 56(f). Plaintiffs likewise withdraw any of their exhibits from consideration that may be improper under Rule 56(c).

ARGUMENT

Three groups of Defendants have filed joint motions and briefs seeking the SAC's dismissal, and over 20 Defendants have filed individual motions and briefs seeking the same for themselves.[3]

This Omnibus Response will first address Defendants' substantive challenges to Plaintiffs' causes of action in Manufacturer and Distributor Defendants' Joint Motions to Dismiss and firmly demonstrate that Plaintiffs have stated valid claims for negligence, public nuisance, and statutory claims under the Crime Victims' Statute and Drug Dealer Liability Act. Plaintiffs will then address the various procedural challenges and individual arguments through Defendants' individual motions to dismiss and dispense with unwarranted challenges to the State's standing, personal jurisdiction, pleading requirements, statutes of limitations, and preemption. This Court should summarily deny all pending motions to dismiss.

Defendants moved for dismissal pursuant to Rule 12, which tests the sufficiency of the pleadings. However, "Pursuant to ARK. R. CIV. P. 12(b) and (c), a motion to dismiss is converted to a motion for summary judgment when matters outside of the pleadings are presented to and not excluded by the court." *Fegans v. Norris*, 351 Ark. 200, 204, 89 S.W.3d 919, 923 (2002). But, "it would [be] incorrect to base the decision on allegations in briefs and attached exhibits. ARK. R. CIV. P. 56(c) provides the court may consider 'pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any.'" *Guthrie v. Tyson Foods, Inc.*, 285 Ark. 95, 96, 685 S.W.2d 164, 165 (1985). Plaintiffs object to any consideration

[3] Although the SAC names manufacturers, distributors, retailers, and healthcare professionals as Defendants, only Manufacturers and Distributors have filed motions to dismiss. Accordingly, this Omnibus Response addresses allegations and claims related to Manufacturer Defendants and Distributor Defendants. A list of Defendants and Motions to which this responds is attached as Exhibit 1.

of Defendants exhibits which are not proper for consideration under Rule 56(c) and which introduce matters outside the pleadings. If the Court intends to consider those matters, then Plaintiffs request that the Court continue the motions while Plaintiffs conduct discovery to develop the factual record for summary judgment. *See* ARK. R. CIV. P. 56(f).

A. Plaintiffs pleaded actionable common law claims (Counts I and II).

1. Plaintiffs state a claim for negligence.

Plaintiffs' negligence claim is straightforward and rests on a foundation of well-settled Arkansas law. Plaintiffs allege that Defendants breached their duty of ordinary care to conduct themselves as reasonably prudent opioid manufacturers and distributors so as to avoid causing the foreseeable harm suffered by Plaintiffs.

Arkansas law defines negligence "as the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably prudent person would not do, under the circumstances." *New Maumelle Harbor v. Rochelle*, 338 Ark. 43, 46, 991 S.W.2d 552, 553 (1999) (citing *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998)). "To constitute negligence, an act must be done which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner." *Rochelle*, 338 Ark. at 46 (citing *Sublett v. Hipps*, 330 Ark. 58, 961 S.W.2d 140 (1997)).

An Arkansas plaintiff states a prima facie case of negligence by pleading "that he sustained damages, that the defendant was negligent, and that such negligence was a proximate cause of the damages." *Id*. These three elements mirror the "traditional four-element scheme" by combining duty and breach into the singular element of "negligence." 1 ARK. LAW OF DAMAGES, § 33:1 (2017).

a. Plaintiffs pleaded that Defendants breached duties of ordinary care as reasonably prudent opioid manufacturers and distributors to avoid causing foreseeable harm to Plaintiffs.

Under Arkansas law, all persons engaged in any activity owe a duty to use ordinary care to avoid unreasonable risks of injury to other persons. ARK. MODEL JURY INST., Civil AMI 305; 1 ARK. LAW OF DAMAGES, § 33:1. "Ordinary care is the care a reasonably prudent person would use under the circumstances similar to those shown by the evidence." *Wiles v. Webb*, 329 Ark. 108, 115, 946 S.W.2d 685, 698 (1997) (quoting ARK. MODEL JURY INST., Civil AMI 303). Plaintiffs pleaded the existence of this duty that Defendants owed Plaintiffs under the common law. (*See* SAC, at ¶¶ 291, 301-04, 310, 375-392). That is, Defendants had a duty of ordinary care to conduct themselves as reasonably prudent opioid manufacturers and distributors so as to avoid causing foreseeable harm to Plaintiffs. (*See id*.).

Arkansas's "ultimate test in determining the existence of a duty to use due care is found in the foreseeability that harm may result if care is not exercised." *Shannon v. Wilson*, 329 Ark. 143, 150, 947 S.W.2d 349, 352 (1997); *see also Rhoads v. Serv. Mach. Co*., 329 F. Supp. 367, 373 (E.D. Ark. 1971) (duty to exercise due care "does not depend upon privity of contract but upon the foreseeability of injury or damage"). As explained by the Arkansas Supreme Court, "the ideal 'prudent person' will . . . not neglect what he can foresee as probable" and "will order his conduct by the measure of what appears likely in the ordinary course of events." *Ethyl Corp. v. Johnson*, 345 Ark. 476, 482, 49 S.W.2d 644, 648 (2001) (quoting *St. Louis-S.F. Ry. Co. v. Burns*, 186 Ark. 921, 56 S.W.2d 1027 (1933)). Thus, the duty to exercise ordinary care "arises when it is reasonably foreseeable that injury will probably result to one's self or to another if care is not used." *Rhoads*, 329 F. Supp. at 373.

In evaluating duty, this Court need not determine whether "the particular injury" that occurred was foreseeable, but only whether "the act is one which the party in the exercise of

ordinary care ought to have anticipated was likely to result in injury to others. . . ." *Coca-Cola Bottling Co. of Memphis v. Gill*, 352 Ark. 240, 255, 100 S.W.3d 715, 724-25 (2003); *see also Saine v. Comcast Cablevision of Ark., Inc*., 354 Ark. 492, 500, 126 S.W.3d 339, 344 (2003) (not necessary that defendant foresee the "particular injury," but only that he "reasonably foresee an appreciable risk of harm to others"). Unless there can be no reasonable difference of opinion, foreseeability is always a question for the jury. *Keck v. Am. Emp't Agency, Inc*., 279 Ark. 294, 302, 652 S.W.2d 2, 7 (1983) (citing W. PROSSER, LAW OF TORTS, § 45); *see also Cobb v. Indian Springs, Inc*., 258 Ark. 9, 19, 522 S.W.2d 383, 389 (1975) (jury question presented on foreseeability and intervening causes).

Arkansas law recognizes that statutory and regulatory obligations constitute "evidence of the types of considerations that should bear on the reasonable person" in exercising ordinary care. *Koch v. Northport Health Servs. of Ark*., LLC, 361 Ark. 192, 208, 205 S.W.3d 754, 766 (2005). Thus, as Distributor Defendants concede, (Distr. Joint MTD, at 15), the violation of "regulations can be evidence of negligence to be considered along with the other facts and circumstances in the case." *Id*. (citing ARK. MODEL JURY INST., Civil AMI 601[4]). Arkansas precedent is replete with examples of this principle. *See* ARK. MODEL JURY INST., Civil AMI 601, *Comment*.[5]

[4] ("A violation of [this] [one or more of these (number)] [statute(s)][ordinance(s)][regulation(s)], although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.").

[5] (citing *Koch v. Northport Health Services of Ark.*, LLC, 361 Ark. 192, 205 S.W.3d 754 (2005) (Code of Federal Regulations governing nursing homes); *Berkeley Pump Co. v. Reed-Joseph Land Co*., 279 Ark. 384, 653 S.W.2d 128 (1983) (violation of ARK. CODE ANN. § 4-88-107); *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977) (violation of federal gun control law); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976) (OSHA safety regulation); *Bussell v. Missouri Pac. R. Co*., 237 Ark. 812, 376 S.W.2d 545 (1964) (I.C.C. safety regulation).

Defendants' statutory and regulatory obligations go hand-in-hand with foreseeability. In fact, the foreseeability of widespread harm to Arkansas public health through addiction, abuse, and diversion is the very reason that Arkansas and federal authorities enacted laws to prevent addiction, abuse, and diversion. (*See* SAC, at ¶¶ 421, 429) (explaining that the Arkansas CSA and UNDA deem opioids as drugs with "high potential for abuse," that "may lead to severe psychic or physical dependence," and are "promotive of addiction-forming or addiction-sustaining results upon the user which threaten harm to the public health [and] safety"). Under these laws, Manufacturer and Distributor Defendants are a limited class of registrants in a closed distribution system allowing them to manufacture, sell, and maintain exclusive control over dangerous and addictive drugs. (*See id*.). Defendants' privilege places them in a position of great trust and grave responsibility: namely, their obligations to exercise and maintain control over the distribution of their opioid products throughout the supply chain such that they do not cause foreseeable harm to public health through addiction, abuse, and diversion. (*Id*. at ¶¶ 17, 29, 310, 316-322, 375-394). Fully consistent with Arkansas law, these obligations represent "the types of considerations that should bear on the reasonable" opioid manufacturer and distributor in evaluating whether its failure to exercise adequate control over opioid distribution could cause foreseeable injury. *Koch*, 361 Ark. at 208.

(1) The "special relationship" rule does not apply in this case because it does not concern a duty to control the actions of third parties.

Both Manufacturer and Distributor Defendants wrongly confine the question of their duties to the "special relationship" rule, which states that "one is ordinarily not liable for the ***acts of another*** unless a special relationship exists." *First Commercial Trust Co. v. Lorcin Engineering, Inc*., 321 Ark. 210, 215, 900 S.W.2d 202, 204 (1995) (emphasis added); (Mfr. Joint MTD, at 17; Distr. Joint MTD, at 18). This rule stands for nothing more than the well-established

principle that a person generally has no affirmative duty "***to control the actions of another person***," absent a special relationship (a) between the defendant and the third party, "such as master and servant," that gives the defendant a duty to control the third party; or (b) between the defendant "and the victim which gives the victim the right to protection." *Tackett v. Merch.'s Sec. Patrol*, 73 Ark. App. 358, 362, 44 S.W.3d 349, 352 (2001). Defendants' reliance on the special relationship rule fails for two reasons: (1) Plaintiffs root their negligence claims in Defendants' ***own acts*** in failing to exercise ordinary care; and regardless, (2) the special relationship rule does not absolve Defendants where their failure to exercise ordinary care contributes to foreseeable third-party harm.

As the Arkansas Supreme Court recognizes, the "special relationship" rule is consistent with § 315 of the Restatement (Second) of Torts, which similarly states that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another" absent a "special relation" of the same two types recognized in Arkansas case law. *Shepherd v. Washington Cty*., 331 Ark. 480, 499, 962 S.W.2d 779, 787 (1998) (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS, § 315 (Am Law. Inst. 1965)). But the same Restatement and Arkansas precedent recognize the difference between (a) the duty to control third parties and (b) one's duty of ordinary care regarding ***his own conduct*** that increases the risk of third parties causing harm. For their part, §§ 302A and 302B of the Restatement provide that "[a]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another ***through the negligent or reckless conduct of . . . a third person***[,]" or "***through the conduct of . . . a third person*** which is intended to cause harm, even though such conduct is criminal." RESTATEMENT (SECOND) OF TORTS, §§ 302A, 302B (emphasis added); *see*

also Sw. Bell Tel. Co. v. Adams, 199 Ark. 254, 133 S.W.2d 867 (1939) (illustration 6 to § 302B, where defendant is liable after removing locks to building later damaged by third parties).

Section 302B's *Comment e* explicitly recognizes that a defendant is required to anticipate and guard against third party conduct, not only when there is a special relation to the victim, but also "where the actor's ***own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct***, which a reasonable man would take into account." *Id*. at § 302B, cmt. e (emphasis added). If any confusion remained, the Third Restatement further clarified:

> Section 315 of the Restatement Second of Torts contributed to frequent judicial pronouncements . . . that absent a special relationship an actor owes no duty to control third parties. ***Section 315, however, must be understood to address only an affirmative duty to control third parties. It did not address the ordinary duty of reasonable care with regard to conduct that might provide an occasion for a third party to cause harm.***

RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM, § 37, cmt. d (Am. Law Inst. 2012) (emphasis added). Based on this distinction, the United States District Court for the Western District of Washington recently denied Purdue Pharma's motion to dismiss on the same argument that Defendants make here. *See Everett* 2017 WL 4236062, at *3-4 ("special relationship" not required because plaintiff alleged Purdue's acts created risk of harm, even from third party conduct). Similarly, a West Virginia Circuit Court held that governmental plaintiffs stated valid negligence claims against opioid manufactures and distributors for their "affirmative conduct" in distributing large amounts of opioids to pill mill pharmacies when they knew or should have known that such amounts in such areas created an unreasonable risk of harm to others in the form of increased crime and other public health dangers. *See West Virginia v. AmerisourceBergen Drug Corp.*, No. 12-C-141 (W.V. Cir. Ct. Boone Cty. Dec. 12, 2014).

This distinction is also on display in Arkansas precedent, including gun sale cases *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977) and *First Commercial Trust Co. v. Lorcin Engineering, Inc.*, 321 Ark. 210, 900 S.W.2d 202 (1995). While both Manufacturer and Distributor Defendants deem *Lorcin* instructive as to why they owed no duty, the opposite is true. (See Mfr. Joint MTD, at 17-18; Distr. Joint MTD, at 18-19).

Decided first, *Franco* involved a retailer's liability for selling a secondhand pistol to a fugitive prisoner who later shot and killed the decedent. 261 Ark. at 145. The retailer made the sale in violation of federal statutes and regulations requiring, among others, the purchaser's driver's license and his certification of having no prior felony convictions. *Id*. at 145-46. The court observed Congress's goal in passing these laws to alleviate its concern with widespread trafficking in firearms and to prevent their distribution to criminals and other illegal channels. *Id*. Noting that the retailer's regulatory violations constituted evidence of negligence, the court had "no doubt" that a genuine issue of fact existed for the retailer's liability. *Id*. at 147.

With no discussion of a "special relationship" between the retailer and defendant, or between the retailer and decedent, the *Franco* court further explained,

> On the issue of foreseeability, we need say only that ***the very purpose of the law is to keep pistols out of the hands of such persons as [the purchaser]***, who was both a convicted criminal and a fugitive from justice. ***It certainly cannot be said that this use of the gun in such a way as to injure others was not foreseeable. Of course it is not required that the precise sequence of events leading to the injury be foreseeable.***

Id. at 147 (emphasis added). But the *Franco* court found no liability for the national chain store Western Auto Supply Company. *Id*. As the court explained, the retailer was a home-owned franchise of Western Auto, meaning the retailer reserved to itself ownership and control of the store in the franchise agreement. *Id*. More critically, the retailer—not Western Auto—held the federal license to sell guns, and only the retailer violated federal regulations in selling the pistol.

Id. For these reasons, Western Auto had no duty evidenced by statute and no duty under a theory of agency or joint venture because it lacked control over the retailer's actions. *Id*.

The Arkansas Supreme Court decided *Lorcin* almost 20 years later. *Lorcin* was a virtually identical case involving a shooting death after the perpetrator purchased a handgun from a pawn shop. 321 Ark. at 211-12. This time, the plaintiff also sued the gun manufacturer. *Id*. Alleging that it failed to give safe sales policies and warn of potential gun misuse, the plaintiffs argued that the gun manufacturer should "bear similar responsibility" to retailers, such as the one liable in *Franco*. *Id*. at 213-14. The *Lorcin* court rejected this argument and recognized that the basis of the *Franco* retailer's liability was its failure to comply with federal gun control laws, which was evidence of negligence. *Id*. at 214. Similar to the national chain in Franco, however, no federal or state law obligations evidenced a duty on the manufacturer. *Id*. With no liability regarding its own conduct, the manufacturer also could not be liable for the conduct of the retailer or the shooter absent a "special relationship." *Id*. Like in *Franco*, the plaintiff's case against the retailer became fully triable, despite the *Lorcin* court's acknowledgement that there was "no 'special relationship' between" it and the gun purchaser. *Id*. at 216.

Defendants' reliance on *Lorcin*'s special relationship rule thus requires a shallow and incorrect reading of the case. Despite having no special relationship with the victims or gun purchasers, both the *Lorcin* and *Franco* retailers had to face the jury on the issue of negligence. The fact that a third party carried out the shooting did not change this outcome. The reason is simple: the retailers were liable for their ***own conduct*** in failing to exercise ordinary care—as evidenced by their violating federal regulations. The harm resulting from the retailer's conduct was foreseeable, even though carried out by a third person, because "the very purpose of the law is to keep pistols out of the hands of such persons." *Franco*, 261 Ark. at 147.

The same reasoning applies to both manufacturers and distributors of opioid pharmaceutical products. ***Arkansas law does not leave it to retail pharmacies alone to maintain controls against opioid diversion.*** *See* ARK. CODE. ANN. §§ 5-64-101, *et seq.*; 20-64-201, *et seq.*; ARK. ADMIN. CODE §§ 007.07.1-I, *et seq.* ***Rather, it assigns this responsibility to every link in the supply chain, including the Moving Defendants***. *Id.* As did the retailers in *Lorcin* and *Franco,* Manufacturer and Distributor Defendants carry licenses to manufacture and distribute opioids in Arkansas, and those licenses subject them to specific statutory and regulatory obligations, including the obligation to exercise and maintain effective controls over their opioid distribution, "the very purpose of" which is to prevent opioid abuse and diversion. *Franco,* 261 Ark. at 147. Plaintiffs plead the existence of these laws and that Defendants regularly violated them. Thus, unlike in *Lorcin*, Plaintiffs do not simply suggest that Defendants' ***should "bear similar responsibility"*** with downstream retailers despite them having no legal obligation to do so. To the contrary, that responsibility undisputedly exists in this case: not from Plaintiffs' suggestion, but from Arkansas law itself. This is evidence of negligence—i.e., duty and breach—under Arkansas law that resulted in foreseeable injury to Plaintiffs, the protectors of public health.

(2) Plaintiffs allege that Defendants failed to exercise and maintain effective controls against opioid diversion in violation of Arkansas regulations.

Plaintiffs allege that Defendants' breached their duties of ordinary care by violating the Arkansas Controlled Substances Act, Uniform Narcotic Drug Act, and accompanying regulations passed by the Arkansas Department of Health. (SAC, at ¶¶ 374-396). One such regulation, ARK. ADMIN. CODE § 007.07.2-II-III, requires all Defendants to maintain effective controls against diversion.

While Distributor Defendants acknowledge that statutory and regulatory violations can evidence negligence under Arkansas law, they briefly argue that Plaintiffs have not alleged that Defendants violated any laws. (Distr. Joint MTD, at 15-16). With respect to § 007.07.2-II-III, Distributor Defendants contend that, because the regulation's title is "Security Requirements" and it addresses diversion in the context of "physical security," the regulation is somehow inapplicable. This strained argument lacks plausibility.

Section 007.07.02-II-III states in its entirety:

> Security Requirements
>
> A. All ***practitioners***[6] shall provide effective controls and procedures to guard against theft ***and diversion*** of controlled substances. Controlled substances listed in Schedules I, II, III, IV, V, and VI, shall be stored under double-lock security in a substantially constructed, permanently mounted cabinet. However, pharmacies may disperse controlled substances in Schedule II-V throughout the prescription area stock of non-controlled substances in such a manner as to obstruct the theft or diversion of the controlled substances.

ARK. ADMIN. CODE § 007.07.2-II-III (emphasis added). There can be no genuine dispute that the term "diversion" clearly extends beyond the concept of physical security. As the General Assembly used it in the state's Controlled Substances Act, "diversion" means to something "other than a legitimate medical, scientific, or industrial channel." ARK. CODE ANN. § 5-64-415(e)(1)(B)(i). This is also plain in its distinction from "theft." *See* ARK. ADMIN. CODE § 007.07.2-II-III. Clearly, "diversion" occurs when Defendants either cause or allow their opioids to be used for illegitimate, non-medical and non-scientific purposes. Examples include illegitimate prescriptions to maintain an addict, forged prescriptions, under the counter sales, and street sales.

[6] That is, "[a] physician . . .[,] pharmacy, hospital or related institution, manufacturer, wholesaler, distributor or other institution or facility, licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in Arkansas." ARK. ADMIN. CODE § 007.07.2-II-I.

Read as Distributor Defendants would have it, the regulation becomes a farce. It is inconceivable that opioid manufacturers and distributors maintain effective controls against diversion by simply locking opioids in cabinets, while turning a blind eye at best, or willfully concealing at worst, blatant red flags in downstream orders to reap the profits. In reality, Distributor Defendants know that effective controls go far beyond that. It is the same phrase in virtually every state's controlled substances act and the federal counterpart. In fact, the D.C. Circuit has already rejected this ***identical*** argument as applied to the federal "effective controls" regulation in 21 C.F.R. § 1301.71. *See Masters Pharm., Inc. v. Drug Enf't Admin.*, 861 F.3d 206, 222-23 (D.C. Cir. 2017) (upholding DEA's revocation of opioid distributor's license and rejecting distributor's argument that "effective controls" are only physical security requirements and "do not require a distributor to perform due diligence on customers").

