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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, et al.

Plaintiffs,

vs.

PURDUE PHARMA L.P. et al.

Defendants.

Case No. 3:18-cv-07591-CRB

DEFENDANT WALGREEN CO.'S TRIAL BRIEF

Hon. Charles R. Breyer

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INTRODUCTION

Plaintiffs' proposed $8 billion abatement plan seeks, in the words of Judge Polster, "the sun and the moon"—remedies that go far beyond an order designed to modify Walgreens' conduct or to remediate any hazardous condition caused by that conduct. Plaintiffs seek more than $130 million for a pretrial diversion program—the LEAD program—that the City previously tried but abandoned. They seek billions of dollars to treat individuals suffering from Opioid Use Disorder (OUD) who have insurance—treatment costs the City will never incur. Plaintiffs seek well over $100 million to provide Uber and Lyft rides to patients suffering from OUD. They seek more than $600 million to house those with OUD suffering homelessness—in one-bedroom apartments at a cost of $2,631 per person, per month. The list goes on, but one thing is clear: Plaintiffs do not seek equitable abatement, they seek a windfall.

This Court is not the first to evaluate a sprawling, multi-billion-dollar abatement plan like the one Plaintiffs and their expert Dr. Caleb Alexander advance here. In related MDL litigation in West Virginia, Judge Faber scrutinized a similar plan, also advanced by Dr. Alexander. He rejected it outright. According to Judge Faber: "it is readily apparent that what plaintiffs seek is not relief from wrongful conduct; instead, plaintiffs' 'Abatement Plan' seeks recovery for the extensive harms of opioid abuse and addiction." *City of Huntington v. AmerisourceBergen Drug Corp.*, No. CV 3:17-01362, 2022 WL 2399876, at *67 (S.D. W. Va. July 4, 2022). Judge Faber noted that "[u]nder West Virginia law, a public nuisance consists of wrongful conduct," and that "[e]quitable abatement has historically been limited to an injunction designed to eliminate allegedly tortious conduct or, in certain environmental nuisance cases, an injunction to remove the contaminant from the environment." *Id*. at *67-68. The Oklahoma Supreme Court reached the same conclusion when it overturned a jury verdict and rejected the proposed abatement plan in that state's opioid litigation. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 729 (Okla. 2021) ("The State's Abatement Plan is not an

abatement . . . . It is instead an award to the State to fund multiple governmental programs for medical treatment and preventive services for opioid abuse . . .").

California law is also in accord. Under *ConAgra*, "An equitable remedy's sole purpose is to eliminate the *hazard* that is causing *prospective harm* to the plaintiff." *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 132 (2017) (emphasis added). "A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative *conduct* that assisted in the creation of a hazardous condition." *Id.* at 91 (emphasis added). In other words, under *ConAgra*, the role of an abatement remedy is to eliminate a hazardous condition (there, lead paint in buildings; here, excess dispensed prescription opioids in circulation), not to pay for all "prospective harm" that the hazard may cause (there, treating children who ingested lead paint; here, treating or housing patients with OUD). The former is abatement, the latter damages. Thus, as Judge Faber concluded in West Virginia, and consistent with `*ConAgra*, the only portion of Plaintiffs' Abatement Plan that "even arguably" addresses Walgreens' conduct (dispensing pills that could be diverted) or the "hazardous condition" created by that conduct (excess prescription opioid pills in circulation) is funding of drug takeback and safe disposal kiosks. *City of Huntington,* 2022 WL 2399876 at *55.

The only other court that has addressed an abatement remedy in opioids litigation is the MDL court in Ohio. In August, Judge Polster entered an abatement order in MDL Track 3 that far exceeded what the West Virginia and Oklahoma courts deemed lawful and appropriate. *See generally In re National Prescription Opiate Litigation*, 1:17-md-2804, 2022 WL 3443614 (N.D. Ohio Aug. 17, 2022) ("Track 3 Abatement Order"). To be clear, Walgreens believes that the West Virginia and Oklahoma courts' criticisms of plaintiffs' abatement plans—and their views regarding the proper scope of an abatement remedy—were correct, and that Judge Polster's abatement order is inconsistent with Ohio and California law and erroneous. But even if the Court were to reject the majority approach, and read *ConAgra* more broadly than Walgreens believes is permissible,

Plaintiffs' Abatement Plan is still wildly excessive and must be reduced in at least four ways: (1) it should address only harms directly attributable to Walgreens' conduct (and not, for example, far-reaching tangential programs like stigma-reduction training for police officers or transitional housing for newly released inmates); (2) it should exclude costs solely attributable to illicit opioids; (3) it should correct errors in Plaintiffs' cost calculations; and (4) it should apportion fault among other actors who indisputably contributed to the crisis in San Francisco. These reductions are consistent with those Judge Polster instituted in MDL Track 3. *See* Track 3 Abatement Order at *2, *21-22, *24-29.

ARGUMENT

I. SCOPE OF PLAINTIFFS' PROPOSED PLAN

A. Proper Abatement Is Limited to What Is Necessary to Stop Nuisance-Causing Conduct or to Eliminate the Hazardous Condition Caused by That Conduct.