Plaintiffs cannot omit that all three Distributor Defendants have paid the DEA millions of dollars in penalties and/or had their licenses suspended for failing to protect against opioid diversion. (SAC, at ¶¶ 306-308). That they still minimize this responsibility is both alarming and outrageous.

b. Plaintiffs pleaded facts to support gross negligence.

There is no sound reasoning behind Distributor Defendants' offhand claim that Plaintiffs have failed to plead gross negligence. (*See* Distr. Joint MTD, at 21). Sharing common elements with simple negligence, gross negligence is distinct only in that it is "the failure to use even slight care." *Spence v. Vaught*, 236 Ark. 509, 512, 367 S.W.2d 238, 240 (1963); *see also Doe v. Baum*, 348 Ark. 259, 278, 72 S.W.3d 476, 487 (2002) (quoting *Gross Negligence*, BLACK'S LAW DICTIONARY 1033 (6th ed. 1990) (gross negligence is an "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another"). Distributor Defendants simply ignore the allegations saturating the SAC that they

failed to exercise even slight care in knowingly failing to police their opioid supply in the face of known diversion. (*See, e.g.*, SAC, at ¶¶ 288-326). This unsupported argument should be rejected.

2. Plaintiffs state a claim for common law public nuisance.

The Arkansas Supreme Court defines a common law public nuisance as "that which affects the people and is a violation of a ***public right***, either by a direct encroachment upon public property ***or by doing some act which tends to a common injury or by the omitting of that which it is the duty of a person to do***." *City of Fort Smith v. W. Hide & Fur Co*., 153 Ark. 99, 239 S.W. 724, 725 (1922) (emphasis added) (quoting *Town of Lonoke v. Chicago, R.I. & P.R. Co.*, 92 Ark. 546, 123 S.W. 395, 398 (1909)); *see also Ex parte Foote*, 70 Ark. 12, 65 S.W. 706, 707 (1901) (defining public nuisance as "that class of wrongs that arise from" unlawful use of "property, real or personal, ***or*** from . . . ***improper, indecent, or unlawful personal conduct***. . . .") (emphasis added) (citation omitted). "[R]ight[s] in which the public in general has an interest . . . belong to the public" as opposed to private rights which are rights "where the public has no such interest." *Ark. Dep't of Envtl. Quality v. Brighton Corp*., 352 Ark. 396, 412–13, 102 S.W.3d 458, 469 (2003) (quoting *Alcorn v. Ark. State Hosp*., 236 Ark. 665, 367 S.W.2d 737 (1963), *in turn* quoting *Jensen v. Fordyce Bath House*, 209 Ark. 478, 190 S.W.2d 977 (1945)).

Under the common law, a public nuisance is "founded upon wrongs that arise from the unreasonable, unwarrantable, or unlawful use of property, ***or from improper, indecent, or unlawful conduct, working an obstruction or injury to the public and producing material annoyance, inconvenience, and discomfort founded upon a wrong.***" *Fort Smith*, 153 Ark. 99, 239 S.W. at 725. (emphasis added). Such "improper, indecent, or unlawful conduct" may constitute a public nuisance when it affects "privileges of the public, ***or the public health***." *Lyric Theatre Co. v. State*, 98 Ark. 437, 136 S.W. 174, 175 (1911) (emphasis added). Licensure for a given activity does not bar a public nuisance claim, as a license gives no right to conduct

activities "in a manner so as to constitute a public nuisance." *Fort Smith*, 153 Ark. 99, 239 S.W. at 726.

In Arkansas and as sought by this case, government protects and vindicates public rights. A "political subdivision represents the public at large [concerning] rights belonging to the public and pertaining purely to governmental affairs." *Brighton*, 352 Ark. at 412-13 (quoting *Alcorn*, 236 Ark. 665, *in turn* quoting *Jensen*, 209 Ark. 478).

a. Plaintiffs sufficiently pleaded Defendants' interference with a public right.

Ignoring the SAC, both Manufacturer and Distributor Defendants argue that Plaintiffs have failed to allege an interference with a public right. (Mfr. Joint MTD, at 26; Distr. Joint MTD, at 9-12).To the contrary, Plaintiffs allege a coordinated campaign by the Manufacturer Defendants to convince the medical community that opioids were safe while trivializing their risks. (*See* SAC, at ¶¶ 179-287).Further, all Defendants failed to provide effective controls against opioid diversion; and instead, they flooded Arkansas with opioids, created widespread abuse and diversion, and spread the disease of addiction that fuels Arkansas's opioid epidemic. (*Id*. at ¶¶ 288-493). Plaintiffs allege, e.g.,

- that Defendants flooded Arkansas with far more opioids than could conceivably be used for legitimate medical purposes; indeed, enough for every man, woman, and child to have 80 opioid pills per year, (*see* SAC at ¶¶ 5);
- that Arkansas is a top recipient of wholesale opioids of four different types, (*see id.* at ¶ 7);
- the grossly inflated number of opioid prescriptions in the state make Arkansas number two in the nation in opioid prescriptions per person, (*see id*. at ¶¶ 5
- that Arkansas ranks first in the nation for ages 12 to 17 in misuse of painkillers, (*see id.* at ¶ 10);
- the alarming increase in rates of hospital visits due to opioid-related problems and neonatal abstinence syndrome, (*see id.* at ¶¶ 9, 12, 16);

- the tripling of overdose deaths in Arkansas between 2000 and 2015, during a time in which prescription opioid sales quadrupled, (*see id.* at ¶ 4);
- the 73% increase of children in foster care in just one year, over half of which was due to parental drug abuse, with opioids a substantial factor (*see id.* at ¶ 11); and
- the rapid, eight-fold increase of heroin users in the State, 80% of whom started on prescription opioids, (*see id.* at ¶12).

That is widespread and well-documented devastation to Arkansas public health and safety caused by Defendants' failure to carry out their duties, which fueled the spread of the disease of opioid addiction in Arkansas. (*See id.*). Defendants' objection that holding them liable under public nuisance law would be "unprecedented" rings hollow in the face of the correspondingly unprecedented destruction they wrought. Taken as true, as they must be, these pleadings sufficiently allege an ongoing threat to Arkansas public health.

Defendants' claim that these allegations merely blend "private rights of individuals" fails in the face of Plaintiffs' straightforward allegations. To be sure, a multitude of Plaintiffs' citizens have been harmed in a variety of ways by Arkansas's opioid crisis, but Plaintiffs do not seek to recover for individual personal injuries. Plaintiffs' allegations instead show that they seek to recover for the increased costs they have borne, and will continue to bear—and need to bear, but for a lack of revenue—in bringing this crisis to an end. (*See, e.g.*, SAC, at ¶¶ 122-23, 395 (alleging increased costs for emergency response, law enforcement, addiction treatment, incarceration, court administration, new and accelerated economic blight, diminished property values, and lost tax revenue)). Plaintiffs' Prayer for Relief makes this even clearer. (*See id.* at p. 129-30).

But even if Plaintiffs based their public nuisance claim on the theory that a large number of individuals were affected by the opioid crisis, that would still be sufficient under Arkansas law. Even the Restatement that Defendants rely on acknowledges that a public nuisance

"involves a significant interference with the public health" or "public safety," and it may be something that "affect[s] the health of so many persons so as to involve the interests of the public at large". RESTATEMENT (SECOND) OF TORTS § 821B (2)(a) and cmt. g. The same section of the Restatement recognizes *Fort Smith* as Arkansas precedent of an "interference with some public right when a considerable number of people are affected in their private rights." *Id.*, cmt. g.

b. Common law public nuisance does not require "interference with property by a landowner."

Going a step further than the Manufacturer Defendants who argue that Plaintiffs have failed to allege an interference with a public right, Distributor Defendants complain that Plaintiffs cannot bring a public nuisance claim under Arkansas common law absent a landowner's interference with another's use and enjoyment of property. (Distr. Joint MTD, at 7-8). This argument is incorrect and a sleight of hand blending of two nuisance definitions.

In manufacturing this argument, Defendants cite several Arkansas cases defining "nuisance" as an interference with another's use and enjoyment of property. (*Id*. at 7) (citing *Milligan v. Gen. Oil Co*., 293 Ark. 401, 738 S.W.2d 404, 405 (1987); *Ark. Release Guidance Found. v. Needler*, 252 Ark. 194, 477 S.W.2d 821 (1977)). Defendants erroneously conclude that the definition of public nuisance is an interference with a large number of people's use and enjoyment of property. This is wrong for several reasons.

First, Distributor Defendants' position is one of self-contradiction that even Manufacturer Defendants do not join. On the one hand, Distributor Defendants—correctly—define public nuisance as an interference with a public right, invoking Arkansas's definition and that of the Restatement. (*See id.* at 9-10) (citing *Ozark Poultry Prods., Inc. v. Garman*, 251 Ark. 389, 472 S.W.2d 714, 715-16 (1971); RESTATEMENT (SECOND) OF TORTS, § 821B). On the other hand, they claim that public nuisance is the same "interference" at issue in a private nuisance—i.e.,

with the "peaceful, quiet, and undisturbed use and enjoyment of property." (Distr. Joint MTD, at 7-8). ***Distributor Defendants cannot have it both ways***, and the very Restatement they cite does not allow this contradiction. *See* RESTATEMENT (SECOND) OF TORTS, § 821B, cmt. h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."). *Accord Fort Smith, supra* (finding public nuisance in noxious odors and insects harming both nearby business owners and members of the public in the vicinity "for any purpose"); *Gaines v. Waters*, 64 Ark. 609, 44 S.W. 353 (1898) (allowing abatement of nuisance endangering public health of entire city). The Restatement's definition is also in complete agreement with that of Arkansas. *Compare* RESTATEMENT (SECOND) OF TORTS, § 821B (public nuisance may be "conduct [that] involves a significant interference with the public health [or] safety") *with Fort Smith*, 153 Ark. 99; *Lyric Theatre*, 98 Ark. 437; *Gaines*, 64 Ark. 609 (same).

Second, a page of history is worth a volume of logic. The "extent of the injury" distinction between public and private nuisance originated in *Fort Smith, supra*. *See Milligan*, 293 Ark. at 404 (quoting *Needler*, 252 Ark. at 196, *in turn* citing *Fort Smith*, 153 Ark. 99 ("The distinction between a public and private nuisance lies merely in the extent of the injury or annoyance which results therefrom."")). But in that same case, the Arkansas Supreme Court observed two ***different*** definitions of private and public nuisance. First defining private nuisance, the court stated,

> "It is the duty of every one to so use his property as not to injure that of another; and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built or used ***as to destroy the comfort of persons owning and occupying adjoining premises***, creating an annoyance which renders life uncomfortable; and it may be abated as a nuisance."

Fort Smith, 153 Ark. 99, 239 S.W. at 725 (emphasis added) (quoting *Durfey v. Thalheimer*, 85 Ark. 544, 109 S.W. 519, 521-22 (1908) (private nuisance case by homeowner against owner of neighboring property planning to build livery stable). *Accord* RESTATEMENT (SECOND) OF TORTS,

§ 821D ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."). The court then provided the definition of ***public nuisance***: again, "'that which affects the people and is a ***violation of a public right, either*** by a direct encroachment upon public property ***or*** by ***doing some act*** which tends to a common injury or by the omitting of that which it is the duty of a person to do.'" *Fort Smith*, 153 Ark. 99, 239 S.W. at 725 (emphasis added) (quoting *Lonoke*, 92 Ark. 546). The court found it "unnecessary to give any further definitions of a public or private nuisance." *Id*.

The *Fort Smith* court's application of this public nuisance definition is also demonstrative. There, the City of Fort Smith filed suit against a hide and fur business in the city's business district, claiming that it gave off offensive odors, attracted flies, and endangered the health of the public such that it constituted a public nuisance. 153 Ark. 99, 239 S.W.2d at 725. Numerous witnesses testified as to the odors, including the City Commissioner and member of the district board of health. *Id*. at 726. Finding the odors and public health hazard to constitute a public nuisance, the court concluded:

> A careful consideration of the testimony leaves no escape from the conclusion that the place of business maintained by the appellee was offensive to those who came into the immediate neighborhood. There were bad odors which were easily detected and which were sufficient to constantly annoy those who were engaged in business in the locality ***or who came there for any purpose***.

Id. (emphasis added).

Fort Smith illustrates the substantive difference between public and private nuisance. If an "injury or annoyance is sufficient in extent to become common to all persons within its influence, it is of a public nature. . . ." *Id*. at 725. Thus, not only were the odors and insects a public nuisance for interfering with the business owners' property rights, but also for interfering with the public health and comfort—including members of the public "***within its influence . . . for any purpose***." *Id*. at 725-26 (emphasis added). Similarly, the Arkansas Supreme Court in

Gaines recognized a city's authority to abate a public nuisance to protect the public health from the threat of smallpox. 64 Ark. 609. The court further confirmed that conduct endangering the public health can constitute a public nuisance in *Ark. State Bd. of Architects v. Clark.* 226 Ark. 548, 550-51, 291 S.W.2d 262, 263-64 (1956) (public health is additional grounds for public nuisance, but refusing to find unlicensed practice of architecture a public nuisance absent allegations that the defendant's conduct endangered the public health).

Fort Smith and *Gaines* are dispositive—nearly every governmental and medical authority, including the National Institute on Drug Abuse, American Medical Association, and American Society of Addiction Medicine, deems addiction a disease. To wit, "[a]ddiction is a primary, chronic ***disease*** of brain reward, motivation, memory, and related circuitry."[7] This disease manifests itself in individuals "pathologically pursuing reward and/or relief by substance use and other behaviors."[8] A hallmark of addiction is one's "inability to consistently abstain [and] impairment in behavioral control[;]"—i.e., the inability to stop taking addictive drugs.[9] For this very reason, the Arkansas Legislature labels opioids as "promotive of addiction-forming or addiction-sustaining results upon the user which ***threaten harm to the public health [and] safety***." (ARK. CODE ANN. §§ 20-64-201 (8)(A); 5-64-101(16)(A)(ii)(a)). (emphasis added). Under clear Arkansas authority, Plaintiffs have stated quintessentially valid public nuisance claims against Defendants for failing to control the opioid supply, the "omitting of that which it

[7] American Medical Association, *Definition of Addiction* (April 12, 2011) (emphasis added), *available at* https://www.asam.org/resources/definition-of-addiction; *see also* National Institute on Drug Abuse, *The Science of Drug Abuse and Addiction: The Basics* (updated Oct. 2016) (defining addiction as a chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences"), *available at* https://www.drugabuse.gov/publications/media-guide/science-drug-abuse-addiction-basics

[8] American Society of Addiction Medicine, *Public Policy Statement: Definition of Addiction* (April 12, 2011), *available at* https://www.asam.org/resources/definition-of-addiction.

[9] *Id.*

is the duty of a person to do[,]" *Fort Smith*, 239 S.W. at 725,and oversupplying known illegitimate channels, spreading addiction that causes "harm to the public health [and] safety."ARK. CODE ANN. §§ 20-64-201(8)(A); 5-64-101(16)(A)(i).

c. "Control at the time of injury" is not an element of public nuisance in Arkansas, but Defendants nonetheless controlled the flood of opioids that is the basis of Plaintiffs' public nuisance claim.

In another failed attempt to evade liability, Distributor Defendants argue they cannot be liable because they did not control the nuisance-causing opioid supply "at the time of injury." (Distr. Joint MTD, at 11-12). First, this argument fails as a matter of law because control at the time of injury is not an element of public nuisance under Arkansas law. Second, and more importantly, this argument is irreconcilable with Plaintiffs' allegations that the nuisance ***is*** the over-supply of addictive opioids that Defendants' continually poured into Arkansas in violation of their duties. (*See* SAC, at 12-13).

Stating that nuisance requires "control[] of the instrumentality of the nuisance at the time it was created," Distributor Defendants notably fail to cite a single Arkansas case for what they deem "hornbook law." (Distr. Joint MTD, at 12). Instead, they cite non-binding and inapposite cases involving defective products with no continuing wrongful conduct and two gun cases where, unlike here, the manufacturers had no legal obligation to control supply and guard against their misuse. (*Id*. at 12-13). In any event, many jurisdictions have rejected this so-called black letter law. See, e.g., *N.J. Dept. of Envtl. Prot. & Energy v. Gloucester Envtl. Mgmt. Servs., Inc.*, 821 F. Supp. 999, 1012-13 (D.N.J. 1993) ("It is enough for a nuisance claim to stand that the [defendants] allegedly contributed to the creation of a situation which . . . unreasonably interfered with a right common to the general public."); *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 306 (2006) ("[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate

the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance."); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003) (rejecting control at time of injury as requirement for public nuisance claim); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002) ("Contrary to appellees' position, it is not fatal to appellant's public nuisance claim that appellees did not control the [nuisance instrumentality] at the moment the harm occurred."); *State v. Fermenta ASC Corp.*, 608 N.Y.S. 2d 980, 985 (N.Y. Sup. Ct. 1994) (lack of control over an herbicide at time of injury to public occurred does not preclude public nuisance action against manufacturer); *Orancio v. Arinofsky*, 5 Conn. Supp. 231, at *2 (1937) ("It is sufficient that [the defendant] is responsible in any way for the creation or maintenance of the nuisance."). Distributor Defendants' fabricated, extra public nuisance element is neither "hornbook law" nor recognized in Arkansas case law.

Regardless, Defendants do control the overwhelming supply of opioids that they ship into Arkansas—creating the disease of opioid addiction in the State—in violation of the regulations obligating them to control it. Where Plaintiffs allege that Defendants continue to supply opioids to known illegitimate channels, Defendants' claim that they have no responsibility strains credulity and subverts equity's purpose to provide abatement for unreasonable interferences with the public health.

d. Plaintiffs' common law public nuisance claims are not abrogated by statute.

On no authority but their own, Distributor Defendants make a final argument that Plaintiffs' "lack ***statutory*** authority" to bring ***common law*** public nuisance claims. (Distr. Joint MTD, at 14) (emphasis added). The only conceivable basis for their argument would be the common law's abrogation by statute. This argument crumbles under the weight of the "long recognized . . . rule that statutes in derogation of the rules of the common law are strictly

construed by [Arkansas courts]." *Wright v. Wright*, 248 Ark. 105, 108, 449 S.W.2d 952, 953 (1970).

"Although the General Assembly has the power to alter the common law, a legislative act will not be construed as overruling a principle of common law unless it is made plain by the act that such a change in the established law is intended. *Books-A-Million, Inc. v. Ark. Painting and Specialties Co.*, 340 Ark. 467, 470, 10 S.W.3d 857, 859 (2000) (citing *Hartford Ins. Co. v. Mullinax*, 336 Ark. 335, 984 S.W.2d 812 (1999)). Thus, "[h]ad the General Assembly by [the statutes cited by Defendants] intended to abrogate the common law [maxim that public nuisance law will protect against endangerment of the public health,] it should have said so. . . ." *Taylor v. State*, 220 Ark. 953, 957-58, 251 S.W.2d 588, 590 (1952). There being no evidence of such intent in the statutes that Defendants cite, their argument falls flat.

B. Plaintiffs sufficiently pleaded proximate cause.

Standards for proximate and intervening cause, and examples of their application, permeate over a century of Arkansas precedent. But rather than construct an argument applying these well-established principles, Defendants attack causation by fabricating a "direct and immediate" cause standard and attempt to cut off their responsibility for foreseeable harm under the so-called "remoteness doctrine." (See Mfr. Joint MTD, at 18-22; Distr. Joint MTD, at 22-24). Defendants' fabricated proximate cause standard is an illusion contrary to Arkansas law.

Arkansas law defines proximate cause as "that which in a natural and continuous sequence, produces damage and without which the damage would not have occurred." *Kubik v. Igleheart*, 280 Ark. 310, 312, 657 S.W.2d 545, 546 (1983) (quoting ARK. MODEL JURY INST., Civil AMI 501); *see also Ouachita Wilderness Inst., Inc. v. Mergen*, 329 Ark. 405, 414, 947 S.W.2d 780, 785 (1997). "Proximate cause may be shown from circumstantial evidence, and such evidence is sufficient to show proximate cause if the facts proved are of such a nature and

are so connected and related to each other that the conclusion may be fairly inferred." *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 375, 268 S.W.3d 905, 916 (2007) (citing *Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999)).

Arkansas "case law is replete with the proposition that causation is ***almost always*** a question of fact for the jury and not appropriate for summary judgment," much less a motion to dismiss. *Green v. Alpharma, Inc*., 373 Ark. 378, 395, 284 S.W.3d 29, 42 (2008) (emphasis added); *see also Mergen*, 329 Ark. at 414 (proximate cause "is usually an issue for the jury to decide"). Proximate cause becomes a question of law only in the rare case in which "reasonable minds could not differ," but "when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury." *Id*.

In the SAC, Plaintiffs set out many facts from which a jury could conclude that Defendants' acts and omissions are a proximate cause of Plaintiffs' injuries. (*See, e.g.*, SAC at ¶¶ 3-12; 15-17; 20-29; 122a-h; 123a-e; 235-237; 273-287; 289-323; 379; 382-397; 399-416; 420-427; 430-436; 438-446; 449-457; 460-466; 468-476; 479-490). These allegations also identify foreseeable harms caused by Defendants' breach of their duties, including the governmental costs Plaintiffs incurred and will incur as a result of Arkansas's opioid crisis. (*See id.*). Plaintiffs' injuries arose as a natural and probable result of Defendants' conduct and would not have occurred without it. A properly instructed jury could conclude that Defendants' acts in failing to control opioid supply as required by law caused the opioid epidemic that is devastating Arkansas.

1. Third party acts do not break the causal chain.

Both Manufacturer and Distributor Defendants argue that third-party actors, such as retailers illegally dispensing opioids, doctors writing illegitimate prescriptions, and those involved in the illegal street market, preclude Defendants' misconduct from serving as a

proximate cause to Plaintiffs' injuries. (Mfr. Joint MTD, at 18-22; Distr. Joint MTD, at 22-24). Whether third-party conduct breaks the causal chain is a question for well-established Arkansas principles of intervening cause, but these principles are conspicuously absent from Defendants' briefing. In any event, Arkansas law is clear: when all actors within the chain of opioid distribution have a legal obligation to prevent diversion, all actors within that chain are responsible for any diversion that results, because diversion is entirely foreseeable when "effective controls" are absent. Thus, in no instance did the causal chain break.

Defendants base their argument on the imaginary premise that "Arkansas law generally holds that a plaintiff cannot establish causation when there is an intervening 'immediate and direct cause' of the injury. . . ." (Mfr. Joint MTD, at 22) (quoting *Lovell v. Brock*, 330 Ark. 206, 216, 952 S.W.2d 161, 166 (1997)). But the Arkansas Supreme Court has expressly recognized ***rejected*** that standard. *See Shannon v. Wilson*, 329 Ark. 143, 156, 947 S.W.2d 349, 356 (1997). Specifically, while reversing Arkansas's common law rule that the consumption of intoxicants, rather than their sale, was the sole proximate cause of injuries caused by intoxication, the court observed:

> The rule of nonliability predicated on the "proximate cause" of injuries being the consumption, not the sale of intoxicants, is not persuasive. ***Implicit in the common-law rule is that proximate cause must be the immediate cause. This is contrary to our cases interpreting proximate cause. This Court has held that proximate cause is the efficient and responsible cause, but it need not be the last or nearest one.***

Id. at 157 (emphasis added) (citing *Bennett v. Bell*, 176 Ark. 690, 3 S.W. 996 (1928)).

The *Shannon* court's observation finds support in a long line of Arkansas case law that Defendants simply ignore. Arkansas law does not recognize "only one [immediate and direct] cause of damage." ARK. MODEL JURY INST., Civil AMI 501. "To the contrary, if two or more causes work together to produce damage, then [a jury] may find that each of them was a proximate cause." *Id*. Where causes occur at different points in the chain of causation, original

acts of negligence remain a proximate cause if the subsequent intervening cause is reasonably foreseeable. *See, e.g., Mergen, supra*; *Shannon, supra*; *State Farm Mut. Auto Ins. Co. v. Pharr*, 305 Ark. 459, 808 S.W.2d 769 (1991); *Moody Equip. & Supply Co. v. Union Nat'l Bank*, 273 Ark. 319, 619 S.W.2d 637 (1981); *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980); *see also Chaney v. Falling Creek Metal Prods., Inc.*, 906 F.2d 1304 (8th Cir. 1990); *Collins v. Ark. Cement Co.*, 453 F.2d 512 (8th Cir. 1972); *Rhoads v. Serv.. Mach. Co.*, 329 F. Supp. 367 (E.D. Ark. 1971). As the Arkansas Supreme Court explained:

> The original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is in itself sufficient to stand as the cause of the injury and the intervening cause must be such that the injury would not have been suffered except for the act, conduct, or effect of the intervening cause ***totally independent*** of the acts or omissions constituting the primary negligence. The mere fact that other causes intervene between the original act of negligence and the injury for which recovery is sought is not sufficient to relieve the original actor of liability ***if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable. In no case*** is the connection between an original act of negligence and an injury broken by an intervening act of another ***if a person of ordinary capacity and experience, acquainted with all the circumstances, could have reasonably anticipated that the intervening event might, in the ordinary course of things, follow his act of negligence or if the negligence is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause.***

Mergen, 329 Ark. at 415 (emphasis added) (citing *Pharr*, 305 Ark. at 359); *see also* ARK. MODEL JURY INST., Civil AMI 503. In such cases, "[a]n intervening cause will not excuse the original misconduct but will be held to be the result of it." *Id*.; *see also Collins*, 453 F.2d at 513-15 (applying Arkansas law, employer liable for its employee giving cherry bomb to minor, who later gave to another minor that injured herself, as children relaying them to each other "clearly foreseeable").

Here, the conduct of downstream actors was in no way independent of Defendants' misconduct. As for physicians, not only do Plaintiffs allege that Defendants were aware of

physicians writing ***illegitimate*** prescriptions, Plaintiffs also allege that Manufacturer Defendants misled prescribing doctors by misrepresenting the risks and benefits of opioids. (*See* SAC, at 179-287). Thus, their decision to overprescribe opioids was not independent of Manufacturer Defendants' wrongdoing, but the foreseeable—indeed, the intended—result of it. The "learned intermediary" doctrine does not alter this analysis. That doctrine applies in products liability and negligent failure to warn cases and provides that, although drug manufacturers have a duty to warn of dangers posed by their drugs, they may rely on physicians to warn individual patients of the drug's risks. *West v. Searle & Co*., 305 Ark. 33, 42, 806 S.W.2d 608, 613 (1991).

Manufacturer Defendants' invocation of the learned intermediary doctrine concerning the ***duty to warn*** in ***products liability*** is entirely inappropriate to support an argument on ***proximate cause***—specifically, that individual doctors' conduct constituted independent intervening causes resulting in Plaintiffs' harm. It is the ***Manufacturer Defendants*** who "ha[ve] the burden of proving that following any act or omission on [their] part an event intervened that in itself caused damage completely independent of [their] conduct." *Benson v. Temple Inland Forest Prods. Corp*., 328 Ark. 214, 217, 942 S.W.2d 252, 254 (1997) (quoting ARK. MODEL JURY INST., Civil AMI 503). Defendants' attempt to shift this burden to Plaintiffs should be rejected, as should their improper attempt to apply the learned intermediary doctrine to causation.

Nor do the acts of individuals in the secondary market or rogue pharmacies—with whom Plaintiffs specifically allege Defendants acted in concert[10]—break the causal chain. Again, when an intervening cause,

> ***including human conduct***, . . . is ***foreseeable to the original actor*** or where his conduct ***substantially increases the likelihood of the occurrence of the intervening cause***, the original conduct, if negligent, is ***still considered to be a***

[10] (*See* SAC, at 400, 435, 446, 465, 476, 491-493).

> ***'proximate cause' of the injury***, and the original actor ***remains liable for the ultimate consequences of his negligence***."

Rhoads, 329 F. Supp. at 374 (emphasis added)[11]. Thus, the question is the same as it is with respect to physicians: whether the conduct of retailers and actors in the secondary market was a foreseeable consequence of Defendants' conduct or completely independent of it. As described in the SAC and herein, the Defendants' failure to control the opioid supply chain to prevent diversion of drugs "with high potential for abuse" was naturally the cause of widespread diversion and abuse. "On the issue of foreseeability, [this court] need say only that the very purpose of the [Arkansas drug] law[s are] to" prevent diversion of opioids to illegitimate channels and abuse. *Franco*, 261 Ark. at 147; ARK. CODE. ANN. §§ 5-64-101, *et seq.*; 20-64-201, *et seq.*; ARK. ADMIN. CODE §§ 007.07.1-I, *et seq.* Thus, "[i]t certainly cannot be said that [widespread diversion] was not foreseeable" from Defendants' failure to control opioid supply. *Id*.

a. *Ashley County* demonstrates why dismissal is inappropriate.

Both Manufacturer and Distributor Defendants rely heavily on *Ashley Cty. v. Pfizer*, 552 F.3d 659 (8th Cir. 2009),[12] a case with some similar facts but with dispositive differences. There, twenty Arkansas counties brought suit against several pharmaceutical manufacturers and distributors of cold and allergy medicine containing ephedrine or pseudoephedrine. *Id*. at 662-63. The counties alleged that the defendants marketed and sold the medicines in the state knowing

[11] (citing *Hartsock v. Forsgren, Inc*., 236 Ark. 167, 365 S.W.2d 117 (1963); *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949); *Sw. Bell Tel. Co. v. Adams*, 199 Ark. 254, 133 S.W.2d 867 (1939); *Walton v. Sherwin-Williams Co*., 191 F.2d 277 (8th Cir. 1951); *Lowden v. Shoffner Mercantile Co*., 109 F.2d 956 (8th Cir. 1940); *Kisor v. Tulsa Rendering Co*., 113 F. Supp. 10 (W.D. Ark. 1953)).

[12] As discussed further below, both Manufacturer and Distributor Defendants improperly rely on the district court's decision in *Independence County*, based on the "remoteness doctrine" derived from federal RICO cases. The Eighth Circuit did not adopt this reasoning and instead relied on proximate cause. These are distinct concepts that Distributor Defendants also improperly conflate in their briefing. (*See* Distr. Joint MTD, at 22-23.)

that meth cooks were using it to illegally manufacture the street drug methamphetamine. *Id*. at 663. They further alleged that the defendants should have voluntarily placed limitations on retailers in the manner and number of medicines they could sell before the DEA implemented the same measures in 2005. *Id*. at 664. Despite recognizing that the manufacture and distribution of ephedrine and pseudoephedrine was regulated at the state and federal level, ***the counties did not allege that any defendant violated any such laws***. *Id*. After the district court dismissed the claims in *Independence Cty. v. Pfizer, Inc.*, 534 F. Supp. 2d 882 (E.D. Ark. 2008), sixteen counties appealed to the Eighth Circuit. *Ashley County*, 552 F.3d at 663.

Applying Arkansas principles of proximate and intervening cause, the Eighth Circuit asked whether the intervening causes, including meth cooks taking ephedrine from cold medicine to illegally create meth and sell it on the street, were "the natural and probable consequences of the Defendants' sales of cold medicine to retail stores and whether the Counties' expenditures for government services to deal with the methamphetamine epidemic 'might reasonably have been foreseen to the cold medicine manufacturers as probable.'" *Id*. at 668 (quoting *Shannon*, 329 Ark. at 157).

Without Arkansas decisions on point, the Eighth Circuit compared the counties' claims to cases against gun manufacturers. The court first noted similarities to *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 426 (3d Cir. 2002), where the city failed to establish proximate cause between the sale of firearms in compliance with all laws and the city's costs in combatting gun crime. *Ashley County*, 552 F.3d at 669. The Eighth Circuit noted the importance of the fact that gun manufacturing was highly regulated, and "[c]ritical to the Third Circuit's analysis was the 'long and tortuous' route the guns took from the manufacturers, ***who complied with the law in selling the guns***, to the streets of Philadelphia." *Id*. (emphasis added) (citing *City*

of Philadelphia, 277 F.3d at 423-24). By way of analogy, the sale of cold medicine was highly regulated, and the *Ashley County* defendants sold it "to legitimate independent retailers" in compliance with all laws before it reached the hands of meth cooks. *Id*. at 669.

Finally, the Eighth Circuit turned to *Lorcin* as the "only word from the Arkansas courts" on the analogous gun cases. *Id*. at 670. As discussed above, the *Lorcin* court found no duty for the gun manufacturer, first under an agency theory because it lacked control of the retailer that sold the gun, and second because it violated no federal laws in its role as a gun manufacturer. *Lorcin*, 321 Ark. at 214-16. Though *Lorcin* relied on a finding of no duty rather than proximate cause, the Eighth Circuit found it instructive on proximate cause because "'both depend on an analysis of foreseeability.'" *Ashley County*, 552 F.3d at 670 (citations omitted). *Accord Verson Allsteel Press Co. v. Garner*, 261 Ark. 133, 142, 547 S.W.2d 411, 415 (1977) ("Whether foreseeability be considered in relation to proximate cause or in its relationship to negligence appears to be largely a matter of semantics.").

The Eighth Circuit found that Arkansas courts would not conclude the "natural and probable consequences" of the defendants' sale of cold medicine through highly regulated channels, ***in compliance with those regulations***, was the outbreak of a meth epidemic resulting in increased governmental services. *Id*. at 671. As in *Lorcin* regarding the defendant gun manufacturer, the counties did not allege that any defendant violated any laws in manufacturing and distributing cold medicine, and they did not allege that the manufacturers had control over the retailers' conduct. Thus, the Eighth Circuit "predict[ed] the Arkansas courts would not impose liability on the[] manufacturers based on actions that could only be taken by the independent retailers, putting aside the fact that the measures were not then required in the highly regulated industry." *Id*.

Defendants' reliance on *Ashley County* is a diversion of another sort. The most glaring distinction from this case is in the harmful drugs themselves. This case is about the distribution of dangerous, unadulterated opioid products—not some harmless medicine from which criminals extract a single substance, combine with others in labs, and create a completely new drug for illegal street sale. *Cf. Hartsock*, 236 Ark. at 169 (allowing "harmless condition" of tar overflowing into park not the proximate cause of boy's burn injuries when parents tried to clean tar from his foot with gasoline that ignited from a spark of a nearby cap gun). In other words, this case is not about the methamphetamines; it's about the cold medicine—except the "cold medicines" are dangerous and addictive drugs in the same state they were in the moment they left the factory.

But more importantly, *Ashley County* relies heavily on analogous gun cases emphasizing the manufacturers' lack of legal responsibility because of the lack of allegations that they violated any laws in their conduct. The same analogy demonstrates this case's dispositive difference from *Ashley County*. Here, Defendants are ***themselves*** responsible for preventing opioid diversion; they are ***themselves*** responsible for ensuring that downstream retailers are not participating in or enabling diversion. ARK. CODE. ANN. §§ 5-64-101, *et seq.*; 20-64-201, *et seq.*; ARK. ADMIN. CODE §§ 007.07.1-I, *et seq.*; (*See, e.g.,* SAC, 293-297, 374-383).Arkansas law is crystal clear that intervening third party acts do not break the causal chain if such acts are foreseeable to the original actor. Whereas the *Ashley County* defendants distributed cold medicine to legitimate channels in compliance with all laws, Plaintiffs allege that Moving Defendants diverted and facilitated diversion of ***drugs "with high potential for abuse"*** to known ***illegitimate*** channels ***in violation*** of Arkansas laws and regulations. (*See, e.g.,* SAC, at ¶¶ 421, 429). Thus, Defendants cannot claim that the resulting widespread diversion was unforeseeable

as a matter of law. *See, e.g.*, *Franco*, 261 Ark. at 147 ("On the issue of foreseeability, [this court] need say only that the very purpose of" Arkansas' controlled substances laws is to prevent the diversion of opioids to illegitimate channels.).

2. Arkansas does not recognize the "remoteness doctrine" or require "direct injury" for causation.

As alluded to in footnote 12, Distributor Defendants improperly mix the analysis of the *Independence County* district court with that of the Eighth Circuit's affirming opinion in *Ashley County*. While the Eighth Circuit discussed proximate cause in light of Arkansas precedent, the district court applied a "remoteness doctrine" derived from federal RICO cases that has never been applied or recognized in Arkansas common law. With due respect to the District Court, its observation that "Arkansas recognizes [this] remoteness doctrine" is erroneous. *Independence County*, 534 F. Supp. 2d at 888. This is evident in the District Court's citation to *Larson Mach., Inc. v. Wallace*, in which the Arkansas Supreme Court discussed "remoteness" in terms of whether an intervening act breaks the causal chain and becomes the sole proximate cause of an injury—consistent with Arkansas common law. 268 Ark. at 211 (while discussing well-established Arkansas rules of proximate and intervening cause, stating that an original act will not be "too remote" from the injury if the result ought to have been apprehended). The clear issue in *Larson* was whether a tractor manufacturer could reasonably anticipate the intervening cause of a retailer selling it with its safety shield removed—not whether the plaintiff suffered "direct injury." *See id*.

The "remoteness doctrine" relied on by the *Independence County* District Court and Defendants is a different species entirely. Both cite *Holmes v. Sec. Inv'r Prot. Corp*., 503 U.S. 258 (1992) to support its application. But *Holmes* was a federal RICO case where the Court was specifically applying a Clayton Act "direct injury" standard, "one of [the Clayton Act's] central

elements." *Id*. at 269. As thoroughly discussed above, there is no such "direct injury" limitation in Arkansas law. *See, e.g., Shannon*, 329 Ark. at 157. Stated differently, Defendants "are simply mistaken that the common law embraces a rule which bars all claims for 'indirect' injuries." *Blue Cross & Blue Shield of N.J. v. Phillip Morris, Inc*., 36 F. Supp. 2d 560, 579 (E.D.N.Y. 1999). *Accord Shannon*, 329 Ark. at 157 ("Implicit in the common-law rule [on intoxication] is that proximate cause must be the immediate cause. This is contrary to our cases interpreting proximate cause."). Defendants' attempt to change the common law should be rejected, just as it was in *Everett*, 2017 WL 4236062, at *5-6 (rejecting Purdue's attempt to apply "direct injury" standard under "remoteness doctrine") (citing *Phillip Morris*, *supra*; *City of St. Louis v. Am. Tobacco Co*., 70 F. Supp. 2d 1008, 1012 (E.D. Mo. 1999) (common law claims not "barred by the remoteness doctrine"); *Shepherd v. Am. Honda Motor*, 822 F. Supp. 625, 633 (N.D. Cal. 1993) ("Parties who . . . are unable to satisfy RICO's stringent proximate cause and concrete loss requirements remain free to pursue common law or statutory state law claims.")).

a. Arkansas likewise does not recognize the "derivative injury rule."

Defendants similarly argue that the nonexistent "derivative injury rule" bars recovery under the same analysis as the nonexistent "remoteness doctrine." (Distr. Joint MTD, at 27-30). Defendants claim that Plaintiffs' injuries are merely and wholly derivative of injuries suffered by opioid users. In support of their argument, Defendants cite a handful of tobacco cases from other jurisdictions, none of which are controlling on this Court. The only Arkansas case Defendants cite is *Ark. Carpenters' Health & Welfare Fund v. Phillip Morris, Inc*., 75 F. Supp. 2d 936 (E.D. Ark. 1999), yet another federal RICO case in which the Eastern District of Arkansas dismissed the complaint because the court found the case to be lacking a direct injury as required by the federal RICO statute. Defendants' attempt to replace Arkansas's existing law of proximate cause

with RICO's statutory "direct injury rule"[13] should be rejected, because Arkansas's law of proximate cause controls, and RICO's "derivative injury rule" has no place here.

C. Plaintiffs pleaded actionable statutory claims (Counts III-IX).

Before addressing Defendants' specific arguments on Plaintiffs' statutory claims, Plaintiffs note a key difference between the parties' positions. While Arkansas is certainly a sovereign, and her Counties and Cities are at times vested with sovereign authority including to make policy, none of the governmental Plaintiffs appeal to policy to support their statutory claims. Instead, Plaintiffs ask nothing more than for the Court to construe and apply the statutes' plain language. On the other hand, Defendants assert a naked policy plea that these statutes not be construed to reach them or their conduct, regardless of the General Assembly's actual words. Defendants' policy problem is not for this Court to resolve. Their redress is with the General Assembly, which has decided to allow the lawful sale of Defendants' narcotic drugs if—and only if—done in strict compliance with the regulatory scheme established by these statutes.

1. Plaintiffs state claims under the Civil Action by Crime Victim Statute.

a. Plaintiffs are "persons" under the statute.