In MDL Track 2, Judge Faber recognized the "fundamental distinction between entitlement to damages and entitlement to abatement of the nuisance." *City of Huntington*, 2022 WL 2399876 at *68. "Equitable abatement has historically been limited to an injunction designed to eliminate allegedly tortious conduct or, in certain environmental nuisance cases, an injunction to remove the contaminant from the environment." *Id*. at *68 (collecting cases). In contrast, "[d]amages, unlike abatement, are directed at compensating a plaintiff for 'the costs of eliminating the nuisance effects.'" *Id*. (quoting Dobbs, I LAW OF REMEDIES § 5.7 (3)). Based on this distinction, the court concluded "the relief that plaintiffs seek is not properly understood as in the nature of abatement" because "Plaintiffs' Abatement Plan, virtually in its entirety, is directed at treating or otherwise addressing drug use and addiction, not any of defendants' alleged nuisance-causing conduct." *Id*. at *68-69.

The Oklahoma Supreme Court reached the same conclusion in its decision overturning a jury verdict for the plaintiff in that state's opioids litigation. There, the trial

court entered an abatement order similar in scope (though much shorter in duration) to the one proposed by Plaintiffs here. *See State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 9241510, at *15-18 (Okla. Dist. Nov. 15, 2019), *rev'd by State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). The Supreme Court rejected the plan: "[t]he State's Abatement Plan is not an abatement in that it does not stop the act or omission that constitutes a nuisance." *Hunter*, 499 P.3d at 729. "It is instead an award to the State to fund multiple governmental programs for medical treatment and preventive services for opioid abuse, investigatory and regulatory activities, and prosecutions for violations of Oklahoma law regarding opioid distribution and use . . . ." *Id*.

California law contains the same limiting principles these courts applied. "A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative *conduct* that assisted in the creation of a hazardous *condition*." *ConAgra*, 17 Cal. App. 5th at 91 (emphasis added); s*ee also* RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979) (defining public nuisance with regard to "the conduct") (cited with approval by *In re Firearm Cases*, 126 Cal. App. 4th 959, 987 (2005)). "It is a familiar doctrine of equity that the scope of [an] injunction will be limited to the wrongful *act* sought to be prevented." *Magill Bros. v. Bldg. Service Emp. Int'l Union*, 20 Cal. 2d 506, 512 (1942) (emphasis added); *see also People v. Padilla-Martel*, 78 Cal. App. 5th 139, 151 (2022) ("When a nuisance . . . occurs in the operation of a legitimate business, any injunction to address the problem must be narrowly drawn to eliminate the unlawful *activity* . . . .") (emphasis added). Conversely, "California's general nuisance statute . . . does not grant a damage remedy in actions brought on behalf of the People to abate a public nuisance." *Cty. of San Luis Obispo v. Abalone All.*, 178 Cal. App. 3d 848, 860 (1986).

Consistent with these basic principles, California courts typically tie abatement plans to the defendant's conduct only. For example, in *People v. City of Los Angeles*, 83 Cal. App. 2d 627, 644 (1948), the appellate court found that numerous municipalities had

created a public nuisance through improper disposal of sewage in the Santa Monica Bay. The court noted that "[g]arbage, fecal matter, solid matter and oily sludge . . . on all the beaches on Santa Monica Bay" was "dangerous to the health of any one making use of the beaches." *Id*. at 632-33. Yet the abatement that the Court ordered—"a mandatory injunction requiring the defendants . . . to plan, construct, operate and maintain sewage treatment works, pipes and conduits for the safe and sanitary disposal of sewage"—was limited to enjoining the municipalities' *conduct* causing the harm; not remediating the downstream *effects* of that conduct, such as the contaminated beaches or numerous injuries of individuals impacted by the sewage over the years. *Id*. at 638; *see also People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1099 (1997) (gang members prohibited from associating with one another in public or intimidating residents, but not ordered to pay social costs of gang activity); *Markey v. Danville Warehouse & Lumber, Inc*., 119 Cal. App. 2d 1, 4-7 (1953) (operator of cement plant in a commercial district required to cease all industrial activities, but not to address downstream effects such as the "dust and grit from the plant pervading the homes of the residents of Danville").

And while *ConAgra* recognized that a court may require a defendant to "prefund remediation costs" as part of an abatement plan without running afoul of the prohibition on awarding damages, the abatement there was specifically limited to remediation of the hazardous condition caused by defendants' conduct. *See, e.g., ConAgra*, 17 Cal. App. 5th at 79 (ordering the defendants pay into an "abatement fund that would pay for lead inspections, education about lead hazards, and remediation of particular lead hazards inside residences" but not for treatment of lead-paint induced injuries or other downstream effects). Walgreens is not aware of any public nuisance case in California where a court has exceeded those parameters and ordered funding for treatment for the downstream effects (the "prospective injury") caused by the hazardous condition. *ConAgra*—one of the most frequently cited cases by both parties in this litigation—did not include funding to treat children harmed by ingesting lead paint. Plaintiffs have never

explained how ordering the payment of funds for treatment in this case would be consistent with *ConAgra*.[1]

Here, Plaintiffs' expert acknowledges that his abatement plan seeks funding to address downstream effects—what he calls future "sequelae from the [opioid] epidemic." *See* Alexander Report, ECF 987-3 Ex. 1, at 15, n. h. Consistent with the decisions in West Virginia, Oklahoma, and *ConAgra*, this Court should reject Plaintiffs' far-reaching proposal and find that the vast majority of the money it seeks is not available as an abatement remedy. The only element of Plaintiffs' plan "arguably tailored" to Walgreens' wrongful conduct is the "Safe Storage and Drug Disposal" component. *City of Huntington*, 2022 WL 2399876 at *55. The Court should limit any abatement accordingly.

B. Even If the Court Allows a Broader Remedy, Plaintiffs' Proposal Goes Well Beyond What Any Court Has Deemed Equitable Abatement.

Even if the Court orders an abatement plan that goes beyond addressing Walgreens' conduct or remediation of the hazardous condition caused by that conduct, it should reject many of the costs aimed at addressing prospective harms that are at best tangentially related to Walgreens' conduct—including many costs the City will never incur. In MDL Track 3, Judge Polster addressed this very issue, agreeing that the defendants should not be required to pay for harms not "directly attributable" to their dispensing misconduct. Track 3 Abatement Order, at *19; *see also id*. at *6 ("[T]he Plaintiffs' plan is unrealistic because it asks for the sun and the moon . . . . There is no way this Court would enter such a blue-sky order, nor any likelihood the Sixth Circuit would ever affirm it."). Plaintiffs' plan here is similarly "unrealistic" and overbroad.

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[1] Judge Polster tried to distinguish *ConAgra*, stating that the abatement remedy there did not include funding for treatment because "brain damage from lead paint is not analogous to OUD—the latter can be treated, while the former cannot." Track 3 Abatement Order at *15 n.39. That rationale finds no support in the text of *ConAgra* itself and makes little sense in any event. Children suffering brain damage from lead paint ingestion require treatment (even if not to cure their injury), and many impose a financial burden on the city or county—just as Plaintiffs argue individuals with OUD do here.

1. Plaintiffs seek costs only tangentially related to Walgreens' conduct.

In California, "[t]he *scope* of injunctive relief available to address a public nuisance . . . is limited." *Padilla-Martel*, 78 Cal. App. 5th at 151 (emphasis in original). "An abatement of a nuisance is accomplished by a court of equity by means of an injunction proper and suitable to the facts of each case." *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 310-11 (2006).

Far from being "proper and suitable," Judge Polster found that the Track 3 plaintiffs' characterization of the nuisance as the "opioid epidemic" was "too broad" and that their abatement plan sought recovery for future expenses having little or nothing to do with the pharmacy defendants' conduct. Track 3 Abatement Order, at *10.

Judge Polster drew the line at programs related to "(1) *treatment* of those suffering from opioid addiction or OUD . . . and (2) *prevention* of opioid abuse and opioid recidivism," *id*. at *21 (emphasis in original), and concluded that programs unrelated to those elements were outside the proper scope of abatement. Thus, for example, Judge Polster concluded that "it is not appropriate to include in the abatement plan programs and interventions such as compassion fatigue interventions for first responders, stigma reduction training for police officers, transitional housing for newly released inmates, certain parent-child interventions for adoptive families, permanent supportive housing for homeless individuals with OUD, and several others [that] are not reasonably calculated to reduce the actual, unreasonable interferences with public health caused by the Pharmacy Defendants' intentional and/or unlawful dispensing conduct . . . ." *Id*. at *22. If the Court awards a remedy beyond the injunctive relief and remediation described above in Section I.A., it should nonetheless omit these and other programs bearing only a tangential relation to Walgreens' conduct, as Judge Polster did.

2. Plaintiffs seek costs for harms caused solely by illicit opioids.

Judge Polster found that "[d]rug addiction existed long before the advent of prescription opioids, and it is uncontroverted that some percentage of individuals with

OUD would have become addicted to illicit opioids even in the absence of the nuisance created by these Defendants." Track 3 Abatement Order, at *25. Judge Polster therefore concluded that it would be "unfair—that is, it would be inequitable—not to recognize this truth and adjust Defendants' abatement obligations accordingly." *Id*.

Like the MDL Track 3 plaintiffs, Plaintiffs here have proposed a "comprehensive plan" that seeks to address the local opioids crisis in its entirety—it is not limited to the crisis caused by *prescription* opioids. By Plaintiffs' own concession, their plan includes treatment, services, and other programs for patients who have never taken a prescription opioid in their lives. *See, e.g.*, Alexander Report, ECF 987-3 Ex. 1, at 11-12 (describing the basis for estimate of "the number who should have access to services to treat OUD"). Yet Plaintiffs' own experts have provided evidence that, even taking into account Plaintiffs' "gateway" theory, a large percentage of opioid overdose deaths have nothing to do with prescription opioids, and are attributable solely to illicit drugs.