Applying its plain language, Arkansas's Civil Action by Crime Victim Statute (or "Crime Victims' Statute") provides that "[a]ny ***person*** injured or damaged by reason of conduct of another ***person*** that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct." ARK. CODE ANN. § 16-118-107 (emphasis added). Defendants cite to a Louisiana case for the proposition that "[i]n general, the word "person" used

[13] Even if the Court were to require a direct injury, Plaintiffs pleaded several direct economic injuries to public rights that are a natural and probable consequence of Defendants' conduct in creating and exacerbating the opioid epidemic thereby resulting in "increased emergency response costs, law enforcement costs, incarceration costs, court administration costs, addiction treatment costs, and medical costs." (*See* SAC, at ¶ 396). These public rights, as discussed below, can be vindicated only by "political subdivisions" and are not derivative of harm to the opioid users, emphasizing the importance of the issue that faces this Court.

in a statute will not be construed so as to include [governmental entities]." (Distr. Joint MTD, a 32) (citing *State v. La. Riverboat Gaming Comm'n,* 655 So. 2d 292 (La. 1995)). Plaintiffs make no attempt to state a claim under Louisiana law, but instead note that under the settled law of Arkansas: the State,[14] Counties,[15] and Cities[16] are corporations that are also "persons."

Defendants argue that "[t]he repeated use of male and female personal pronouns" limits the definition of "persons" to only "natural persons." (Distr. Joint MTD, at 31-32). This is nothing more than a futile disagreement with the General Assembly, which has already cut off Defendants' attempt at misconstruction:

> When any subject matter, party, or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included.

ARK. CODE ANN. § 1-2-203(a). Section 1-2-203(a)'s directive "shall apply in all cases, both civil and criminal, unless it is otherwise specially provided or unless there is something in the context or subject matter repugnant to that construction." ARK. CODE ANN. § 1-2-201.

Defendants have failed to establish that construing corporate bodies as "persons" within the Crime Victims' statute would be "repugnant." *Id.* Nor can they; indeed, Plaintiffs are not even the first corporate bodies to state claims under the Crime Victims' Statute. *See LasikPlus Murphy, M.D. P.A. v. LCA-Vision, Inc.*, 776 F. Supp. 2d 886, 900-901 (E.D. Ark. 2011). Under the General Assembly's clear statutory directive, Plaintiffs are "persons" entitled to relief under the Crime Victims' Statute.

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[14] *See State v. Allis*, 18 Ark. 269, 279 (1857) (citing ANGELL AND AMES ON CORPORATIONS, p. 10 sec. 15) (recognizing "[t]he State is a corporation–an artificial person.").

[15] *See* ARK. CODE ANN. §14-14-102 (Counties are "bod[ies] politic and corporate.").

[16] *See* ARK. CODE ANN. §14-54-101 (Cities are "bod[ies] politic and corporate.").

b. Plaintiffs sufficiently pleaded that Defendants violated the Uniform Narcotic Drug Act (Count III).

Manufacturer and Distributor Defendants do not dispute that they committed the acts alleged in the SAC, but instead, they assert that their failures to "provide effective controls against theft and diversion of controlled substances" in violation of Arkansas law do not amount to felonies. The Uniform Narcotic Drug Act ("UNDA") highly regulates the individuals and companies that are legally authorized to deal narcotic drugs in Arkansas—those not in compliance with the UNDA are engaged in the unauthorized manufacture and distribution of illegal drugs as a matter of law. *See* ARK. CODE ANN. § 20-64-202 ("It shall be unlawful for any person to manufacture, purchase, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, ***except as authorized in this subchapter***.") (emphasis added). Compliance is mandatory; noncompliance is a felony. *Id*. at § 20-64-220(1).

Manufacturer and Distributor Defendants violated the UNDA when they failed to prevent diversion. ARK. ADMIN. CODE § 007.07.2-II-III. Whether they were duly licensed and whether the pills moved only through seemingly legitimate channels is beside the point. For instance, the regulations state that prescriptions issued for nonmedical purposes are invalid, unauthorized, and illegal. *Id*. at § 007.07.2-II-VIII(B)(1). This encompasses more than just a forged prescription. A prescription for an addict or habitual user to keep the user comfortable or to maintain the addiction is similarly invalid, unauthorized, and illegal. *Id*. at § 007.07.2-II-VIII(B)(2).

While Arkansas's Opioid Epidemic raged, both Manufacturer and Distributor Defendants turned a blind eye to their responsibilities to police the supply chain while their profits soared. (*See, e.g.*, SAC, at ¶ 26) ("Defendants could and should have curbed the excess opioid supply in Arkansas."). Using the recordkeeping required by the UNDA, Defendants were well-situated, as intended by the General Assembly, to identify and prevent diversion by recognizing that the

unreasonable growth in the drugs they were supplying could not have possibly been a result of legitimate medical use. Plaintiffs highlighted these facts throughout the SAC. (*See* SAC, at ¶¶ 263, 286, 294-308, 310-320, 327-355, 424, 426). As these paragraphs illustrate, Defendants were not attempting to prevent diversion, they were reaping its profits.

Defendants admit that preventing diversion requires more than simply selling only to licensed pharmacies. Cardinal proudly boasts of its "advanced analytics, technology and on-the-ground deployment of investigators to evaluate pharmacies, scrutinize customers and orders, as well as identify, block and report orders of prescription controlled substances that do not meet our strict anti-diversion criteria." (Cardinalhealth.com, *Anti-diversion program*, attached as Exhibit 2).[17] Cardinal further concedes that preventing diversion entails understanding the business, purchasing patterns, and customer demographics of pharmacies that purchase their products. (*Id*.). Likewise, McKesson brags about its "sophisticated algorithms designed to monitor for suspicious orders, [and] block the shipment of controlled substances to pharmacies when certain thresholds are reached. . . ." (McKesson.com, *McKesson's Controlled Substance Monitoring Program*, attached as Exhibit 3).[18] AmerisourceBergen claims that it "takes full advantage of the latest advanced data analysis tools to prevent opioid diversion. . . ." (Amerisourcebergen.com, *Corporate Citizenship Overview 2017 Year in Review*, at 12, attached as Exhibit 4).[19] Finally, Purdue also acknowledges the importance of "Supply Chain Responsibility" and touts its procedures to identify potential diversion and then "discontinue our

[17] *available at* https://www.cardinalhealth.com/en/about-us/corporate-citizenship/opioid-action-program/anti-diversion-program.html.

[18] *available at* https://www.mckesson.com/about-mckesson/fighting-opioid-abuse/controlled-substance-monitoring-program/.

[19] *available at* https://www.amerisourcebergen.com/abcnew/- /media/assets/amerisourcebergen/corporate_ citizenship/abc_ corpcitizenship_report2017_final_digital.pdf.

company's interaction with the prescriber or pharmacist" (Purduepharma.com, *Setting the Record Straight on Our Anti-Diversion Programs,* attached as Exhibit 5).[20] Defendants' own public acknowledgement of their duties highlights their lack of actual effort to prevent diversion. The statements also confess an understanding that the UNDA[21] imposes an affirmative duty to develop and implement effective anti-diversion controls in exchange for the privilege of selling and distributing opioids in Arkansas. Under the UNDA, Defendants are prohibited from turning profit-blinded eyes to the evidence of diversion readily apparent in the records and data they are required to maintain, but this is exactly what Plaintiffs have sufficiently pleaded they did. (*See, e.g.*, SAC, at 419-427).

Despite Distributor Defendants' protests, the fact that the Plaintiffs have not yet—at this nascent stage of the litigation—detailed how many pills were supplied in each county is irrelevant to stating a claim. "[I]t is unnecessary that a complaint set out the evidence relied upon or a history of transactions leading up to the essential facts, it is necessary that substantive or issuable facts be alleged. . . ." *Kohlenberger,* 256 Ark. at 510. The SAC alleges that an explosion in the supply of opioids caused harm to Arkansas, its cities, and its counties, (*see, e.g.*, SAC at ¶¶ 1-17), and Defendants, having no concern for diversion, pumped opioids into Arkansas despite knowing the supply was being diverted for misuse and illegitimate purposes. (*See id*. at ¶¶ 286, 288-355).

The Defendants' reliance on *Ashley County* fails as it does in their attack on duty and causation. As discussed above, the *Ashley County* Plaintiffs did "not allege . . . that any of the

[20] *available at* https://www.purduepharma.com/news-media/2016/07/setting-the-record-straight-on-our-anti-diversion-programs/.

[21] The duty imposed by Arkansas law is not unique; the "Uniform" Act imposes a uniform duty upon opioid companies, making it easier for these companies to comply with states' laws.

Defendants violated any federal or state regulation governing the manufacture, distribution, packaging, or sale of their products." 552 F.3d at 664. Instead, the plaintiffs complained that ephedrine manufacturers should have ***voluntarily*** taken steps to order ***third parties*** to handle their products in a way that would help curb the production of methamphetamine. *Id*. In contrast, in this case, the Plaintiffs have alleged failures of the distributors and manufacturers, themselves, to take steps required of them by Arkansas law to curb the misuse and diversion of the products they create and distribute.

(1) Defendants' UNDA violations are felonies.

Before advancing the baseless argument that violation of the UNDA regulations is not a felony, the Manufacturers suggest that they are not subject to the regulations at all! Plaintiffs have alleged that each's opioid products are shipped into and sold in Arkansas. (*See* SAC, at ¶¶ 124-161). As discussed previously, the UNDA is the General Assembly's means of controlling the supply of narcotics; it thoroughly covers every possible actor involved in the supply chain—including manufacturers and distributors—and every possible description of how the drug moves through the chain. Without question, the UNDA covers Defendants because they sell narcotic drugs in Arkansas.

At the heart of their actual, but nonetheless specious argument, both Manufacturer and Distributor Defendants claim that violating the UNDA's requirement to develop and implement effective controls to prevent diversion is not a felony and, therefore, is not actionable through the Crime Victims' Statute. (Mfr. Joint MTD, at 31; Distr. Joint MTD, at 33). Defendants contend that because their duties regarding diversion are set forth in a regulation, they haven't violated the UNDA's felony provision. That is simply not the case.

Arkansas law is clear: "***It shall be unlawful*** for any person to manufacture, purchase, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic

drug, ***except as authorized in this subchapter***." ARK. CODE ANN. § 20-64-202 (emphasis added). Authorization under the subchapter is subject to the "efficient enforcement of this act" by the "director" through "promulgate[d] regulations," which "conform insofar as possible… under the policies of this subchapter. . . ." *Id.* at § 20-64-219. Thus, it is clear that "[i]t shall be unlawful for any person to manufacture, purchase, posses, have under control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized…" by "promulgated regulations" by the "director" for the "efficient enforcement of the act," "which conform insofar as possible . . . under the policies of this subchapter." *Id.* at §§ 20-64-202 and 20-64-219. Pursuant to the General Assembly's authorization, the "director" has promulgated ARK. ADMIN. CODE § 007.07.2-II-III, which states in pertinent part, "[a]ll practitioners shall provide effective controls and procedures to guard against theft and diversion of controlled substances." Thus, unless a "practitioner[] . . . provide[s] effective controls and procedures to guard against theft and diversion of controlled substances," ***"[i]t shall be unlawful"*** to deal "any narcotic drug." Other courts agree that "when a provision of the enabling statute for the promulgation of administrative regulations expressly mandates compliance with those regulations, the violation of the regulation is the equivalent of a violation of a statute. . . ." *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 228 (Ky. 2015). Thus, violation of a regulation promulgated in accordance with delegated statutory authority "must be equated with a violation of [the] statute itself." *Ferrell v. Baxter*, 484 P.2d 250, 257 (Alaska 1971); *see also Meacham v. Conway*, 435 A.2d 961, 962 (Vt. 1981) (violation of valid local regulation "becomes a violation of the applicable statutory provision" authorizing it).

That the effective controls requirement is part of the regulations and not expressly set forth in the statute is irrelevant. "An agency regulation is part of the substantive law the trial

court must determine and then apply to the facts of the case before it." *State v. Jones*, 338 Ark. 781, 786, 3 S.W.3d 675, 677 (1999). Furthermore, the whole notion of a regulatory scheme is premised upon the recognition that the legislature cannot detail every possible violation with its own statute. The process employed by the legislature with the UNDA is consistent with the regulatory process approved by the Supreme Court for over a century, as illustrated in *U.S. v. Grimaud*:

> It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes from which we have quoted declare that the privilege of using reserves for 'all proper and lawful purposes' is subject to the provision that the person using them shall comply with the rules and regulations covering said forest reservation. The same act makes it an offense to violate those regulations; that is, to use them otherwise than in accordance with the rules established by the Secretary . . . If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations . . . they thereby made themselves liable to the penalty imposed by Congress.

220 U.S. 506, 521 (1911). Similar to the *Grimaud* statute's language, the UNDA makes it unlawful to possess narcotics, "except as authorized [by the UNDA]." The same Act authorizes the creation of regulations and calls for a criminal penalty for violation of the UNDA. ARK. CODE ANN. § 20-64-220(1). Thus, *Grimaud*'s logical application is that, "after the passage of the act and the promulgation of the rule, the defendants [manufacturing, distributing, and possessing narcotics] in violation of the regulations . . . thereby make themselves liable to the penalty imposed by [the Arkansas General Assembly]."[22]

[22] The Defendants' argument that the exclusive remedy for a regulatory violation is contained in ARK. ADMIN. CODE § 007.07.02-II-X likewise takes a myopic and misguided view of the regulation as somehow unconnected to the UNDA. That regulation states that a violation "may be reported by Pharmacy Services and Drug Control to the appropriate Licensing Board of the violator for possible disciplinary action." *Id*. In context, it is clear that this regulation is cumulative of the penalty already established by ARK. CODE ANN. § 20-64-220, i.e., the felony provision. It is unnecessary for the regulations to restate the already codified statutory penalty. The regulation, however, makes it clear that in addition to the criminal penalty imposed by the UNDA, the violation may place the violator's registration or license to possess narcotics in jeopardy.

Manufacturer Defendants also argue that construing the UNDA exactly as it reads—i.e., that violating its requirements is a felony—would run contrary to the rule of lenity. This argument can be quickly dismissed. The rule of lenity is primarily reserved for criminal cases and, even then, it is a rule of last resort only appealed to "when, after consulting traditional canons of statutory construction, [the Court] [is] left with an ambiguous statute." *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 16 (2011). Furthermore, the level of ambiguity must be remarkable, as "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what [the legislature] intended." *Reno v. Koray*, 515 U.S. 50, 65 (1995) (internal citations omitted). The UNDA, and its effectuating regulations are neither complicated nor ambiguous. The rule of lenity is inapplicable.

Finally, Distributor Defendants make a tepid constitutional argument that the effective controls regulation of the UNDA should not apply because it is too vague and contains no *mens rea* element. Regarding vagueness, Defendants bear the burden of demonstrating that the UNDA and its regulations do not give "a person of ordinary intelligence fair notice of what is prohibited." *Abraham v. Beck*, 2015 Ark. 80, at *13, 456 S.W.3d 744, 753. A person mounting a vagueness challenge must be an "entrapped innocent who has not received fair warning." *Bynum v. State*, 2018 Ark. App. 201, at 10, 546 S.W.3d 533, 540. But when, by his or her action, the party "clearly falls within the conduct proscribed by the statute, he cannot be heard to complain." *Id*. Concerning constitutionality, the regulation presents no problems because it "merely regulates business activity, [and] a less stringent analysis is applied and more flexibility is allowed." *Id*. at 14, 456 S.W.3d at 753. Regardless, and contrary to Defendants' argument, there is a *mens rea* element provided by ARK. CODE ANN. § 5-2-203(b), which states that a minimum

mens rea of recklessness should be read into any provision that defines an offense but that does not prescribe a mental state.

Defendants voluntarily and very profitably operate in a heavily regulated industry in which every state requires them to take steps to prevent their product from being diverted for illegal use. Defendants cannot be heard to complain that they do not understand the meaning of "effective controls" to prevent diversion when the whole gravamen of this case is that the Defendants recklessly ignored ***all*** evidence of diversion, oversupply, and oversaturation in order to sell as much of their product as possible regardless of the consequences. UNDA is neither vague on its face nor as applied to these Defendants.

c. Plaintiffs sufficiently pleaded that Defendants are accomplices to UNDA violations. (Count IV).

Defendants next argue that they cannot be accomplices because (1) the Plaintiffs have not used magic words to plead the distributors acted with the purpose of promoting or facilitating diversion; (2) they had no duty to prevent diversion; and (3) the SAC contains no factual allegations demonstrating that the Defendants were accomplices to diversion. These arguments are meritless.

Pleadings are to be liberally construed so as to do substantial justice. ARK. R. CIV. P. 8(f). "[E]ffect is given to the substance of the pleading rather than the form," and use of specific words is not required. *Fort Smith Symphony Orchestra, Inc. v. Fort Smith Symphony Ass'n*, 285 Ark. 284, 287, 686 S.W.2d 418, 420 (1985). It doesn't matter if the SAC says "with the purpose," because the SAC paints an unmistakable picture that the Defendants acted as knowing accomplices to diversion.

Accomplice liability attaches when a person acts "with the purpose of promoting or facilitating the commission of an offense" by encouraging the commission of the offense, aiding

or attempting to aid in the commission of the offense, or failing to make an effort to prevent commission of the offense when the person has a legal duty to do so. ARK. CODE ANN. § 5-2-403(a). As discussed at-length in the SAC, Manufacturers premised their entire business model on fostering misuse of opioids through downplaying their risks. (*See, e.g.,* SAC, at ¶¶ 180, 238-241, 243, 251-253). Throughout the SAC, Plaintiffs allege that Defendants facilitated this misuse throughout Arkansas by selling and supplying pills that they knew were being diverted—violating their duty to prevent diversion under the UNDA. (*See id*. at ¶¶ 263-265, 283, 286, 289, 305-313, 319-321, 432-435). Rather than comply with their duties to develop effective controls to guard against diversion as the Act requires, Defendants intentionally turned a profit blinded-eye to suspicious orders and prescriptions manifesting wildly excessive and illegitimate opioid use. (*See, e.g., id.* at ¶¶ 306-309, 327-355, 364-367). In doing so, they both facilitated diversion and failed to make an effort to prevent its occurrence.

Distributor Defendants' selective reading of *Gilcrease v. State*, 2009 Ark. 298, 318 S.W.3d 70 does not help their argument. Plaintiffs specifically allege that Defendants "transferred pills through the supply chain, from the manufacturer to the end user, and without regard for state law requiring them to take affirmative steps to prevent the diversion of drugs into the illegal marketplace or for other illegitimate purposes. (SAC, at ¶ 432). "Thus, Defendants actively aided in, agreed to aid in, and failed to prevent each other and other manufacturers, distributors, retail stores, and physicians from habitually violating the Arkansas UNDA and Department of Health regulations, and Defendants failed to prevent each other from engaging in or aiding others' opioid diversion, despite Defendants' duty to do so." (SAC, at ¶ 435). Defendants all committed the conduct giving rise to accomplice liability, "[a] defendant is an accomplice so long as the defendant renders the requisite aid or encouragement to the principal

with regard to the offense at issue, irrespective of the fact that defendant was not present at the murder scene and did not directly commit the murder." *Gilcrease*, 2009 Ark. 298 at *12.

Plaintiffs have made straightforward factual allegations and, though not required, pleaded representative examples of the violations occurring here in Arkansas, (*see* SAC, at ¶¶ 327-355, 364-367), as well as numerous instances of the distributors being caught intentionally abandoning their duty to prevent diversion. (*Id*. at ¶¶ 306-309). Taking the allegations in the SAC as true, and construing them liberally to do substantial justice, Plaintiffs have more than sufficiently pleaded facts supporting the conclusion that Defendants encouraged diversion and made no effort to prevent it, despite their legal duty to do so.

d. Plaintiffs sufficiently pleaded that Defendants conspired to violate the UNDA (Count V).

Defendants' attack on Plaintiffs' civil conspiracy claim fails alongside their accomplice arguments. The SAC's allegations illustrate intentional conduct by Defendants joining in concert with each other and with third parties to violate the UNDA. (*See, e.g.,* SAC, at ¶¶ 186, 263-265 318-323, 327-355, 433-434, 438-444). The conspiracy is manifest in Defendants' concurrent actions to maximize the flow of opioids into Arkansas in the face of known diversion. Conspiracy to commit an unlawful act "may be inferred, even though no actual meeting among the parties is proved, if it be shown that two or more persons pursued by their acts the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected." *Griffin v. State*, 248 Ark. 1223, 1227-28, 455 S.W.2d 882, 885 (1970). The SAC is saturated with allegations that Defendants worked concurrently in pursuit of the unlawful objective of profiting by oversupplying opioid drugs in dereliction of their duty to prevent diversion and misuse. (*See, e.g.*, SAC, at 400, 435, 446, 465, 476, 491-493).

e. Plaintiffs sufficiently pleaded that Defendants violated the Arkansas Controlled Substances Act (Count VI).