For example, Dr. Phillip Coffin, the City's director of substance use research, published data showing that in 2019, just 19% of opioid overdose deaths were caused by prescription medications. *See* Coffin Decl. Exh. 2, ECF 1376-2, at 6 of 83. Plaintiffs' expert Dr. Keyes stated that the numbers were somewhat higher, but still testified that just 25% of fatal overdoses were caused by prescription opioids that year. Keyes Decl., ECF 1386, at 40. Based on her "gateway theory," Dr. Keyes added a significant number of *illicit* opioid overdose deaths she claims were *indirectly* attributable to prescription opioids, but even with that adjustment, Dr. Keyes found that just 65% of opioid overdose deaths in 2019 were attributable (directly or indirectly) to prescription opioids, a number that has been declining for several years. *See id.* (Figure 14). Despite these concessions, Plaintiffs' abatement plan asks Walgreens to pay for programs and treatment for ***all*** individuals suffering from OUD, even those who never ingested a prescription opioid in their lifetime. That is improper.

At a minimum, the Court should reduce the costs of any abatement plan to 65% to account for harms that Plaintiffs themselves concede are unrelated to prescription opioids or any Walgreens conduct, as Judge Polster did in MDL Track 3. *See* Track 3 Abatement Order, at *25.

3. Plaintiffs seek recovery for costs the city will never incur.

"An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff." *ConAgra Grocery Prods.*, 17 Cal. App. 5th at 132. "In fashioning a remedy, a court should strive for the least disruptive remedy adequate to its legitimate task and tailor it to the harm at issue." *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266, 313 (2020) (citation and quotation marks omitted).

Consistent with these principles of equity, Judge Polster ruled in Track 3 that if plaintiffs do not actually incur costs associated with the programs in the abatement plan, Defendants should not be required to bear those costs. *See* Track 3 Abatement Order at *23 n.53 ("[I]f insurance companies pay for some treatment and government grants fund some programs, and those additional sources of funding allow for fewer expenditures to be drawn from the abatement fund, then, to the extent there are funds remaining at the end of the expenditure period, that money will rollover or refund to the Defendants.").

Here, Plaintiffs will never incur many of the costs it now seeks to recoup up front. For example, the evidence will show that approximately 80% of individuals diagnosed with OUD are covered by some form of insurance, and that those insurance providers cover a wide array of OUD-related expenditures, many of which are included in Plaintiffs' proposed abatement plan, including: opioid treatment programs, FDA-approved medications for addiction treatment, substance use counselling, and individual and group therapy. In addition, many of the proposed abatement programs are covered by grants that are already funded by the federal and state governments. The evidence will show that in 2020, California was awarded $210 million from the State Opioid Response grant, which provides funds to state and local health departments to improve

medication-assisted treatment ("MAT") services. Federal, state and private programs also contribute to the funding of Syringe Service Programs and other services.

Forcing Walgreens to put up money for billions of dollars of treatment "expenses" Plaintiffs will never incur would be grossly unfair and inequitable and would result in a substantial windfall for Plaintiff. Equity requires the Court to tailor its remedy to the harm at issue, and to disallow recovery of costs Plaintiffs will never incur.

C. Plaintiffs' Plan Includes Unreasonable and Incorrect Calculations.

1. Plaintiffs provide no basis for the plan's 15-year timeframe.

The Supreme Court has cautioned that, because injunctive relief "is drafted in light of what the court believes will be the future course of events," significant changes in the circumstances underlying an injunction may render the decree an "instrument of wrong." *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (quoting 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2961, at 393-394 (3d. Ed.)). As a result, an injunction should be ordered "only after taking into account all of the circumstances that bear on the need for prospective relief." *Id*. Moreover, to be legally enforceable, an injunction "should be sufficiently clear and definite in its terms." 43A C.J.S. INJUNCTIONS § 451 (May 2022 update); *see also Pitchess v. Super. Ct. of L.A. Cty*., 2 Cal. App. 3d 644, 651 (1969). Thus, for example, while the trial court in Oklahoma approved an abatement plan, it limited the duration from a requested ***20 years*** down to just ***one year***. *State v. Purdue Pharma L.P*., 2019 WL 9241510, at *15, *rev'd on other grounds by Hunter*, 499 P.3d 719.

Here, Plaintiffs provide no support for continuing the proposed plan for 15 years, much less any justification that is sufficiently clear and definite to demonstrate what costs will be necessary ten or 15 (or five or two) years out. The only explanation Dr. Alexander provides for the lengthy abatement period is that "some abatement approaches may be framed in the context of looking forward ***ten or*** fifteen years." Alexander Report, ECF 987-3 Ex. 1, at 15 (emphasis added). In a footnote, he adds: "This medium-term view

strikes a balance—it is long enough to support infrastructure development . . . while avoiding some uncertainty entailed in trying to anticipate the magnitude of sequelae from the epidemic . . . ." *Id.* at 15, n. h; *see also id.* at 16 ("I leave it to stakeholders in San Francisco to determine the degree to which further investment should be undertaken"). That's it.

This explanation is insufficient to justify a 15-year, $8 billion program. First, Dr. Alexander offers no opinion whether the appropriate timeframe for the program is ten ***or*** fifteen years. The difference is significant. Extending the program from ten to 15 years represents a 50% increase in duration and would account for more than $2 billion in additional funds.

In addition, Dr. Alexander's rationale for any "medium-term view" lacks discussion of what specific "infrastructure development," if any, a city like San Francisco needs. In fact, San Francisco already has a well-developed infrastructure for providing many of the public services Plaintiffs would now like Walgreens to fund. *See, e.g.*, Alexander Report, ECF 987-3 Ex. 1, at 12-13. Plaintiffs' witnesses testified at length about the various ways in which the city has been a national leader in implementing programs to fight opioid abuse, addiction, and death—programs the city has had in place for decades. *See, e.g.,* Coffin Decl., ECF 1376, at ¶¶ 12-14 (San Francisco "pioneered an array of new programs" to decrease the rate of overdose deaths from heroin in the 1990s and 2000s); 5/26/22 Trial Tr. (Coffin), ECF 1557, at 1897:11-16; Zevin Decl., ECF 1296, at ¶¶ 3, 4, 7, 8 (describing the many services provided by SFDPH to treat and reduce harm for individuals with substance use disorders, including OUD). There is no evidence San Francisco needs even ten years to develop the infrastructure in Plaintiffs' plan.

Finally, the rapidly changing dynamics of the opioid crisis make forward-looking cost estimates speculative at best. As Dr. Alexander admits, the longer an abatement program runs, the more likely it is to encounter "uncertainty entailed in trying to

anticipate the magnitude" of consequences from the epidemic. Alexander Report, ECF 987-3 Ex. 1, at 15, n. h. This is undoubtedly true.

Given the dynamic nature of the opioid crisis, as well as Plaintiffs' utter lack of evidence supporting its proposed timeframe, the Court should not accept Plaintiffs' speculative ten- or 15-year proposal, or any other time period that Plaintiffs cannot support with reasonable certainty.

2. Plaintiffs' treatment costs are based on an inflated population estimate.

By far the largest portion of Plaintiffs' abatement plan—$4.4 billion for treatment of OUD—derives from Plaintiffs' estimate of the number of people in San Francisco who have OUD. As Walgreens will show at trial, however, the population estimate Dr. Alexander relies on in his abatement plan is based on speculative and unsupported assumptions that substantially overstate the OUD population in San Francisco. Correcting unsupported assumptions reduces the OUD population estimate—and thus the amount of money that could possibly be required for OUD treatment—by 20% or more.

3. Plaintiffs failed to discount costs to present value.

Plaintiffs rely on William Padula to calculate cost estimates for each aspect of Dr. Alexander's proposed abatement plan. The evidence will show that in doing so, Dr. Padula increased costs to reflect inflation, but he did not then discount those costs to present-day value. The evidence will also show that discounting future costs and benefits in healthcare economics is well supported and uncontroversial. The effects of discounting here are significant, as the evidence will show. For example, discounting costs by the historical inflation rate specific to medical care would reduce Plaintiffs' total cost estimate by $1.7 billion, or approximately 22%. As Walgreens' expert Erica Bramer will explain at trial, even this 22% reduction would not account fully for the time value of money or address the probability that costs forecast so far into the future will never be incurred. As a result, Plaintiffs' cost estimates encompass a substantial windfall.

II. APPORTIONMENT OF FAULT

The record contains overwhelming evidence supporting apportionment of liability among several categories of actors. As Plaintiffs themselves conceded in opening statements:

> The defendants here are not the only ones who we concede are responsible for the opioid epidemic. There are others, actually many others, who share that responsibility. . . . 'The origins of the opioid crisis reflect substantial failures within the corporate sector, regulatory, and legislative bodies, the medical profession, and healthcare systems.'

4/25/22 Trial Tr. (Pltf. Opening), ECF 1288, at 14:5-14:18 (quoting the Stanford Lancet Commission Report). As the evidence came in, it became clear that the many causes of the crises include at least: (1) criminal drug dealers; (2) government regulators such as the FDA, DEA, California state legislature, and other state agencies; (3) opioid prescribers; (4) manufacturers; (5) distributors; and (6) pharmacies. That evidence amply supports an apportionment that divides any recovery at least six ways.