According to Defendants, it is impossible for them to violate the Arkansas Controlled Substances Act ("ACSA") as licensed and registered practitioners that are permitted to manufacture, possess, sell, and distribute controlled substances under Arkansas law. (Mfr. Joint MTD, at 35; Distr. Joint MTD, at 41). Defendants are wrong. Licensing and registration under the Act does not exempt a practitioner from liability for drug offenses; only compliance with the Act and its accompanying regulations insulates a practitioner from liability. The Court need look no further than the examples provided in the SAC to recognize the fallacy of Defendants' argument. KJ Medical Clinic, Dr. Brooks, Dr. Reifeiss, Ms. Holland, the Bowman Curve Pharmacy, Perry County Food & Drug Pharmacy, Mr. Watson, and Dr. Johns were all licensed practitioners under the ACSA and its federal counterpart, yet they were prosecuted because they failed to comply with the requirements of the federal CSA. (*See* SAC, at ¶¶ 360-371).

The weakness of Defendants' argument is manifest in the underhanded measures they employ. Selectively quoting the SAC, Manufacturer Defendants argue, "As plaintiffs effectively concede, Manufacturer Defendants' actions cannot violate ACSA because 'the Arkansas CSA and accompanying Department of Health regulations permit [Defendants] to manufacture, distribute and dispense controlled substances within Arkansas.'" (Mfr. Joint MTD, at 35) (quoting SAC, at 450). If the court reviews ¶ 450, it will see that there is no period after "Arkansas":

> As discussed more fully above, the Arkansas CSA and accompanying Department of Health regulations permit the Manufacturer Defendants, Distributor Defendants, and Retail Defendants to manufacture, distribute, and dispense controlled substances within Arkansas ***subject to their compliance with the Arkansas CSA and Department of Health regulations. Outside the bounds set by state law, possessing, delivering, manufacturing, and trafficking in controlled substances is unlawful.***

(SAC, at ¶ 450) (emphasis added to the text omitted by Manufacturing Defendants). Contrary to Manufacturer Defendants' misrepresentation, the actual text of paragraph 450 does not "effectively concede" that Defendants' conduct is lawful—it indicts Defendants' conduct as felonious. Indeed, just like the UNDA, which makes it unlawful to possess, control, or sell any narcotic drug "except as authorized in this subchapter," ARK. CODE ANN. § 20-64-202, the ACSA makes it unlawful for a person to possess a controlled substance "[e]xcept as provided by this chapter." *Id*. at § 5-64-419(a). Also just like the UNDA, the ACSA authorizes the Department of Health to promulgate rules and regulations. *Id*. at § 5-64-702(a). In fact, the regulations are the exact same for both Acts: "The following Rules and Regulations have been promulgated pursuant to Arkansas Code Annotated § 5-64-702 [the ACSA], § 20-64-219 [the UNDA], and § 20-64-317 [the Arkansas Drug Abuse Control Act]." ARK. ADMIN. CODE § 007.07.2-I-I.

Defendants' position that licensure insulates them from liability for drug offenses also completely undermines their simultaneous insistence that regulatory violations do not amount to violations of the statute enabling the regulations. Distributor Defendants claim that they have not violated the ACSA, "because they are licensed practitioners under the ACSA" (Distr. Joint MTD, at 41). However, the licensing requirement is not in the text of the ACSA; ***it is in the regulations***. *See* ARK. ADMIN. CODE § 007.07.2-II-I. And these are the same regulations that require licensees, like Defendants, to "provide effective controls and procedures to guard against theft and diversion of controlled substances." *Id*. at § 007.07.1-II-III. But according to Defendants, regulatory violations merely subject them to discipline from the appropriate licensing board. Logically extended and highlighting its own absurdity, Defendants' argument would mean that unlicensed possession of a Schedule II controlled substance would merely

subject the violator to disciplinary action by the appropriate licensing board, *see id.* at § 007.07.2-II-X, even though the ACSA provides that such possession, "except as provided by this chapter," i.e. in accordance with the regulations, is a felony, ARK. CODE ANN. § 5-64-419(b)(2). It is self-evident that such a reading sabotages Arkansas's criminal drug laws, and Defendants' attempt to have it both ways must again fail.

Plaintiffs thoroughly allege Defendants' failure to comply with the effective controls and anti-diversion requirements of the regulations. Defendants' possession and distribution of controlled substances "except as provided by [the ACSA]," i.e., in accordance with the regulatory requirement to provide effective controls and guard against diversion, subjects Defendants to felony liability under the ACSA. Plaintiffs' civil claim under the ACSA is plainly proper.

f. Plaintiffs state a claim that Defendants are accomplices to ACSA violations (Count VII).

Defendants' argument in opposition to accomplice liability under the ACSA fails for the same reasons as their argument against UNDA accomplice liability. Plaintiffs' have alleged that the acts committed were felony violations of the ACSA and that Defendants, motivated by profit, "render[ed] the requisite aid or encouragement to the [other Defendants] with regard to the offense at issue…." *Gilcrease*, 2009 Ark. 298, at *12; (*see also* SAC, at ¶¶ 461-466).

g. Plaintiffs state a claim that Defendants conspired to violate the ACSA (Count VIII).

Defendants' argument in opposition to civil conspiracy liability under the ACSA fails for the same reasons as their argument against UNDA civil conspiracy liability. Plaintiffs have alleged that the acts committed were felony violations of the ACSA and that Defendants, motivated by profit, "pursued the same unlawful object, each doing a part, so that their acts, although apparently independent, are in fact connected and cooperative, indicating a closeness of

personal association and a concurrence of sentiment." *Mason v. Funderburk*, 247 Ark. 521, 529, 446 S.W.2d 543, 548 (1969) (citing *Wilson v. Davis*, 138 Ark. 111, 211 S.W. 152 (1919); *Stewart v. Hedrick*, 205 Ark. 1063, 172 S.W.2d 416 (1943); *Chapline v. State*, 77 Ark. 444, 95 S.W. 477 (1906)).

2. Plaintiffs state a claim that Defendants violated the Drug Dealer Liability Act (Count IX).

Arkansas is one of several states that have adopted a form of the Model Drug Dealer Liability Act ("DDLA"), *available at* http://www.modelddla.com/Model_Act.htm. *See* ARK. CODE ANN. §§ 16-124-101, *et seq*. Arkansas's DDLA imposes liability on any person who "participates in the illegal drug market" for injuries to "individual drug user[s]" resulting from use of an "illegal drug" and costs borne in treating them. *See id*. The Act defines "illegal drug" as a "drug whose distribution is a violation of the [ACSA], § 5-64-101 *et seq*." *Id*. at § 16-124-102. The "illegal drug market" is the "support system of illegal drug-related operations, ***from production to retail sales***, through which an illegal drug reaches the user. . . ." *Id*. (emphasis added). The DDLA allows not only family members of "individual drug users" to bring claims for injuries to the user, but also any "governmental entity . . . that funds a drug treatment program or employee assistance program for the individual drug user or that otherwise expended money on behalf of the individual drug user." *Id*. at § 16-124-104. Liability attaches to any person who "knowingly participates in the illegal drug market"—that is, "distribute[s], possess[es] with intent to distribute, commit[s] an act intended to facilitate the marketing or distribution of . . . an illegal drug" or "agree[s] to" do the same. *Id*. at §§ 16-124-102, 103.

As commentators have noted, "[t]he first principle [of the model DDLA] is that a potential defendant's liability is based on entering the illegal drug market in any capacity, not just making a sale to a particular person." Joel W. Baar, *Let the Drug Dealer Beware: Market-*

Share Liability in Michigan for the Injuries Caused by the Illegal Drug Market, 32 VAL. U. L. REV. 139, 141 (1997). "The second principle is that the ***focus of the DDLA is on the ultimate harm to society caused by the illegal drug market***, whether to innocent people or even drug users themselves, and not on the determination of how the harm was caused." *Id*. (emphasis added).

Plaintiffs comfortably allege a valid claim against Defendants for moneys expended on behalf of individual drug users resulting from Defendants' "knowing[] participat[ion] in the illegal drug market." (*See* SAC, at 478-490). As thoroughly discussed above, Schedule II opioids manufactured possessed, delivered, trafficked, dispensed, or prescribed in violation of the ACSA and Department of Health regulations are, by clear definition, "illegal drugs." ARK. CODE ANN. § 16-124-102(1). By alleging Defendants continually supplied Schedule II opioids to retailers they knew were diverting the drugs, Plaintiffs have clearly alleged conduct in which Defendants, at the very least, "intended to facilitate the marketing or distribution of . . . an illegal drug[.]" *Id*. at § 16-124-102(9)(A); (*see also* SAC, at 486-490).

What Distributor Defendants deem a "frivolous" claim that "stretches the law," (Distr. Joint MTD, at 41), has already survived several Manufacturer Defendants' Rule 12(b)(6) challenges in the Circuit Court for Sullivan County, Tennessee under Tennessee's similar DDLA. (*See* Order on Motions to Dismiss and/or Strike, *Staubus v. Purdue Pharma, L.P.*, No. C-41916 (Cir. Ct. Tenn. Sullivan Cty. June 12, 2018), attached as Exhibit 6). This Court should join the Circuit Court for Sullivan County, which correctly held that Tennessee district attorneys and counties stated valid claims against many of these same Defendants under Tennessee's DDLA.

a. Diverted prescription opioids are "illegal drugs" under the Act.

Manufacturer and Distributor Defendants both argue that they are not liable under the DDLA because the "illegal drugs" that the Act covers do not include the prescription opioids in which they deal. This flies in the face of the unmistakable definition of "illegal drug"—again, "a drug whose distribution is a violation of the [ACSA]." ARK. CODE ANN. § 16-124-102. But it does not stop Defendants from misquoting the definition of "illegal drug" and fusing it with the definition of "specified illegal drug," to—incorrectly—imply that only drugs such as cocaine, heroin, and methamphetamine are covered by the Act. (Distr. Joint MTD, at 42).

It is beyond dispute that the ACSA and the UNDA make manufacture, possession, and distribution of Schedule II drugs a crime except as authorized through compliance with the regulatory framework. To obtain legal blessing to deal controlled substances, a person must register with the State and federal government, submit to oversight, maintain detailed records and inventories, and develop effective controls to prevent diversion—i.e., comply with the legal ACSA and UNDA requirements. Absent that compliance, possessing, distributing, or selling the drug is a violation of the statutes, and each diverted and misused dose of Defendants' drugs is "illegal"—***by definition***—under the DDLA. *Id*. at § 16-124-102(1).

Distributor Defendants protest that their prescription medication is "exactly the opposite of an illegal drug" because of its therapeutic benefits. (*Id*.). Defendants' attempt to re-write the definition of "illegal drug" is belied by the fact that there are also medical uses for drugs that Defendants claim are the "real" illegal drugs. For instance, doctors can write prescriptions for Desoxyn, the name-brand version of methamphetamine, to treat Attention Deficit Disorder and obesity. (Food & Drug Administration, *Desoxyn*).[23] And as pharmaceutical companies surely

[23] *available at* https://www.accessdata.fda.gov/drugsatfda_docs/label/2007/005378s026lbl.pdf.

know, cocaine has "undeniable therapeutic benefits" and is still commonly used as "local anesthesia for some eye, ear, and throat surgeries." (National Institute on Drug Abuse, *What Is Cocaine?*).[24] Thus, neither the name, nor the active ingredient, nor the schedule of the drug, nor even the existence of a prescription is dispositive in determining illegality of a drug under the ACSA, and by extension, the DDLA.

What ***is*** dispositive in identifying an "illegal drug" is determining whether its distribution was in violation of the Controlled Substances Act. ARK. CODE ANN. § 16-124-102(1). Plaintiffs have alleged throughout the SAC that distribution in violation of the requirements of the ACSA and its regulations is exactly what has occurred in this case. As already mentioned, "it is unlawful for a person to possess a controlled substance"—any controlled substance, including the Defendants' Schedule II opioids—"[e]xcept as provided by the [ACSA]." *Id*. at § 5-64-419(a). Distributor Defendants scoff that non-compliance with the regulatory framework established by the UNDA and ACSA cannot transform a legal prescription into an illegal drug, ***but that is exactly what noncompliance does***. If Defendants had their way of interpreting the DDLA, they could intentionally "facilitate the marketing or distribution of" illegitimate opioid prescriptions with impunity—a logically impossible conclusion.

(1) Neither the Arkansas nor the Model DDLA contain any licensure defense.

Manufacturer Defendants cite *Cooper v. Purdue Frederick Co*., 2008 WL 11355004, at *3 (E.D. La. Nov. 5, 2008) for the proposition that the Louisiana DDLA "does not provide a cause of action against pharmaceutical companies" and state that "[l]ike [Arkansas's] DDLA, Louisiana's [DDLA] is based on the Model [DDLA]." (Mfr. Joint MTD, at 40, n.24). This is a

[24] *available at* https://www.drugabuse.gov/publications/research-reports/cocaine/ what-cocaine.

disingenuous attempt to apply a substantive and dispositive difference in Louisiana's DDLA that is utterly absent from both the Arkansas and Model counterparts. The Louisiana DDLA provides a specific defense for "licensed practitioner[s]" that simply does not exist in either Arkansas's DDLA or the Model DDLA. *Compare* LA. STAT. ANN. § 9:2800.71 *with* ARK. CODE ANN. §§ 16-124-101, *et seq.*; (MODEL DRUG DEALER LIABILITY ACT, *available at* http://www.modelddla.com/Model_Act.htm). Nor does Louisiana's DDLA include "from production to retail sales" in its definition of "illegal drug market" like both Arkansas's DDLA and the Model Act. *See* LA. STAT. ANN. §§ 2800.61, *et seq.*

Manufacturer Defendants' attempt to apply a defense under Louisiana's substantively distinct Act to Plaintiffs' claims not only fails, but highlights why Plaintiffs' Arkansas DDLA claims should proceed. Defendants are ***not*** immunized by their license under Arkansas's DDLA. Thus, as Plaintiffs have correctly argued and alleged, Defendants' knowing violations of Arkansas regulations and facilitation of illegal opioid distribution subjects them to liability under Arkansas's Act.

Finally, unlike Louisiana's Act, Tennessee's DDLA is similar to that of Arkansas and the Model Act. *See* TENN. CODE ANN. §§ 29-38-101, *et seq*. (including "production to retail sales" within the definition of "illegal drug market" and lacking a defense for licensed distribution). *Cf.* ARK. CODE ANN. §§ 16-124-101, *et seq.*; (MODEL DRUG DEALER LIABILITY ACT, *supra*). As noted, a Tennessee court has already allowed Tennessee counties' DDLA claims to progress past many of the same Defendants' motions dismiss, and this Court should do the same.

b. Plaintiffs sufficiently alleged that Defendants knowingly participated in the illegal drug market.

Manufacturer and Distributor Defendants argue that they did not knowingly participate in an illegal drug market. (Mfr. Joint MTD, at 40; Distr. Joint MTD, at 44). As defined by the

DDLA, an "illegal drug market" encompasses everything "from production to retail sales," including the support system of operations "through which an illegal drug reaches the user." ARK. CODE ANN. § 16-124-102(2) (emphasis added). To trigger liability under the Act, an individual need only "knowingly participate[] in the illegal drug market." *Id.* Manufacturers and distributors control the supply chain and system through which opioids are produced, distributed, and sold in Arkansas. If Plaintiffs successfully prove that Defendants failed to comply with the relevant provisions of the ACSA and the UNDA, then the drugs they distributed were "illegal" under the ACSA. Plaintiffs then need only prove that Defendants knew that the drugs were being diverted and used for illicit purposes. If Plaintiffs prove these allegations, then liability under the Act attaches.[25]

Defendants' argument that they have no control or insight into what occurs once the drugs are delivered to pharmacies is not only a ***question of fact***, it also rings hollow in light of their own statements lauding their important role in preventing diversion:

- "McKesson monitors its customers' orders of controlled substances for potential diversion throughout the customer relationship," (McKesson.com, *McKesson's Controlled Substance Monitoring Program*, Exhibit 3);
- Cardinal "engage[s] directly with pharmacists to understand their business, their purchasing patterns, the ratio of controlled to non-controlled substances ordered and the demographics of their customers[, because] [k]nowing our customers is critically important to identifying diversion and flagging suspicious activities," (Cardinalhealth.com, *Anti-diversion program*, Exhibit 2);
- AmerisourceBergen "takes full advantage of the latest advanced data analysis tools to prevent opioid diversion, including mathematical algorithm and data analytics, peer group comparisons, interquartile range analysis, and real-time dashboards with comprehensive ordering and customer information;" (Amerisourcebergen.com, *Corporate Citizenship Overview 2017 Year in Review*, Exhibit 4); and

[25] It is irrelevant whether Distributor Defendants only delivered their drugs to pharmacies. As previously discussed, licensure alone does not equate to legality of all conduct by the licensee.

- From Purdue's website: "The CSA is designed to form a network of supply chain participants monitoring and acting on available market information, and Purdue has fully participated in that process . . . While Purdue cannot compel a wholesaler to discontinue shipping to one of its customers, we can and have reduced the product we ship to a wholesaler if we have concerns about the customer at the end of the supply chain." (Purduepharma.com, *Setting the Record Straight on Our Anti-Diversion Programs*, Exhibit 5).

If Defendants actually did these things, it would go a long way toward satisfying the requirements of Arkansas law. But in reality, Defendants continued to distribute opioids in violation of their legal duties, knowingly created and contributed to the illicit supply of opioids entering the State, and participated in the illegal drug market for those opioids in violation of the DDLA. (*See* SAC, at 288-372, 478-493).

Distributor Defendants' careless statement that "Plaintiffs fail to identify a single suspicious order shipped by Distributors" is inexplicable. The SAC details known drug distribution rings inside Arkansas that Distributor Defendants helped supply—including specific examples of (1) McKesson continually supplying Perry County Food & Drug with oxycodone and hydrocodone ***without even enough prescriptions to account for the number of pills they were selling***; and (2) Bowman Curve Pharmacy, from which all but ***six*** of the ***1,484*** prescriptions it filled included opioids from KJ Medical Clinic, a pill mill that wrote illegitimate prescriptions for ***287,500*** hydrocodone tablets in just ***10 months***. (*See* SAC at ¶¶ 360-371). Defendants carefully counter that they "do not know which patients receive [their drugs] or what they do with them after filling their prescriptions." (Distr. Joint MTD, at 45). This is merely an attempt to distract from the point: The ***identity*** of prescription recipients in those examples is completely ***irrelevant***, as the orders were blatantly suspicious with facts known to Defendants. Plaintiffs invite Distributor Defendants to represent on record that they lack the information to highlight such discrepancies—and have that representation tested by discovery. Though Plaintiffs do not expect this response, it would only display Defendants' utter failure to provide effective controls

against diversion, trading their statutory obligations for willful blindness and aiding felonies for profit.

Manufacturer Defendants have also argued that the DDLA claims must be dismissed because they are premised on vicarious liability. But as explained above, liability under the DDLA expressly encompasses Defendants' ***own conduct*** in "facilitating the marketing or distribution of . . . illegal drug[s]." ARK. CODE ANN. § 16-124-102(9)(A). This argument is clearly without merit.

Finally, Manufacturer Defendants' attempt to re-write Plaintiffs' damages prayer as "aggregate societal harms" likewise fails. (Mfr. Joint MTD, at 41). The SAC references the plight of Arkansas "individual drug users" who have been harmed by the conduct of the Defendants: 335 opioid overdose deaths in 2016; a ten-fold increase in Arkansas babies born addicted to opioids and suffering from NAS; the growing number of Arkansas teenagers abusing opioids; the more than half of children entering Arkansas's foster system as a result of parental substance abuse; and the increased number of government-funded emergency services provided to overdosing opioid addicts. (*See, e.g.,* SAC at ¶¶ 3, 9-11, 280-282). Each of these instances comes associated with an expenditure of money that the State, cities, and/or counties have been forced to make on behalf of individual drug users, and to the extent government monies were spent on medical expenses, treatment and rehabilitation programs, support costs of running such programs, or paying any other expense that can be proximately linked to the illegal drug use, they are clearly recoverable as damages under the DDLA. See ARK. CODE ANN. § 16-124-104(c). Plaintiffs' allegations must be taken as true, and a Rule 12(b)(6) motion is entirely inappropriate in testing Plaintiffs' ***proof***.

Other States adopting the DDLA have explicitly stated its legislative purpose as to "shift, to the extent possible, the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market." TENN. CODE ANN. § 29-38-101. Defendants have reaped gargantuan profits from distributing drugs in Arkansas's communities beyond the legal boundaries in which they were required to operate, and the DDLA is an appropriate vehicle for holding them responsible for the harm caused at the expense of those communities.

D. The "Free Public Services Doctrine" does not exist in Arkansas but nonetheless would not require dismissal.

Defendants ask this court to bar Plaintiffs' claims by applying the "free public services doctrine"—also called the "municipal cost recovery rule" —, which provides that public expenditures for the "normal provision of police, fire, and emergency services" are not recoverable in tort. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983). No Arkansas court has adopted or even addressed the doctrine, but it would not apply in this case even if it were in full force. This is undeniable because neither the public safety hazard of widespread opioid diversion and addiction, nor the resulting demand for public services, can be considered "normal" in any sense of the word. *Id.*; (*see also* SAC, at ¶ 16).