In California, apportionment is necessary "where independent acts of different defendants create a nuisance." 5 WITKIN, SUMMARY OF CAL. LAW 11TH TORTS § 156 (2022) ("where independent acts of different defendants create a nuisance . . . [t]he damages will be assessed against each tortfeasor according to the tortfeasor's contribution to them"); *see also Conner v. Grosso*, 41 Cal. 2d 229, 232 (1953) ("Since Grosso did not act in concert with the other persons dumping dirt on the Connor land, he cannot be required to pay for removal of the dirt dumped by them."). "Where a defendant is only one of a number of contributors to the acts alleged to have caused damages, it does not become a joint tortfeasor simply because afterwards its consequences united with the consequences of several other torts committed by other persons or entities." *Jordan v. City of Santa Barbara*, 46 Cal. App. 4th 1245, 1273 (1996) (citing *Slater v. Pac. Am. Oil Co.*, 212 Cal. 648, 651 (Cal. 1931)); *accord I-CA Enters., Inc. v. Palram Ams., Inc.*, 235 Cal. App. 4th 257, 273 (2015) ("[I]ndependent wrongs do not become

joint even if the damages resulting from the wrong add up to one particular type of damage.").

The Restatement likewise provides a general rule that remedies "are to be apportioned among two or more causes where . . . there is a reasonable basis for determining the contribution of each cause to a single harm." RESTATEMENT (SECOND) OF TORTS, § 433A(1) (1965); *see also id*. comment d ("Such apportionment is commonly made in cases of private nuisance"); *see also Carlotto Ltd. v. Cty. of Ventura*, 47 Cal. App. 3d 931, 936-38 (1975) (applying § 433A in a nuisance case). Apportionment may be made "either in proportion to the contribution of each or upon some other reasonable basis afforded by the evidence." RESTATEMENT (SECOND) OF TORTS § 840E, comment b (1979). In this situation, "the trial court [is] at liberty to estimate as best it [can], from the evidence before it" the portion of harm attributable to Walgreens. *Griffith v. Kerrigan*, 109 Cal. App. 2d 637, 640 (1952) (collecting cases). Thus, even where the harms from the nuisance may not be "clearly marked out as severable into distinct parts," they may still be "capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible." RESTATEMENT (SECOND) OF TORTS § 433A, comment d; *see, e.g., People v. Los Angeles*, 83 Cal. App. 2d at 637.

At least the following actors were "substantial factors" in causing the epidemic.

A. Drug Dealers and Other Criminals

Numerous witnesses testified at trial as to the substantial roles that illegal drugs and drug dealers played in the creation of the opioid epidemic. *See, e.g.*, 6/1/22 Trial Tr. (Keyes), ECF 1418, at 2232:5-2232:8 (agreeing that drug cartels are "definitely" substantial factors); *id.* at 2232:12-21 (agreeing that individuals involved in doctor shopping, forging of prescriptions, and use of fake prescriptions were all substantial factors); *id*. at 2231:15-2231:17 (agreeing heroin is a substantial factor); *id*. at 2232:1-4 (agreeing fentanyl is a substantial factor); 6/8/22 Trial Tr. (Tucker), ECF 1558, at 2742:8-2743:8 (majority of opioid overdose deaths in the U.S. for the last five or six years have

been related to illicitly manufactured fentanyl); 5/26/22 Trial Tr. (Coffin), ECF 1557, at 1901:9-1902:4 (discussing illegal manufacture of fentanyl). These factors were particularly significant in more recent years. *See* Findings of Fact and Conclusions of Law Regarding Walgreens ("FOFCOL"), ECF 1578, at 10-15 (noting that in recent years people increasingly have sought out heroin and drug traffickers have increased the production and distribution of black-market fentanyl).

B. Government Regulators

1. The FDA

In 1996, the FDA approved the label for OxyContin, telling prescribers, pharmacists, patients, and others that "'addiction' to opioids legitimately used in the management of pain is very rare." DEF-MDL-13160, 1996 OxyContin FDA Label at 6. Since then, the FDA has continuously approved opioid medications for long-term treatment—with labels that state that the presence of risk factors for misuse, abuse, addiction, and/or overdose should not "prevent the proper management of pain." AL-SF-00339.0008. The FDA has "declined to limit the duration or dosage amount of opioids approved for the management of chronic pain." 5/9/22 Trial Tr. (Lembke), ECF 1351, at 412:6-9. Plaintiffs' expert Dr. Keyes testified that the FDA "is a contributor to the opioid crisis" because it "had the authority to sort of turn down the pump and that could have stemmed the supply" of opioids. 6/1/22 Trial Tr. (Keyes), ECF 1418, at 2232:22–2233:1. The FDA has never done that.

2. The DEA

From 2003 through 2013, the DEA authorized manufacturers to produce substantially larger amounts of prescription opioids. For example, the Average Production Quota ("APQ") of oxycodone in the United States, which the DEA establishes annually, increased over 400 percent between 2003 and 2013. *See* DEF-MDL-00106; Rannazzisi Tr., ECF 1338-2, at 30:12–33:23. The DEA did not start reducing manufacturing quotas for most prescription opioids until 2016—years after prescriptions

for opioids had been on the decline. *See* DEF-MDL-00106. Dr. Keyes testified that, because the DEA could have reduced opioid supply but chose not to do so, the DEA was a "substantial factor in bringing about the opioid crisis." 6/1/22 Trial Tr. (Keyes), ECF 1418, 2233:2-6; 2234:20-2235:7.