Contrary to Defendants' flimsy analogy, Arkansas's "fireman's rule" is both legally and rationally distinct from the free public services doctrine. The fireman's rule provides that a negligent party has "***no legal duty to protect the firefighter*** from the very danger that the firefighter was employed to confront." *Waggoner v. Troutman Oil Co.*, 320 Ark. 56, 60, 894 S.W.2d 913, 915 (1995) (emphasis added). On the other hand, the free public services doctrine does not turn on legal principles such as duty or causation; instead, "it is [only] the identity of the claimant and the nature of the cost that combine to deny recovery. . . ." *Flagstaff,* 719 F.2d at

324. Nor do the rules derive from the same policy, as is evident in a hypothetical application. First, it cannot be said that Plaintiffs have public funds for the very purpose of addressing unprecedented and ongoing narcotic epidemics—as opposed to ordinary fires and emergency calls—especially where ***Plaintiffs lack the funds to do so.*** (*See* SAC, at ¶¶ 16-17, 122-123, 481, *Prayer for Relief*)). Second, workers' compensation programs provide injured firemen with a remedy that Plaintiffs simply do not have—a fact the Arkansas Supreme Court deemed important in adopting the fireman's rule. *See Waggoner*, 320 Ark. at 61.

But even if the "free public services doctrine" applied in Arkansas, ***and it does not***, it nevertheless would not bar Plaintiffs' claims. In seminal cases on the doctrine, courts have recognized that its application would be inappropriate where, e.g., private actors systematically created a prolonged public nuisance, where recovery is authorized by statute or regulation, or in the face of a defendant's gross negligence. *See Flagstaff*, 719 F.2d at 324 (9th Cir. 1983); *Koch v. Consolidated Edison Co. of N.Y.*, 62 N.Y.2d 548, 560 (1984). Nor, as noted above, does the doctrine apply beyond accidents or emergency situations requiring "the ***normal*** provision of police, fire, and emergency services." *Id.* (emphasis added). The New York Superior Court made that crystal clear in its refusal to apply to the doctrine to any of the plaintiffs' claims in the New York State opioid MDL, despite New York having expressly adopted the doctrine. (*See In Re Opioid Litig. I*, at 11-12. (applying the doctrine to opioid case "would distort [it] beyond recognition.").

E. The State of Arkansas has standing to bring its suit through Scott Ellington.

The State's standing to bring this case is straightforward. "The Arkansas Supreme Court has held that '[t]o be a proper plaintiff in an action, one must have an interest which has been adversely affected or rights which have been invaded. Courts will not allow suit by one who is

'stranger to the record' or for the purpose of vindicating an abstract principle of justice.'"[26] *City of Stamps, Arkansas v. Alcoa, Inc.*, No. CIV. 05-1049, 2006 WL 2254406, at *6 (W.D. Ark. Aug. 7, 2006) (quoting *City of Dover v. City of Russellville*, 352 Ark. 299, 304, 100 S.W.3d 689, 693 (2003), *in turn* quoting *Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W.2d 483 (1997)).

In spite of Arkansas Supreme Court precedent and statutory authority, Manufacturer Defendants claim that Second Judicial District Prosecuting Attorney, Scott Ellington, cannot bring the asserted claims on behalf of the State. Defendants are wrong because: (1) the State is an interested party to this action—indeed, no stranger to the scourge of the Arkansas Opioid Epidemic; (2) because of that, the action must be brought in the name of the State; and (3) the prosecuting attorney can bring actions in the name of the State. ARK. CODE ANN. § 16-106-101(a). The plain language of § 16-106-101(a) gives prosecuting attorneys the authority to bring actions on behalf of the State, and Arkansas courts agree: "[p]rosecuting attorneys are authorized to bring actions in which the State is interested in the State's name and behalf." *State v. Hammame*, 102 Ark. App. 87, 90, 282 S.W.3d 278, 281 (2008).

[26] Manufacturer Defendants make four failed standing arguments. First, they assert that counties and cities lack standing to bring suit and "all claims brought by political subdivisions in this action must be dismissed-full stop…." (Mfr. Joint MTD, at 5-9). This argument is easily dispelled by the code, "[w]hen any county has any demand against any persons or corporations, suit thereon may be brought by the county judge," ARK. CODE ANN. § 14-16-101, and "[c]ities . . . are . . . capable to . . . [s]ue and be sued. . . ." ARK. CODE ANN. § 14-54-101. Second, they falsely claim the Attorney General has brought claims on behalf of "counties, and cities of Arkansas." (Mfr. Joint MTD, at 6) (*See* Complaint, *State ex rel. Rutledge v. Purdue Pharma, et al.*, No. 60CV-18-2018 (Cir. Ct. Pulaski Cty. Mar. 29, 2018)) ("This action is brought on behalf of the sovereign State of Arkansas, by and through Leslie Rutledge, the duly-elected Attorney General and chief law officer for the State."). Third, they falsely claim that Plaintiff Counties and Cities seek to bring claims on behalf of the State. (Mfr. Joint MTD, at 7 (arguing that Arkansas law does not authorize "counties and cities throughout Arkansas to bring general civil actions on the State's behalf.")). Fourth, they claim that Prosecuting Attorney Ellington does not have standing to bring the claims he has brought on behalf of the State, which is discussed in more detail in the body. Fifth, they proclaim that "all Plaintiffs" lack standing to litigate "matters of statewide concern," a nonexistent doctrine invented from an unrelated doctrine about local legislative authority. (Mfr. Joint MTD, at 8-9). Manufacturer Defendants' "statewide concern" *ipse dixit* would lead to a result that is absurdly unjust, and this Court should reject it.

First, the State is an interested party in that it has "interest[s] which ha[ve] been adversely affected or rights which have been invaded." *City of Stamps*, 2006 WL 2254406, at *6 (citations omitted). And, ARK. R. CIV. P. 17(a) plainly provides, "[e]very action shall be prosecuted in the name of the real party in interest." The State of Arkansas's interest in recovering from those who caused its Opioid Epidemic cannot be legitimately disputed.

Also beyond dispute is the General Assembly's clear directive that any action in which the state is an interested party "be brought ***in the name of the state***" and "***prosecuted by the prosecuting attorney***." ARK. CODE ANN. § 16-106-101(a) (emphasis added). The clear language of § 16-106-101(a) and Rule 17 leave no doubt that the State has standing to bring this case. *See City of Stamps*, 2006 WL 2254406, at *6. The Manufacturer Defendants' contrived argument, haphazardly cobbled together to contradict the plain language of § 16-106-101(a), should be rejected.

While it is true that the "Attorney General shall be the attorney for all state ***officials, departments, institutions, and agencies***," ARK. CODE ANN. § 25-16-702 (emphasis added), Arkansas law authorizes prosecuting attorneys to bring actions in which the state ***itself*** is interested. *See id.* at § 16-106-101. Manufacturer Defendants cite 7A C.J.S. § 47 for the contention that the attorney general's authority "to represent the state government in civil actions or proceedings is, generally, exclusive." (Mfr. Joint MTD, at 6). But that same secondary source makes clear that "[i]n the absence of expressly conferred power or statutory provisions, the attorney general does ***not have the exclusive control*** of all legal matters in which the state has an interest, particularly when the matter at issue is within the jurisdiction of another state officer." 7A C.J.S. 47 (emphasis added). Regardless, Arkansas law does not derive from national secondary sources, but from statutes enacted by the Arkansas General Assembly and precedent

from the Arkansas Supreme Court—recognizing that "[u]nless otherwise provided by law, all suits on behalf of the state should be brought by the prosecuting attorney in the name of the state."). *Rothrock v. Walker*, 197 Ark. 846, 125 S.W. 2d 459, 463 (Ark. 1939) (emphasis added) (quoting 18 C.J. § 1316).

In the face of the plain authority granted by § 16-106-101 and binding precedent, the Manufacturer Defendants mistakenly claim that "[s]tate law in fact forbids any other persons from 'prosecut[ing] any suit brought on behalf of the state' absent authorization from the Attorney General." (Mfr. Joint MTD, at 6). In keeping with § 16-106-101, Arkansas courts disagree: "Prosecuting attorneys are authorized to bring actions in which the State is interested in the State's name and behalf." *State v. Hammame*, 102 Ark. App. 87, 90, 282 S.W.3d 278, 281 (2008), citing ARK. CODE ANN. § 16-106-101(a); *see also, Scrivner v. Portis Mercantile Co.*, 220 Ark. 814, 816, 250 S.W.2d 119 (1952) (prosecuting attorney has "authority to represent the State in civil actions."); *see also Fraternal Order of Eagles v. State*, 246 Ark. 658, 439 S.W. 2d 36 (1969) (affirming injunction of public nuisance in action brought by prosecuting attorney).

Manufacturer Defendants' misguided arguments virtually mirror those of the Attorney General in her unsuccessful attempt, ***in this case***, to have the Arkansas Supreme Court direct Prosecutor Ellington to dismiss the State's claims. (*Compare* Mfr. Joint MTD, at 5-9 *with* Emergency Petition for Writ of Mandamus, CV-18-296, attached as Exhibit 7). These arguments echo those of the Attorney General in mischaracterizing and dismissing clear statutory language. (*See id.*). Pursuant to ARK. R. CIV. P. 10(c), Plaintiffs incorporate Prosecuting Attorney Ellington's Response to the Attorney General's unsuccessful Petition, attached as Exhibit 8.

As expected, the Supreme Court correctly and unanimously denied the Attorney General's request for a Writ of Mandamus just like this Court should deny the Manufacturer Defendants' Motion to Dismiss. (Formal Order, CV-18-296, attached as Exhibit 9).

F. Venue is proper in Crittenden County.

Defendants incorrectly claim that ARK. CODE ANN. § 16-106-101(d) provides the sole appropriate venue for the prosecuting attorney, making Crittenden County an improper venue. Rather than focus on § 16-106-101, Distributor Defendants need only keep reading, as the very next section states that venue is also proper in Crittenden County. *Id*. at § 16-106-102(a) ("Any action required by law to be brought in the name of the state against any corporation . . . may be brought in any county in the state before any court having jurisdiction of the action."). For the remaining Plaintiffs, venue is proper here because they have satisfied ARK. CODE ANN. § 16-60-101(c).

Arkansas courts determine whether venue is proper based on the allegations in the complaint. *See, e.g.*, *Henderson Specialties, Inc. v. Boone Cty. Cir. Ct.*, 334 Ark. 111, 114, 971 S.W.2d 234, 236 (1998); *Boatmen's Nat'l Bank of Ark. v. Cole*, 329 Ark. 209, 218, 947 S.W.2d 363, 367 (1997); 2 ARK. CIV. PRAC. & PROC. § 14.4 (5th ed. 2010). "Unless the pleadings on their face show that an action was commenced in the wrong county, a defendant objecting to the venue has the burden of proving the essential facts." *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 105, 437 S.W.2d 459, 461 (1969) (citation omitted).

ARK. CODE ANN. § 16-106-102(a) provides that "[a]ny action required by law to be brought in the name of the state against any corporation . . . may be brought in any county in the state before any court having jurisdiction of the action." Because this action is "required by law to be brought in the name of the state," *see id*. at §16-106-101(a), and because Distributor Defendants are corporations, this case "may be brought in any county in the state before any

court having jurisdiction of the action." *Id.* at § 16-106-102. When these conditions are met, like they are here, § 16-106-102(a) simply confers an alternative choice of venue to that contained in §16-106-101(d). Where the General Assembly has given Plaintiffs that choice, it is not for the court to overrule its intent. *Hicks v. Wolfe*, 228 Ark. 406, 412, 307 S.W.2d 784, 788 (1957).

Having established that Crittenden County is a proper venue for the State's claims, the next step is to determine whether venue here is proper as to each named Plaintiff. "In an action with multiple plaintiffs, venue must be proper as to each plaintiff unless the requirements of ARK. CODE ANN. § 16-60-101(c) are met." ARK. CIV. PRAC. & PROC. § 9:2. That section requires:

> (1) The plaintiffs establish that they assert any right to relief against the defendant jointly, severally, or arising out of the same transaction or occurrence; and
>
> (2) The existence of a substantial number of questions of law or material fact common to all the plaintiffs not only will arise in the civil action, but also that:
>
> (A) The common questions of law or material fact will predominate over individual questions of law or material fact pertaining to each plaintiff;
>
> (B) The civil action can be maintained more efficiently and economically for all parties than if prosecuted separately; and
>
> (C) The interest of justice supports the joinder of the parties as plaintiffs in one (1) civil action.

ARK. CODE ANN. § 16-60-101. Here, there is no credible dispute that all Plaintiffs brought the same causes of action or "rights to relief" against Defendants "arising out of the same transaction or occurrence."

Likewise, there is no credible dispute that common questions of law and material fact predominate. ARK. CODE ANN. § 16-60-101(c) mirrors the standard for class actions outlined in ARK. R. CIV. P. 23(b). *See* ARK. CIV. PRAC. & PROC. § 9:12. In the context of class actions, a

common question predominates when it "is the linchpin of every class member's case." *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 360, 10 S.W. 3d 838, 843 (2000). Here, the common question that predominates is whether Defendants are liable for the years of damage they have caused and continue to cause the State, its counties, and its cities.

Defendants do not dispute that the linchpin of every Plaintiffs' claims is whether Defendants are liable for the damage opioids have caused them. To do so would ignore the numerous questions of law and material fact that are common to all Plaintiffs, including the same claims and legal theory arising out of the same material facts concerning their distribution practices across Arkansas. Those material facts include the extent to which each Distributor Defendant breached its duty of care owed to the citizens of Arkansas to take adequate steps to ensure that prescription opioid medication did not end up in the wrong hands. Because Defendants have made no effort to "prov[e] the essential facts" establishing that venue is improper in Crittenden County for each Plaintiff, they cannot meet their heavy burden. *Mack Trucks of Ark., Inc*., 246 Ark. at 105.

Nor can Defendants seriously challenge that this action can be maintained more efficiently and economically for all parties in one action involving ninety Plaintiffs than if prosecuted separately in ninety different actions. The interest of justice compels the same result—the joinder of all Plaintiffs under this unified action.

G. This Court has personal jurisdiction over Defendants.

1. The Footnote Defendants' personal jurisdiction challenge should be denied.

Some Generic Defendants raised the issue of dismissal for lack of jurisdiction in a footnote of their omnibus brief in support of their supplemental motion to dismiss: Lupin Pharmaceuticals, Inc.; Mayne Pharma, Inc.; Mylan Pharmaceuticals Inc.; Sandoz, Inc.; Sun Pharmaceutical Industries, Inc.; Watson Laboratories, Inc.; Actavis LLC; Actavis Pharma, Inc.

f/k/a Watson Pharma, Inc.; and West-Ward Pharmaceuticals Corp. (*See* Generic Supp. Joint MTD, at 6 n.7). But the Joint Supplemental Motion[27] did not contain any assertion or request for dismissal for lack of personal jurisdiction pursuant to ARK. R. CIV. P. 12(b)(2). Rather, it asserted dismissal pursuant to Rule 9 and a theory of preemption. The "Footnote Defendants"' improper attempt to lodge a Rule 12(b)(2) motion should be summarily denied because Rule 12(b) required them to assert lack of personal jurisdiction either in a "responsive pleading" or "by motion." *Id*. A catch-all footnote contained in a brief in support of a supplemental motion, which itself fails to include an assertion of dismissal pursuant to Rule 12(b)(2), is neither a "responsive pleading" nor a "motion." Further, although Rule 12(g) allows the consolidation of defenses into a singular motion, the Footnote Defendants omitted a defense "then available to [them] which this rule permits to be raised by motion." Having not raised the defense in a responsive pleading or a motion, the Footnote Defendants have waived their personal jurisdiction defense pursuant to Rule 12(h)(1).[28] *See id*. While Plaintiffs will address the Footnote Defendants' contacts with the State of Arkansas for sake of responsive argument, Plaintiffs respectfully request that their footnote assertion be summarily denied.

Additional Manufacturer Defendants have asserted motions to dismiss for lack of personal jurisdiction. These include: Depomed, Inc.; Rhodes Technologies Inc.; Sentynl Therapeutics, Inc.; Valeant Pharmaceuticals North America LLC and ECR Pharmaceuticals Co., Inc.; Abbott Laboratories, Inc.; Aurobindo Pharma USA, Inc., and Aurolife Pharma LLC; Gemini Laboratories, LLC ; and UCB, Inc. Because Defendants have asserted a lack of personal

[27] The Joint Supplemental Motion appears intended to supplement Manufacturer Defendants' Joint Motion—which also did not contain any assertion of a lack of personal jurisdiction over these Defendants.

[28] Surely, given Defendants collective argument of over 2,000 pages, the Footnote Defendants were afforded more than ample opportunity to assert their defenses.

jurisdiction with various unconventional methods (footnotes, joinder without discussion, etc.), should Plaintiffs have overlooked one of the Defendants' assertions of a lack of personal jurisdiction, Plaintiffs respectfully seek leave to supplement and oppose such an inconspicuous defense.

Further, because discovery has not even begun, many of the allegations supporting personal jurisdiction, coupled with Defendants' contacts, will develop in the very near future. Accordingly, Plaintiffs seek leave to supplement with matters obtained in discovery. Although, based upon the allegations of the SAC and the judicially noticeable public records, the Court can and should conclude that it has personal jurisdiction over Defendants.

a. Legal Standards for Personal Jurisdiction

Arkansas courts have personal jurisdiction over all persons and causes of action "to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution." ARK. CODE ANN. § 16-4-101(B). Thus, personal jurisdiction in Arkansas is limited only by "Fourteenth Amendment due-process jurisprudence." *Hotfoot Logistics, LLC v. Shipping Point Marketing, Inc.*, 2014 Ark. 460, at *4-5, 447 S.W.3d 592, 595. This Court has specific personal jurisdiction over each Defendant because Plaintiffs' claims stem from each Defendant's contacts with Arkansas. *Id.* at *6.

The bedrock requirement for personal jurisdiction is that "a defendant's contacts with a forum state . . . must be sufficient to cause the defendant to 'reasonably anticipate being haled into court there.'" *Payne v. France*, 373 Ark. 175, 181, 282 S.W.3d 760, 766 (2008) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). To demonstrate this "'reasonable anticipation,' there must be some act by which the defendant purposefully avails itself of the privileges of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610,

612 (8th Cir. 1994) (quoting *Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc*., 950 F.2d 526, 528-29 (8th Cir. 1991)); *see also Hotfoot*, 2013 Ark. 130, at *6. This ensures that defendants are not haled into a forum court "solely as a result of 'random,' fortuitous,' or 'attenuated' contacts" or "the 'unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (quoting *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 299; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). As long as the cause of action arises from conduct where the defendant "purposefully avails itself of the privileges of conducting activities" in Arkansas, the Arkansas Supreme Court has recognized that personal jurisdiction may be exercised over a nonresident "even though he has had only one contact with the forum state." *Concrete Wallsystems of Ark., Inc. v. Master Paint Indus. Coating Corp*., 95 Ark. App. 21, 25, 233 S.W.3d 157, 160 (2006) (citing *John Norrell Arms, Inc. v. Higgins*, 232 Ark. 24, 962 S.W.2d 801 (1998), *in turn* citing *Burger King, supra*). All Defendants profited, some mightily, from their "contact with [Arkansas]."[29]

b. Defendants' contacts give rise to specific personal jurisdiction.

(1) Each Defendant sought and obtained a license from the Arkansas Board of Pharmacy.

With the exception of just two, all Defendants raising personal jurisdiction were or are licensed as Wholesale Distributors through the Arkansas State Board of Pharmacy:

Defendant	**Wholesale Distributor License Date**

[29] For all matters pertaining to Defendants' motions for lack of personal jurisdiction and pursuant to Rule 10(c) of the Arkansas Rules of Civil Procedure, Plaintiffs adopt and incorporate by reference the arguments and citation to authorities made in Plaintiff's Response in Opposition to Sentynl's Motion to Dismiss, and Plaintiffs' Incorporated Motion to Strike. (June 13, 2018).