3. The California legislature and other agencies

In 1997, the California Legislature passed the Pain Patient's Bill of Rights. Cal. Health & Safety Code §§ 124960(c), (j); 124961(b). In addition, "State Medical Boards that received significant support and funding from opioid manufacturers warned doctors that failing to adequately treat pain could be grounds for a malpractice claim." FOFCOL at 9; *see also* Lembke Decl., ECF 1281, at ¶¶ 92–93, 95. The Joint Commission on the Accreditation of Healthcare Organizations "branded [] pain as the fifth vital sign [and] required that every single patient be assessed for their pain and that pain be aggressively treated." 5/31/22 Trial Tr. (Herzberg), ECF 1417, at 1986:25-1987:3; *see also* 5/9/22 Trial Tr. (Lembke), ECF 1351, 421:24-422:5; 5/31/22 Trial Tr. (Herzberg), ECF 1417, at 1993:23-1993:25; Herzberg Decl., ECF 1387, at ¶ 33. The California Board of Pharmacy instructed pharmacists that "ongoing use of opioids . . . is not what causes addiction," that "[p]atients suffering from extreme pain . . . may require increased doses," and that these occurrences are "normal" and "should not be confused . . . with drug addiction." TE-SF-02798 at .00005 These acts opened the doors for the dramatic increase in opioid prescriptions.

C. Prescribers

As the Court has noted, the medical community was instrumental in facilitating the opioid epidemic. *See* FOFCOL at 8-9. For example, "[f]rom the late 1990s to 2012, opioid prescribing quadrupled" and "[this] massive increase in opioid prescriptions caused corresponding increases in opioid abuse, addiction, and overdoses." FOFCOL at 9. Plaintiffs' witnesses similarly testified that the multiplication of the supply of prescription opioids from the late 1990s through the first decade of the 2000s was "driven

by a shift in prescribing practices favoring use of such drugs in treating chronic non-cancer pain." Coffin Decl., ECF 1376, at ¶ 17; *see also* 5/9/22 Trial Tr. (Lembke), ECF 1351, at 394:14-394:20. Plaintiffs' own experts testified that prescribers bear some responsibility for the opioid epidemic. 5/9/22 Trial Tr. (Lembke), ECF 1351, at 422:3-422:4; *see also* 6/1/22 Trial Tr. (Keyes), ECF 1418, 2232:9-2232:13.

D. Manufacturers

The Court has made numerous findings regarding the role that manufacturers played in creating the opioid crisis through "aggressive marketing campaigns intended to persuade medical professionals that prescription opioids were a safe and effective form of treatment" and that "pain was commonplace and undertreated." *See generally* FOFCOL at 7-10. Plaintiffs' experts have likewise asserted that manufacturers were "a substantial factor in bringing about the opioid crisis." *See, e.g.*, 6/1/22 Trial Tr. (Keyes), ECF 1418, at 2233:7-10. Plaintiffs have specifically alleged that the crisis was "precipitated" by manufacturers who "engineered a dramatic shift in how and when opioids are prescribed by the medical community and used by patients" "[t]hrough a massive marketing campaign premised on false and incomplete information." First Am. Compl., ECF 128, ¶¶ 8-11. "Put simply, the Marketing Defendants manipulated and misrepresented medical science to serve their own agenda at the cost of human lives and health." *Id*. at ¶¶ 25-32. In addition, Plaintiffs' experts have detailed the various actions taken by manufacturers that contributed to the crisis. *See, e.g.*, Lembke Decl., ECF 1281, at ¶ 12; 5/9/22 Trial Tr. (Lembke), ECF 1351, 541:12-542:14; 5/31/22 Trial Tr. (Herzberg), ECF 1417, 1994:5-7.

E. Wholesale Distributors

Plaintiffs have detailed the extensive public record regarding other distributors' contributions to the opioid epidemic. *See, e.g.*, First Am. Compl., ECF 128, ¶ 34 ("As further evidence of their malfeasance, the country's major opioid distributors and dispensaries have paid hefty fines for their failure to report suspicious orders as required

by law."). In his deposition, former DEA deputy Joe Rannazzisi, provided similar testimony. *See, e.g.*, Rannazzisi Dep., ECF 1338-1, 471:25-480:7 ("Q. Is this when McKesson paid a $13.25 million fine? A. Yes.").