Abbott Laboratories Inc.	Multiple licenses beginning as early as January 29, 2004, through December 21, 2016. (*See* Exhibit 10).
Actavis, Inc. (misnamed Actavis LLC)	August 13, 2010, through December 31, 2014. (*See* Exhibit 11) (inactive).
Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.	At least two licenses beginning as early as December 29, 1993, through December 31, 2010. (*See* Exhibit 13) (inactive).
Aurobindo Pharma USA, Inc.	At least two licenses beginning as early as December 30, 2004, through December 31, 2018. (*See* Exhibit 14).
Aurolife Pharma, Inc.	June 19, 2013, through December 31, 2018. (*See* Exhibit 15).
Depomed, Inc.	September 20, 2006, through December 31, 2018. (*See* Exhibit 16).
ECR Pharmaceuticals Company, Inc.	February 7, 2014, through December 31, 2014. (*See* Exhibit 17).
Gemini Laboratories, LLC	February 3, 2014, through December 31, 2018. (*See* Exhibit 18).
Lupin Pharmaceuticals, Inc.	At least two licenses beginning as early as February 22, 2006, through December 31, 2018. (*See* Exhibit 19).
Mayne Pharma, Inc.	At least four licenses beginning as early as December 5, 2003, through December 31, 2018. (*See* Exhibit 20).
Mylan Pharmaceutical, Inc.	At least two licenses beginning as early as July 23, 1981, through December 31, 2018. (*See* Exhibit 19).
Sandoz, Inc.	At least two licenses beginning as early as April 3, 1978, through December 31, 2018. (*See* Exhibit 21).
Sentynl Therapeutics, Inc.	July 9, 2015, through December 31, 2018. (*See* Exhibit 22).
Sun Pharmaceutical Industries, Inc.	Multiple licenses beginning July 20, 1994, through December 31, 2018. (*See* Exhibit 23).
UCB, Inc.	At least two licenses beginning on May 27, 2010, through December 31, 2018. (*See* Exhibit 24).
Valeant Pharmaceuticals North America, LLC	May 16, 2011 through December 31, 2018. (*See* Exhibit 25).
Watson Laboratories, Inc. When Watson is typed in it pulls up Actavis Pharma, Inc. (Active); Teva Pharmaceuticals, Inc. (Active); and Watson Laboratories, Inc. (Not Active since 12/31/16)	At least two licenses beginning on June 2, 2003, through December 31, 2016. (*See* Exhibits 26).

West-Ward Pharmaceutical Corp.	March 17, 1997, through December 31, 2018. (*See* Exhibit 27).

Defendants will argue that merely applying for a wholesale distribution license with the Board is akin to simply registering to do business in a given state and would not be a singular sufficient contact to expect to be haled into court in Arkansas. But this ignores (a) Defendants' affirmative representations in their applications, (b) their consent to follow and abide by Arkansas statutes and regulations, and (c) their consent and affirmative agreements to undertake the very actions which Plaintiffs assert they have failed to do.

To obtain the Wholesale Distribution licenses, each Defendant affirmatively certified, "All of the provisions of Arkansas laws and regulations related to the wholesale distribution of drugs into Arkansas ***will be faithfully observed*** during the period any permit issued may be in force and effect." (*See* Sample Application, Part VI: Certification, attached as Exhibit 28; Defendants' Applications or Renewal of Applications, Exhibits 10-27). Each Defendant also expressly and falsely affirmed under oath that it, "complies with all applicable federal, state and local laws and regulations." (*Id*.). Finally, each Defendant confirmed, "I have read regulations 08-00-0001 through 08-00-0014 and will abide by them." (*Id*.). Accordingly, each Defendant acknowledged, under oath, that they were familiar with and would abide by Arkansas's laws regulating opioid distribution and were in compliance at the moment of their application, continuing through their effective license periods. This certification of compliance is an expression or admission of the consequences of the "privileges of conducting activities." Those consequences necessarily include the liability arising from the allegations in the SAC.

In addition to affirming compliance, each Defendant certified under oath that "[t]his business . . . ***before shipping to a recipient in Arkansas***, will determine that the recipient is appropriately licensed and authorized by law to purchase and possess prescription drugs." (*See*

id.). Each Defendant certified it would maintain records of all transactions of prescription drugs. (*Id*.). These records must contain the following information: (a) the source of the drugs, including the name and principal address of the seller or transferer, and the address of the location from which the drugs were shipped; (b) The identity and quantity of the drugs received and distributed or disposed of, and (c) The dates of receipt and distribution or other disposition of the drugs. *See* ARK. ADMIN. CODE § 070.00.08-00-0008; (*see also* Sample Application, Part VI: Certification, Exhibit 28; SAC, at ¶ 383 (record-keeping)).

Because the Arkansas State Board of Pharmacy requires each Defendant to maintain the types of records expressed in ARK. ADMIN. CODE § 070.00.08-00-0008—and each Defendants expressly consented in writing to do so—each Defendant knows the amount and types of drugs they sent into Arkansas, the actual recipient, and the ultimate destination. Far from simply putting a product into the stream of commerce without knowledge of its destination, each Defendant was required—***prior to shipment***—to know exactly the quantity and the ultimate destination of the subject opioids; i.e., each Defendant knew the quantity of its opioids that it intentionally directed into Arkansas. (*See* SAC, at ¶ 375, ("Based upon Defendants' (a) knowledge and foreseeability of the effects of their actions or inactions and (b) control over the chain of manufacturing and supply . . . Defendants owe a duty of reasonable care[.]"); *id*. at ¶¶ 376-77 (regarding knowledge, control, and care); *id*. at ¶¶ 424-426 (Defendants' violations of Arkansas Uniform Narcotic Drug Act by "consciously oversupplying the market" with opioids and "failing to review controlled substance orders for red flags.")).

Moreover, Arkansas law required each Defendant to assess—again, ***prior to shipment***—the actual recipient to ensure it also is authorized by law to purchase and possess prescription narcotics. (*See* Defendants' Applications, Exhibit 10-27); SAC, at ¶¶ 379-380, 382 (alleging

Defendants' requirement to "maintain effective controls")). Thus, each Defendant not only had the ability, but also the obligation to track its product into Arkansas—giving it direct knowledge of its opioid distribution within the State. Each Defendant then was not merely seeing a rise in demand from the general US marketplace, but each Defendant was intentionally, knowingly, and continually directing opioids into Arkansas knowing exactly the increase in numbers and its proportionate share of opioids to a location in Arkansas. (*See* SAC, at ¶ 386 ("[Defendants] negligent acts include: a. consciously oversupplying the market throughout the State with highly-addictive prescription opioids . . . g. failing to properly review controlled substance order for red flags[.]"); *id*. at ¶¶ 399, 402-03 ("The nuisance is the over-saturation of opioids in the Plaintiffs' cities and counties . . . ."; Defendants failed to implement effective controls; and Defendants had actual knowledge of the conditions they created); *id*. at ¶¶ 426 (Defendants' violations of the UNDA by "consciously oversupplying the market" with opioids and "failing to review controlled substance orders for red flags."); *id*. at ¶¶ 437-446 (conspiracy allegations tying manufacturers to distributors to physicians to pharmacies). With this knowledge, Defendants continued to certify that they were in compliance with Arkansas's laws.

Defendants' applications to the Arkansas State Board of Pharmacy thus belie any argument that they simply put their opioids into a general stream of commerce without knowledge of the true effect in Arkansas.[30] Instead, each Defendant purposefully directed its products into Arkansas with actual knowledge of the recipient and quantities of products sold.[31] The information Defendants were required to know and maintain in their records is the very

[30] (*See* Plaintiffs' Response in Opposition to Sentynl's Motion to Dismiss and Incorporated Motion to Strike, at 5-13).

[31] (*See id.*).

information that gives rise to Defendants' purposeful actions directed into the State and creates the very duties that Defendants breached.

For example, Defendant Sentynl admits that it can account for at least 125 bottles of Sentynl's Levorphanol product being distributed to five pharmacies in Arkansas. (*See* Stokely Affidavit, at ¶¶ 23-25). Plaintiffs counter that in 2016 alone, 335 deaths were related opioids. (*See* SAC, at ¶ 3). How many of these deaths, how many overdose calls, how many opioid arrests were caused from Sentynl's drugs? That question will be answered in discovery. Sentynl also proves Plaintiffs' point: Defendants have actual knowledge of the number of opioids they peddled in Arkansas while they enjoyed the "privileges of conducting activities" here, while also failing to use the information to implement effective controls against diversion.

c. Defendants are subject to personal jurisdiction as conspirators.

Plaintiffs allege that Defendants, "along with other manufacturers, wholesale distributors, retail stores, and physicians, agreed to continuously oversupply prescription opioids" and disregarded their statutory and regulatory duties against diversion of opioids. (SAC, at ¶¶ 438--476). Through this conspiracy and the personal jurisdiction obtained over the other Defendants, the Court has specific jurisdiction over all conspiring Defendants. The exercise of specific personal jurisdiction pursuant to a Defendants' participation in a conspiracy satisfies the standards of due process and ARK. CODE ANN. § 16-4-101. *See Gibbs v. PrimeLending*, 2011 Ark. 255, 381 S.W.3d 829. "[A]ny act done or declaration made by one of the conspirators in furtherance, aid, or preparation of the alleged conspiracy may be shown as evidence against his or her fellow conspirators." *Gibbs*, 2011 Ark. 255, at *7. To establish their conspiracy theory of personal jurisdiction, Plaintiffs have sufficiently alleged (1) the existence of a conspiracy (*see* SAC, at ¶¶ 19-28, 181-193, 238-256, 266-272); (2) the Defendants' participation in the conspiracy (*see id.* at ¶¶ 9-28, 181-193, 437, 468); and (3) the overt acts taken in furtherance of

the conspiracy within Arkansas (*see id.* at ¶¶ 273-283, 286-289, 294-297, 377, 384, 386-392). The Court has specific jurisdiction over all Defendants.

H. The SAC satisfies Arkansas's fact-pleading standard as to each Defendant.

1. Plaintiffs appropriately pleaded their claims under Arkansas law.

Defendants' draconian interpretation of fact-pleading is inconsistent with governing law and would chill rather than further substantial justice. Nevertheless, Plaintiffs adequately allege that Defendants:

1. Engaged in predicate acts of a deceptive and fraudulent marketing scheme designed to persuade doctors to prescribe and patients to use opioids for chronic pain despite the fact that opioids are too addictive and dangerous for treatment of chronic pain, (*See* SAC, at 19-29, 179-287);

2. Falsely trivialized or concealed known risks and grossly overstated the benefits of long-term opioid use, targeting susceptible Arkansas prescribers and vulnerable Arkansas patients in an concerted effort to create a market for diversion, (*see id.* at ¶¶ 20-23, 179-200, 211-12, 238-65, 386, 426);

3. Caused a staggering demand for opioids in Arkansas that created an epidemic of opioid addiction, overdose deaths, neonatal disease, and other adverse effects from opioid use—diversion by any definition, (*see id.* at 19-25, 312, 318);

4. Fueled the opioid epidemic in Arkansas by facilitating widespread diversion of opioids in violation of Arkansas law, (*see id*. at ¶¶ 26, 288-326);

5. Breached statutory and common-law duties to Plaintiffs and their citizens, and violated numerous Arkansas laws, in the course of their ongoing conspiracy of greed and diversion, (*see id*. at ¶¶ 373-493); and,

6. Failed to maintain effective controls against diversion in order to greatly enrich themselves at the expense of Arkansas, its counties, cities, and people. (*See id.* at 165, 288-326, 382, 386, 402, 410, 424, 426, 444, 474, 487).

The SAC also contains many allegations specific to individual Defendants where such facts are publicly known through criminal prosecutions and public investigations. (*See id*., ¶¶ 14, 183-85, 213, 240, 327-371).[32] The SAC contains sufficient factual allegations against all

[32] The SAC plainly includes sufficient factual allegations against individual Defendants in this category, and the Defendants who argue otherwise tilt at windmills. (*See, e.g.*, Endo Brief, at 6-11 (arguing that the complaint is

Defendants as a matter of law, not only those who have been the subject of those prosecutions and investigations. *See In re Opioid Litig. I*, at 22-25 ("The court finds the allegations in the complaint are legally sufficient to state a cause of action . . . against each of the manufacturer defendants."). This Court should do as other courts have done in cases where local and state governments are suing drug manufacturers and distributors over their role in the opioid epidemic: Allow Plaintiffs to pursue their case against the opioid industry and uncover the totality of Defendants' bad conduct through discovery.

2. Lack of specificity is the result of informational asymmetry.

Some Defendants—those whose misconduct is yet to be publicized—seek to use informational asymmetry to fashion their own immunity. They insist Plaintiffs must somehow divine confidential details about Defendants' individual practices, but that is the function of discovery and trial rather than pleading. Defendants conflate Arkansas's fact-pleading standard with an imaginary one that requires Plaintiffs to prove their case on the pleadings. *See Kohlenberger*, 256 Ark. at 590 ("[I]t is unnecessary that a complaint set out the evidence relied upon or a history of transactions leading up to the essential facts. . . ."). Plaintiffs are not required to plead with specificity where, as here, "it [i]s apparent that the information sought to be elicited was not available to the plaintiff, but was in the possession of the defendants." *Meriwether v. Du Bose*, 186 Ark. 743, 55 S.W.2d 937, 939 (1933). Here, the SAC includes a bevy of allegations of actionable misconduct by the Defendants, and those allegations must be accepted as true.

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deficient as to Endo despite eight detailed paragraphs of factual allegations about Endo)). The Court should likewise disregard Endo's argument that factual allegations mirroring a settlement agreement entered into between Endo and the State of New York in 2016 should be stricken. *See In re Opioid Litig. I*, at 17-18 (outlining factual details of the 2016 settlement agreement, noting that "[c]ontrary to the assertions by Endo's counsel, the March 2016 assurance of discontinuance does not constitute a stipulation of settlement that is binding on plaintiffs[,]" and concluding that "the March 2016 assurance of discontinuance does not . . . bar the counties from bringing law or equity claims against it for practices within their respective jurisdictions").

In federal multi-district litigation centralized in Cleveland, Ohio, involving hundreds of cases filed by states, counties and cities, *In Re: National Prescription Opiate Litigation*, No. 1:17-MD-2804 (N.D. Ohio), United States District Judge Dan Aaron Polster correctly concluded that the plaintiff states, counties, and cities should be granted access to discovery. That discovery includes transactional data and reports for all states from the Automated Records and Consolidated Orders / Diversion Analysis and Detection System ("ARCOS") database maintained by the Drug Enforcement Administration. *See id*., Doc. 233, 397. After authorizing disclosure of ARCOS data for a subset of six states in April 2018, Judge Polster explained that "it is certain that all of the detailed information in the [ARCOS] database is necessary for ***litigation***, as the defendants recognized." *Id*., Doc. 233, at 7-8 (emphasis in original). "Discovery of precisely which manufacturers sent which drugs to which distributors, and which distributors sent which drugs to which pharmacies and doctors, is critical not only to all of plaintiffs' claims, but also to the Court's understanding of the width and depth of this litigation." *Id*. at 8. Judge Polster concluded his initial order by summarizing the need for the plaintiffs to gain access to data and information that was unknown and unobtainable to them at the time of pleading:

> There is overwhelming need for the Plaintiffs in this case to learn the truth surrounding the marketing and distribution of opioids, including what the manufacturers, distributors, retailers, and DEA knew and when they knew it; what, if anything, was kept, intentionally or unintentionally, away from the DEA and the public by defendants; and what, if anything, the DEA kept, intentionally or unintentionally, from the States, counties, and cities that have filed the . . . lawsuit. . . . [T]he vast oversupply of opioid drugs in the United States has caused a plague on its citizens and their local and State governments. Plaintiffs' request for the ARCOS data, which will allow Plaintiffs to discover how and where the virus grew, is a reasonable step toward defeating the disease.

Id. at 21-22 (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("Sunlight is said to be the best of disinfectants.") (quoting Justice Brandeis, *Other People's Money* (1933)).

Less than a month after the initial disclosure of a subset of ARCOS data, Judge Polster observed that "[t]he ARCOS data for these six States has proved to be extremely informative." *In Re: National Prescription Opiate Litigation*, Doc. 397, at 1. Specifically, it "allowed plaintiffs in these States to identify previously-unknown entities involved in the manufacturing and distribution of opioids . . . [and] allowed plaintiffs to identify improperly-named defendants"—thus allowing plaintiffs in individual cases to amend their complaints to add proper defendants and remove improperly-named defendants. *Id*. Because the transactional ARCOS data "shows the precise number of opioid pills delivered to each City and County in America, partitioned by manufacturer and distributor and pharmacy," it allows the litigation "to proceed based on meaningful, objective data, not conjecture or speculation." *Id*. at 2. The same will be true in this case when it proceeds to discovery—but Plaintiffs have no access to this information at the pleadings stage.[33]

3. "Group pleading" is proper when pleading a conspiracy.

The so-called "group pleading" allegations are proper given the conspiratorial nature of the allegations and claims. Several of the Defendants even concede that the SAC includes many allegations of conspiracy among the Defendants. (*See, e.g*., Depomed Brief, at 3 ("[T]he Complaint alleges that manufacturers, distributors, and health care providers engaged in a wide-ranging twenty-year conspiracy to market and distribute opioids in violation of the law."); Teva/Cephalon Brief, at 11-12 ("Plaintiffs seek to hold [Defendants] liable on a conspiracy theory—that they purportedly acted in concert with numerous third parties to engage in the false marketing of opioids for long-term chronic pain.")).

[33] Plaintiffs have already demonstrated a willingness to dismiss Defendants who do not belong in this litigation. *See supra* note 4.

As the U.S. Supreme Court has observed, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Consistent with this direction, collective pleading is proper when allegations relate to collective action among defendants. Courts nationwide have exercised discretion, allowing collective pleading in various types of cases based on the specific contexts of those cases.[34] Plus, the prohibition against "group pleading" is not recognized in Arkansas.

Multiple courts faced with opioid lawsuits by public entities against drug companies have specifically rejected the same "group pleading" arguments advanced by Defendants here. *See In re Opioid Litig. II*, at 4 ("The distributor defendants . . . contend that the complaint fails to provide details of any claimed misrepresentations by them or make specific and separate allegations against them, and instead simply lumps them together in generally crafted paragraphs. They claim that the plaintiffs' failure to plead those causes of action with the requisite specificity warrants dismissal . . . . The court disagrees."); *Missouri v. Purdue Pharma, L.P.*, at 2-3 ("It has long been accepted that an allegation that 'Defendants' did something is an allegation that each Defendant collectively referred to as 'Defendants' did that thing . . . . Plaintiff's petition here clearly alleges specific representations made by specific actors at specific

[34] *See, e.g., Phillips v. Scientific-Atlanta, Inc*., 374 F.3d 1015, 1019 (11th Cir. 2004) (noting the "presumption of group responsibility for statements and omissions in order to satisfy the particularity requirements for pleading fraud" in securities litigation); *In re: Cabletron Systems, Inc*., 311 F.3d 11, 40 (1st Cir. 2002) (identifying one form of "the group pleading presumption" as an approach in which "the court need not consider the liability of each individual defendant, but may attribute all the statements to all the defendants as 'collective actions'"); *Wool v. Tandem Computers, Inc*., 818 F.2d 1433, 1440 (9th Cir. 1987) (allowing group pleading and concluding that it satisfied particularity requirements because "[i]n cases of corporate fraud where the false or misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that these are the collective actions of the officers*."); In re TFT–LCD (Flat Panel) Antitrust Litig*., 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009) (finding that direct-purchaser plaintiffs stated valid claims against defendants despite their use of group pleading).

times, both by Defendants and others acting in concert with Defendants, and clearly makes claims against each Defendant."). Like those courts, this Court should reject Defendants' "group pleading" challenge.

4. Defendants make too much of *Brighton*.

Many Defendants incorrectly assert that the Complaint is deficient under *Ark. Dep't of Envtl. Quality v. Brighton Corp*., 352 Ark. 396, 102 S.W.3d 458 (2003). There, the plaintiff's factual allegations were focused on the conduct of a third party instead of the fifteen named defendants. 352 Ark. at 399. The Arkansas Supreme Court affirmed dismissal of the case for failure to plead facts about the defendants' actionable conduct:

> [D]espite DEQ's contention that its complaint made reference to certain activities being conducted "on behalf of the defendants," a close reading of the complaint reveals that ***no such allegations were actually made, and the complaint's allegations almost exclusively refer to USI's activities and performance***, and fails to describe the defendants' involvement.

Id. at 407 (emphasis added). There, plaintiff did "nothing more" than allege that the defendants violated a statute without any factual support "that defendants came within the meanings of these terms" in the statute. *Id.* at 408–09.

In search of Arkansas authority prohibiting "group pleading" where there is none, Defendants stretch *Brighton* to the point of perverting its holding. The *Brighton* court construed the allegations in the complaint liberally and concluded even the group allegations were deficient, not because they were group allegations, but because they merely recited statutory language and said nothing about the defendants' conduct. Ultimately, the *Brighton* Court held, "the General Assembly never intended an innocent customer to be found liable resulting from unlawful conduct by a [separate business]." *Id.* at 410–11.

After deconstructing *Brighton*, Defendants' foundation crumbles leaving them no Arkansas rule or case that supports their argument that the SAC is factually insufficient. Indeed,

Plaintiffs' factual allegations, contained in 300 numbered paragraphs spanning 100 pages—taken as true and construed liberally to further justice as they must be—are more than sufficient to state valid claims against all Defendants.