F. Other Pharmacies

The evidence at trial shows that many pharmacies in San Francisco dispensed prescriptions that contributed to the opioids crisis. For example, Plaintiffs' expert Craig McCann acknowledged that pharmacies other than Walgreens dispensed more than 40% of the opioid pills dispensed by retail pharmacies in San Francisco, to say nothing of the large number of opioids dispensed at hospitals and clinics. *See* 5/18/22 Trial Tr. (McCann), ECF 1551, 1153:2-15. Moreover, Plaintiffs' expert Lacey Keller testified about the large numbers of prescriptions written by several so-called "bad doctors" whose prescriptions were filled at pharmacies throughout the Bay Area. Keller Decl., ECF 1392, at 5-15. The Court focused on 31 of these doctors in its Findings of Fact, relying on each prescriber's subsequent discipline to support a conclusion that the prescriptions Walgreens filled for these doctors were suspicious and that some portion of those prescriptions must have been diverted. FOFCOL at 95. However, these doctors had their prescriptions filled at pharmacies throughout the Bay Area. The evidence will show that, overall, 76% of their prescriptions were filled at pharmacies other than Bay Area Walgreens. In addition, internet pharmacies, independent pharmacies, and "pill mills" were infamous nationwide for dispensing large quantities of opioids to patients, without any evidence that their prescriptions were legitimate, or even that they had a legitimate doctor-patient relationship. *See, e.g.*, Ashley Dep. Tr., ECF 1440-1, at 30:12-31:5, 76:19-77:3; Rannazzisi Dep. Tr., ECF 1338-1, at 1731:1-1732:10; Mapes Dep. Tr., ECF 1437-1, at 241:10-242:03; 5/24/22 Trial Tr. (Paonessa Dep.), ECF 1407, at 1529:1-25, 1537:16; 5/12/22 Trial Tr. (Catizone), ECF 1323, at 794:23-25. Congress ultimately passed a law that eliminated internet pharmacies, because of the significant harm they caused. *See* Rannazzisi Dep. Tr., ECF 1338-1, at 1731:1-13.

* * *

Courts considering nuisances with similarly large numbers of contributors have noted the inherent inequity of tagging only one or a small number of actors with all of the costs. *See, e.g.*, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876-77 (N.D. Cal. 2009) (claim not appropriate for litigation where numerous actors are to blame: "Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming."); *State ex rel. Brown v. BASF Wayandotte Corp.*, 1975 WL 182459, at *5 (Ohio Ct. App., Apr. 24, 1975) ("These defendants cannot be singled out and held solely responsible for the deteriorated condition of Lake Erie which was caused by innumerable contributors over hundreds of years."). Judge Polster likewise found apportionment appropriate in MDL Track 3. Track 3 Abatement Order, at *29 ("[T]he Court finds it is reasonable and fair to allocate one-third of the recoverable abatement costs to the Pharmacy Defendants . . . This allocation takes into account the fact that all three categories of actors along the pharmaceutical supply chain . . . contributed to the nuisance in the Counties, and *it would be inequitable to hold these Defendants liable for more than a one-third share*.") (emphasis added).

The evidence supporting apportionment is even stronger here, and it justifies apportioning liability among the six categories of actors discussed above. In addition, it would be inequitable to hold Walgreens responsible for more than its share of the "pharmacy" apportionment. The Court found that Walgreens made up 58.7% of the pharmacy market for dispensing opioids, and that Plaintiffs provided evidence that 55.4% of the opioids Walgreens dispensed had "red flags"—and could even arguably support liability. FOFCOL at 20, 74. Thus, whatever amount the Court might determine is appropriate to fund abatement in San Francisco should be divided by six, then multiplied by 58.7%, then multiplied by 55.4%, to reflect Walgreens' apportionment of liability.

III. ADMINISTRATION OF ANY ABATEMENT PLAN

As Judge Polster did in Track 3, this Court should appoint an administrator to monitor any abatement plan, both to ensure that funds are being spent appropriately and to refund any monies that are unnecessary or unspent at the end of each year. "[T]rial courts [have] the discretion to appoint receivers to carry judgments in abatement proceedings into effect." *City & County of San Francisco v. Daley*, 16 Cal. App. 4th 734, 744 (1993) (citing Cal. Code Civ. Proc., § 564, subd. (b)(3)); *see also ConAgra Grocery Prods.*, 17 Cal. App. 5th at 157-58 (appointment of a receiver "necessary" "to oversee the disbursement of the abatement funds").

The Court should retain jurisdiction over the plan and exercise judicial oversight over its administration. Any funds that Walgreens is ordered to pay for abatement should be deposited into a separate, dedicated bank account that is not owned, controlled, or otherwise directed by Plaintiff, its employees, or its agents. *See, e.g.*, *ConAgra Grocery Prods*., 17 Cal. App. 5th at 134 ("The trial court's order explicitly required defendants to deposit funds into 'a specifically designated, dedicated, and restricted abatement fund.' It plainly did not require, contemplate, or permit the deposit of those funds into 'the State treasury . . . .'"). Moreover, to the extent that the Court determines that Walgreens must make some payment to fund any programs, it should limit any initial payment to a period of no more than two years—as Judge Polster did in Track 3—so that the administrator can ensure that San Francisco is using any funding in accordance with the abatement plan, and that, to the extent initial funds exceed the City's needs, that the plan and associated funding is adjusted appropriately.

CONCLUSION

Walgreens respectfully requests the Court to limit any abatement order to what is necessary to stop nuisance-causing conduct, or, at least, to limit the abatement as described in Sections I.B. & C. above and to apportion any costs among the numerous other contributors to the epidemic.

Respectfully submitted,

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