5. Plaintiffs have sufficiently apprised Pernix of the claims against it such that Pernix can easily admit or deny them.

Pernix is the only Defendant to file a motion for a more definite statement, claiming that it "is left to guess" what it did wrong, "what legal duties it supposedly breached," and how its conduct injured Plaintiffs. (*See* Pernix Brief, at 1, 4). A motion for more definite statement is proper only "when the pleading is so unclear that 'the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.'" ARK. CIV. PRAC. & PROC. § 14.13, at 333 (4th ed. 2006). Plaintiffs make straightforward allegations against Pernix, including:

- as a manufacturer,[35] it is required to "maintain effective controls against diversion of controlled substances," and keep detailed records of its inventory to prevent diversion of its product. (SAC, at ¶¶ 379-380, 383, 424);

- as a manufacturer, it recklessly supplied its drugs to distributors in the supply chain despite knowing of widespread diversion and oversupply (*Id*. at ¶¶ 433, 441, 463, 471); and

- as a manufacturer, it failed to implement and maintain the required diversion controls, thereby recklessly if not knowingly oversupplying the State of Arkansas with addictive and dangerous drugs. (*See, e.g., id.* at ¶¶ 487-489).

These allegations are neither vague nor ambiguous—Pernix should simply admit or deny them.

[35] Pernix claims it "never has manufactured, marketed, distributed or sold prescription drugs." (Pernix Mtn., at 3, n. 1). At the same time, Pernix publicizes that it is "a specialty pharmaceutical business with a focus on acquiring, developing and commercializing prescription drugs primarily for the U.S. market[,]" that "promotes its branded products to Healthcare Providers through its internal sales force and markets its generic portfolio through its wholly owned subsidiaries. . . ." (Pernix.com, *Our Company*, attached as Exhibit 29). One of those drugs is an opioid for "pain severe enough to require daily, around-the-clock, long-term opioid treatment." (Zohydroer.com, attached as Exhibit 30). Discovery will reveal the truth.

Finally, Arkansas's pleading standard, *supra*, applies equally to Pernix's demand for proof at the pleading stage.[36]

I. Rule 9(b)'s heightened pleading standards do not apply because Plaintiffs state no fraud claim.

Several Defendants seek to impose the heightened pleading requirements imposed by ARK. R. CIV. P. 9(b), which provides that fraud shall be pleaded with particularity. The glaring threshold problem is that Plaintiffs plead no fraud claims.[37] Not surprisingly, the Arkansas and Eighth Circuit cases that this minority of Defendants cite in asking the Court to apply Rule 9(b) ***all involve a plaintiff asserting a fraud claim against a defendant***.[38] None of these cases

[36] The distinction between pleading and proof has been recognized by American Courts since the genesis of the FED. R. CIV. P. 80 years ago, and "[t]o construe Rule 12(e) so as to destroy the fundamental distinction between pleading and proof has never been suggested or intimated by any commentator[, and] [n]o such drastic result could have been contemplated by the Supreme Court." *Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co*., 25 F. Supp. 598, 600 (D. Del. 1938); (*See also Mitchell v. E-Z Way Towers, Inc.*, 269 F.R.D. 126, 132 (5th Cir. 1959) ("[A] motion for more definite statement is not to be used to assist in getting the facts in preparation for trial as such. Other rules relating to discovery, interrogatories and the like exist for this purpose.");

[37] Several of the same Defendants who make this argument admit that Plaintiffs do not assert a fraud claim and attempt to explain this away by contending that the Complaint "sounds in" fraud. (*See, e.g.*, Insys Brief, at 1 ("There is no question that the [complaint] sounds in fraud"); Janssen Brief, at 2 ("Plaintiffs' claims sound in fraud")).

[38] *See Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, at *13-14, 372 S.W.3d 324 (affirming dismissal of "fraud claim"); *DePriest v. AstraZeneca Pharmaceuticals, L.P.*, 2009 Ark. 547, at *19-20, 351 S.W.3d 168 (analyzing consumers' claim of "common-law fraud"); *Wal-Mart Stores, Inc. v. Coughlin*, 369 Ark. 365, 376, 255 S.W.3d 424 (2007) (concluding that "Wal-Mart clearly pled . . . facts supporting fraud in its First Amended Complaint"); *Knight v. Day*, 343 Ark. 402, 405, 36 S.W.3d 300 (2001) (outlining elements for a fraud claim under Arkansas law); *Woodend v. Southland Racing Corp*., 337 Ark. 380, 989 S.W.2d 505 (1999) (complaint failed to sufficiently allege fraud claim); *Hames v. Cravens*, 332 Ark. 437, 443-44, 966 S.W.2d 244 (1998) ("the appellants fail to plead a case of fraud"); *McAdams v. Ellington*, 333 Ark. 362, 365, 970 S.W.2d 203 (1998) (complaint alleged that the defendants "were liable for fraud"); *Evans Indus. Coatings, Inc. v. Chancery Court of Union Cty*., 315 Ark. 728, 732, 870 S.W.2d 701 (1994) ("the issue before this court is whether fraud, either actual fraud or constructive fraud, has been sufficiently pled"); *Davis v. Davis*, 2016 Ark. App. 33, 480 S.W.3d 878 (reviewing dismissal of a fraud claim under Arkansas Securities Act); *Floyd v. Koenig*, 101 Ark. App. 230, 274 S.W.3d 339 (2008) (complaint alleged facts sufficient to support application of fraudulent concealment to toll statute of limitations); *Quintero Cmty. Ass'n, Inc. v. FDIC*, 792 F.3d 1002, 1010 (8th Cir. 2015) ("Appellants failed to plead fraud with the specificity required by Rule 9(b)") *Summerhill v. Terminix, Inc*., 637 F.3d 877, 880 (8th Cir. 2011) ("it is Summerhill's burden to plead, with particularity, facts to support his claim that the doctrine of fraudulent concealment tolls applicable statutes of limitations"); *United States v. St. Luke's Hosp., Inc*., 441 F.3d 552, 556-57 (8th Cir. 2006) (analyzing claims brought under federal "anti-fraud statute"); *J.D. Fields & Co. v. Nucor-Yamato Steel*, 976 F. Supp. 2d 1051, 1068 (E.D. Ark. 2013) ("The Court first considers whether Fields has sufficiently pleaded fraud under Rule 9(b)").

involve claims asserted against drug companies for creating and fueling the opioid epidemic which others courts have allowed to proceed.[39] On this basis alone, this Court can dispense with these Defendants' argument and move on to the next section of this Response.

Purdue's assertion that "[s]imilar shortcomings led the federal district court in Chicago to twice dismiss nearly identical fraud-based claims and allegations against Purdue and other Defendants under Rule 9(b)," (Purdue Brief, at 12), is misleading and false. In *Chicago v. Purdue Pharma L.P.*, 2015 WL 2208423 (N.D. Ill. May 8, 2015), the court initially dismissed the fraud claims and allowed the City thirty (30) days to amend its complaint. The court concluded that the City pleaded sufficient facts to state a claim under the state consumer fraud law, specifically noting the City's assertion that "specific dates and the identities of defendants' sales representatives who made the detailing visits were closely tracked by defendants and such information will be disclosed in discovery." *Id*. at 1071-72. The court likewise concluded that the City stated a valid claim for misrepresentation against all defendants, noting that the City could adequately plead causation and injury based on information learned ***after*** filing the complaint enabling the City to determine what prescribers were detailed with the defendants' allegedly deceptive marketing, and what prescribers wrote prescriptions for defendants' drugs. *Id*. at 1076-83. Even applying heightened pleading requirements for numerous fraud claims brought by the City of Chicago, the district court ultimately upheld the City's fraud claims and allowed the City

[39] Notably, courts have allowed even fraud claims to proceed based on, e.g., informational asymmetry and allegations of conspiracy and concerted action. *See, e.g., In re Opioid Litig. II*, at 4 (denying consolidated motions to dismiss of opioid distributors and noting that "[e]ven in fraud, a plaintiff is not required to allege specific details of an individual defendant's participation where those details are peculiarly within the defendant's knowledge"). *See also Corley v. Rosewood Care Ctr., Inc*., 142 F.3d 1041, 1051 (7th Cir. 1998) ("the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim"); *In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings*, 2016 WL 4091620, at *2-4 (N.D. Ill. Aug. 2, 2016) (an overly strict application of Rule 9(b) was inappropriate given plaintiff's allegations about defendant pharmaceutical companies' scheme as a whole).

to amend its complaint to cure deficiencies based on informational asymmetry at the time the City filed its original complaint. *Id.* If anything, the Chicago case—read as a whole instead of lines cherry-picked by Purdue—guides this Court to ***uphold*** the validity of the SAC which, again, includes no fraud claims.[40]

J. No statute of limitations bars any claim.

A handful of Defendants argue that the statute of limitations bars Plaintiffs' claims. This is wrong for five reasons. First, the statute simply does not apply to governmental entities suing to protect public rights: "[A]s to rights belonging to the public and pertaining purely to governmental affairs, and in respect to which the political subdivision represents the public at large or the state, the exemption in favor of the sovereignty applies, and the statute of limitations does not operate as a bar." *Brighton*, 352 Ark. at 412–13, 102 S.W.3d at 469 (quoting *Alcorn*, 236 Ark. at 670–71, 367 S.W.2d 737 (in turn quoting *Jensen* 209 Ark. 478, 190 S.W.2d 977)).

Second, Plaintiffs allege Defendants' continuing unlawful conduct, and Plaintiffs allege ongoing and devastating injury to themselves and their communities, families, and citizens caused by Defendants' continuing conduct. (*See* SAC ¶¶ 15, 20, 21, 23, 182, 183, 185, 199, 238, 239, 257, 268-72). Third, a motion to dismiss is only appropriate where a complaint is barred on its face by the statute of limitations. *Hutcherson v. Rutledge*, 2017 Ark. 359, at *2, 533 S.W.3d 77 (citing *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984)). *See also McGinnis v. Less*,

[40] Teva/Cephalon also improperly relies on decisions in cases involving fraud claims against Cephalon—none of Teva/Cephalon's cases involve any of the same claims as the instant case. (*See* Teva/Cephalon Brief, at 1 n. 2, 10-11 (citing *Travelers Indem. Co. v. Cephalon, Inc*., 32 F. Supp. 3d 538, 540 (E.D. Pa. 2014) (fraud claim); *Ind./Ky./Ohio Reg'l Council of Carpenters Welfare Fund, Inc. v. Cephalon, Inc*., 2014 WL 2115498, at *1 (E.D. Pa. May 21, 2014) (RICO mail fraud); *Cent. Reg'l Employees Ben. Fund v. Cephalon, Inc.*, 2010 WL 1257790 (D. N.J. Mar. 29, 2010) (RICO and fraud claims); *Cent. Reg'l Employees Ben. Fund v. Cephalon, Inc*., 2009 WL 3245485 (D. N.J. Oct. 7, 2009) (same)).

147 Ark. 211, 227 S.W. 398, 399 (1921).[41] Fourth, Arkansas courts "strictly construe the statute, and if there is any reasonable doubt, we will resolve the question in favor of the complaint standing and against the challenge." *Dunlap*, 284 Ark. at 7 (citing *Jefferson v. Nero*, 225 Ark. 302, 280 S.W.2d 884 (1955)). Finally, limitations periods begin to run under Arkansas law only once the tort is complete and the cause of action accrues. *See State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 623, 66 S.W.3d 613, 616 (2002) ("The limitations period . . . begins to run when there is a complete and present cause of action"); *Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 12, 940 S.W.2d 505, 506 (1997) ("the . . . statute of limitations . . . begins to run when the underlying tort is complete") (citing *Faulkner v. Huie*, 205 Ark. 332, 168 S.W.2d 839 (1943)).

Here, the torts and violation of Arkansas law continue, and will continue until the devastation caused by opioid diversion and abuse is eradicated. For all these reasons, Defendants' statute of limitations arguments should be rejected.

K. Plaintiffs' claims are not preempted because there is no conflict with federal law.

Defendants argue that all of Plaintiffs' claims are preempted by federal law by virtue of "implied conflict preemption"—preemption that arises either "where compliance with both federal and state regulations is a physical impossibility," or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth v. Levine*, 555 U.S. 555, 589 (2009) (citations omitted). The supposed "conflict" manufactured by Defendants is founded upon a mischaracterization of Plaintiffs' claims.

Defendants claim it is impossible to both avoid liability under Plaintiffs' claims and still fulfill their obligations under federal law. "Impossibility pre-emption is a demanding defense,"

[41] ("We are of the opinion . . . that the facts stated in the complaint do not show that appellants are barred by laches or by the statute of limitations and that if either of those defenses exist they must be pleaded in the answer by the allegation of facts which call them into operation.").

Levine, 555 U.S. at 573, yet Defendants fail to identify ***any*** conflict ***at all*** created by Plaintiffs' actual claims. This is so because Plaintiffs' claims are not about the content of Defendants' FDA-approved labels, or marketing consistent with those labels. Instead, Plaintiffs allege that Defendants breached their duty of ordinary care by allowing their products to be unlawfully diverted into Plaintiffs' communities. (*See, e.g.*, SAC ¶¶ 386 & 426, subparts (a) through (k)). Defendants fail to identify any conflict between Arkansas and federal law regarding the prevention of opioid diversion, and therefore Defendants' motions to dismiss Plaintiffs' claims as preempted must be denied.

Nor have Defendants presented any reason why their liability as pleaded would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Levine*, 555 U.S. at 589. As stated clearly by the Supreme Court:

> If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70–year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, … Congress has not enacted such a provision for prescription drugs. Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness … and that Congress did not regard state tort litigation as an obstacle to achieving its purposes.

Id. at 574–75, 577 (citations omitted); *see also id.* at 567 ("The [FDCA's] 1962 amendments added a saving clause, indicating that a provision of state law would only be invalidated upon a 'direct and positive conflict' with the FDCA."). *See also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–167 (1989) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.").

Arkansas law expressly requires Defendants to perform affirmative acts to prevent the diversion of opioids. *See, e.g.,* ARK. ADMIN. CODE § 007.07.2-II-III ("All practitioners shall provide effective controls and procedures to guard against theft and diversion of controlled substances."); ARK. CODE ANN. § 20-64-209 (imposing specific record-keeping requirements on manufacturers and wholesalers to record detailed records of narcotic drugs received and disposed). Plaintiffs have pleaded liability for Defendants' collective and concerted failure to prevent this diversion, including:

- consciously oversupplying the market throughout the State with highly-addictive prescription opioids, causing the oversaturation of opioids for non-medical purposes;
- failing to implement effective controls and procedures in Defendants' supply chain to guard against theft, diversion, and misuse of controlled substances;
- disregarding the Arkansas statutes and regulations for safe dispensing; and
- inviting and enabling criminal activity in the State, counties, and cities by disregarding precautionary measures built into Arkansas law.

(SAC, at ¶¶ 386, 399, 402, 426, 435, 441, 456, 465, 474, 488, 491). Liability under Arkansas's requirements cannot possibly create a "direct and positive conflict" with federal law because Defendants have consistent duties under federal law. *Levine*, 555 U.S. at 567. *See, e.g.*, 21 C.F.R. § 1301.71 ("All applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances."); *Masters Pharm., Inc. v. Drug Enf't Admin*., 861 F.3d 206, 212 (D.C. Cir. 2017) ("[t]he 'security requirement' … mandates that distributors 'design and operate a system' to identify 'suspicious orders of controlled substances'").

Defendants fail to identify any conflict between Arkansas and federal law because their arguments are not actually aimed at Plaintiffs' claims, but appear directed at a different litigation

entirely.[42] Defendants claim "that state-law claims are preempted where, as here, they would require a pharmaceutical manufacturer to make statements about safety or efficacy that are inconsistent with what FDA has required after it evaluated the available data." (Mfr. Joint MTD, at 11). But Plaintiffs have not pleaded Defendants' liability for "statements about safety or efficacy"—Plaintiffs' liability theories are founded squarely on Defendants' concerted diversion of opioids in violation of Arkansas law. Here, facts regarding deceptive marketing campaigns merely highlight Defendants' intent to drive up the demand for diverted opioids—such facts will support Plaintiffs' demand for punitive damages at trial. (*See, e.g.*, SAC, at ¶ 25: "This epidemic, fueled by opioids lawfully prescribed by doctors, has resulted in a flood of prescription opioids available for illicit use or sale (the supply), and a population of patients physically and psychologically dependent on them (the demand)."). But the SAC ***makes clear that Defendants' liability under Arkansas law flows from their unlawful failure to prevent the diversion and oversupply of their drugs.***[43] As a result, none of Plaintiffs' liability theories would "require a

[42] Defendants' preemption arguments distort Plaintiffs' claims beyond recognition. Plaintiffs have filed a lawsuit about Defendants' illegal diversion of their deadly products into Arkansas, but Defendants have moved to dismiss a different lawsuit about the content of Defendants' FDA-approved labelling. For example, the Generic Manufacturers partially quote a single sentence from the complaint's 25 pages of count language before disingenuously asserting, "Plaintiffs' claims cannot reasonably be read as anything other than failure-to-warn claims." (Generic Supp. Joint MTD, at 11). Likewise, Actavis cites a single paragraph to support its extraneous statement that "[t]he essence of Plaintiffs' common law . . . claims is that the Actavis entities failed to adequately warn prescribers and the public of the risks of opioid products." (Actavis Brief, at 7). Purdue disingenuously asserts that "[c]entral to each of Plaintiffs' claims is their allegation that Purdue improperly and fraudulently promoted opioid pain medications," and that the "Complaint seeks to challenge FDA's decisions . . . ." (Purdue Brief, at 3). Gemini misleadingly complains about "Plaintiffs' allegations of alleged defects in the warning labels of generic opioid products." (Gemini Brief, at 8). The Manufacturer Defendants intentionally pick and choose only a few of the complaints' 493 paragraphs to falsely argue that "[t]he crux of Plaintiffs' unlawful marketing claims is that [Defendants] allegedly misrepresented opioid medications to be safe and effective for long-term treatment of chronic non-cancer pain." (Mfr. Joint MTD, at 10). Plaintiffs have not alleged any claim under an "unlawful marketing," "misrepresentation," or "failure to warn" product theory. Marketing activity and label content are not bases for liability listed in Plaintiffs' counts, and Defendants' preemption defenses are therefore irrelevant.

[43] The Generic Manufacturer's additional arguments about their labelling limitations under "the duty of sameness" are likewise irrelevant, because Plaintiffs claims concern Defendants' illegal diversion of their deadly products into Arkansas and not the content of Defendants' FDA-approved labelling. (*See* Generic Supp. Joint MTD, at 12-17, citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011)).

pharmaceutical manufacturer to make statements about safety or efficacy that are inconsistent with what FDA has required" for opioid labelling, (Mfr. Joint MTD, at 11), nor "impose a duty to alter FDA-approved pharmaceutical labeling" or "market … in a way that conflicts with federal law." (*Id.*).

Defendants also attempt to manufacture a conflict with federal law by mischaracterizing Plaintiffs' claims as a "stop sale" or general prohibition on the sale of opioids in Arkansas. (*See* Mfr. Joint MTD, at 15 ("At bottom, Plaintiffs contend that Manufacturer Defendants had a duty not to sell or distribute their prescription opioids due to concerns with opioid diversion[.]")). Plaintiffs have not made any demand that Defendants "stop production" or sale of opioids, and no such injunctive relief has been requested. *See also In re Opioid Litig. I*, at *7 ("On the face of the complaint, it does not appear that the plaintiffs seek to compel the manufacturer defendants to stop selling their medications, nor do the plaintiffs seek to challenge the FDA's approval of their products or to enforce FDA regulations.") (internal citations omitted).

While Plaintiffs allege that Defendants are liable for their failure to report, detect, and withhold suspicious and blatantly illegal orders, these duties are entirely consistent with their obligations under federal law. *See, e.g., Masters Pharm., Inc.*, 861 F.3d at 212-13 ("Once a distributor has reported a suspicious order, it must make one of two choices: decline to ship the order, or conduct some 'due diligence' and—if it is able to determine that the order is not likely to be diverted into illegal channels—ship the order (the Shipping Requirement)."). Ultimately, Defendants' "conflict" theory would only have merit if federal law required them to ship suspicious orders of narcotics—but federal law requires exactly the opposite.

No conflict with federal law is possible here because each of Plaintiffs' claims is supported by a liability theory entirely consistent with Defendants' obligations under both

Arkansas and federal law. This Court should join other courts and reject Defendants' bid for federal preemption of Plaintiffs' claims.

CONCLUSION

Defendants' motions demonstrate that they will spare no effort to avoid responsibility for the widespread harm they have caused. Plaintiffs have stated nine valid causes of action against all Defendants under well-established Arkansas law, and the factual allegations are beyond sufficient to support them. The Court should deny all motions to dismiss, and allow this case to proceed.

Respectfully submitted,

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