IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

LESSIE BENNINGFIELD RANDLE; VIOLA FLETCHER; HUGHES VAN ELLISS, SR.; HISTORIC VERNON A.M.E. CHURCH, INC.; LAUREL STRADFORD; ELLOISE COCHRANE-PRICE; TEDRA WILLIAMS; DON M. ADAMS; DON W. ADAMS; STEPHEN WILLIAMS; AND THE TULSA AFRICAN ANCESTRAL SOCIETY,	)	
Plaintiffs,	)	
vs.	)	Case No.: CV-2020-01179
	)	Judge Caroline Wall
CITY OF TULSA; TULSA REGIONAL CHAMBER; TULSA DEVELOPMENT AUTHORITY; TULSA METROPOLITAN AREA PLANNING COMMISSION; BOARD OF COUNTY COMMISSIONERS FOR TULSA COUNTY, OKLAHOMA; VIC REGALADO, IN HIS OFFICIAL CAPACITY AS SHERIFF OF TULSA COUNTY; and OKLAHOMA MILITARY DEPARTMENT,	)	
Defendants.	)	

TULSA REGIONAL CHAMBER'S REPLY IN SUPPORT OF ITS GENERAL MOTION TO DISMISS AS TO ALL PLAINTIFFS

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TULSA REGIONAL CHAMBER'S REPLY IN SUPPORT OF GENERAL MOTION TO DISMISS AS TO ALL PLAINTIFFS

Tulsa Regional Chamber ("Chamber") submits this Reply in Support of its General Motion to Dismiss as to All Plaintiffs.

SUMMARY OF THE REPLY

I. The Response Brief of Plaintiffs hides behind a strategy of blaming "Defendants" for all harms when law requires attribution of specific allegations to specific defendants.

Plaintiffs' Response makes references to "Defendants" actions without specific identification. This paints all seven Defendants as one combined, monolithic actor on which Plaintiffs blame nearly everything. The alleged actions of non-Chamber defendants and the sufficiency of allegations against those non-Chamber defendants are not at issue in the Chamber's Motions. This strategy of pleading through obfuscation falls apart when subject to the required examination of who allegedly did what, when.

II. Plaintiffs ask the Court to excuse their failure to provide legal support for their claims because "Opioid Litigations", but that catchphrase is meaningless when Plaintiffs' actual allegations are compared to the one district court lawsuit that they reference.

The Response brief repetitiously chants the mantra "Opioid Litigations" as if it is a magic incantation that shields them from their responsibility to plead actionable conduct among specific defendants. *State ex rel. Hunter v. Purdue Pharma, et. al.*, CJ-2017-816, is a district court case from Cleveland County that is both stayed and on appeal. The facts of the "Opioid Litigations" are miles apart from the allegations in this case. Plaintiffs chant "Opioid Litigations" without any explanation for very good reason— the facts are easily distinguished.

In *Purdue Pharma*, the State of Oklahoma sued pharmaceutical companies, and

associated entities (collectively "Pharma") for fraudulent marketing of opioids to the public.[1] Pharma further incentivized health care providers to prescribe dangerous opiates, even where medically unnecessary. *Id.* Pharma's conduct directly resulted in widespread prescription of opiates at hospitals, clinics, and offices across the State. *Id.* When that case was filed in 2017, the misconduct alleged by the State was ongoing, with much of the public victimized by the fraudulent marketing still caught in a cycle of addiction. *Id.* Pharma's conduct co-opted Oklahoma storefronts and infrastructure to market opiates at the expense of the health and safety of the public. The alleged misconduct by Pharma was ongoing and capable of abatement at when the Original Petition was filed. *Id.* at ¶¶ 116-120.

The claims within *Purude Pharma* are not at all like those in this case. Plaintiffs fail to identify particular conduct by Chamber that can be abated today. The only alleged conduct said to constitute a nuisance refer to actions of 100 years ago. The Response proclaims that unlawful acts are "continu[ing]" today but the proclamation does not identify unlawful conduct by Chamber. Likewise, Plaintiffs do not complain of any acts tied to use of property or property rights. Plaintiffs have no automatic right to sue for abatement of public nuisance because this is normally reserved exclusively to the State. Plaintiffs' case is nothing like *State ex rel. Hunter v. Purdue Pharma.*

District court opinions have no precedential value in Oklahoma. They can be persuasive, but such persuasion comes from the logic, law, and argument *found therein.* Plaintiffs do not show how the logic, law, or argument of Purdue Pharma applies directly to their claims against Chamber. The only showing at all is the bald pronouncement, "the Massacre is also a public nuisance requiring abatement." *See* Plaintiffs' Resp., p. 2.

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[1] *See* Original Petition, ¶¶ 1-7, 21-72, CJ-2017-816.

ARGUMENT AND AUTHORITY

I. PLAINTIFFS FAIL TO STATE A CLAIM FOR ABATEMENT OF A PUBLIC NUISANCE.

Plaintiffs allege that the Massacre had an impact on Black Tulsans and the North Tulsa Community that can be felt to this day. However, long lasting consequences of past tortious conduct[2] does not make a nuisance "ongoing." Consider, for example, the conduct of Sooners who entered Oklahoma illegally, prior to the official start of the 1899 Land Rush. The Sooners' conduct, and the way land was obtained and divided unlawfully, stiff affects those who own land in the State today. Nuisance lawsuits against today's owners of that land are improper because the *nuisance conduct* (the unlawful taking of land) is long over-- there is no continuing unlawful conduct to be abated. Likewise, the acts comprising the 1921 Massacre did not create a public nuisance in perpetuity.

Plaintiffs do not allege what the public nuisance at issue is and what unlawful actions or omissions can be abated today. Consequences of an alleged nuisance are not subject to abatement—only the nuisance itself can be abated. Plaintiffs suggest that the only remedy they seek is abatement, because abatement is what you do to a nuisance, and thus, they must have properly pleaded nuisance. Every remedy sought from the Chamber for the alleged nuisance is a demand that the Chamber pay for certain items, provide benefits with an identifiable monetary value, or pay other monetary damages such as punitive damages and attorneys' fees. *See* Amended Petition, Sect. XII, ¶¶ 4, 10-15. The Amended Petition's requested relief reveals that the true goal is monetary damages without facing the bar of the statutes of limitations.

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[2] Plaintiffs elsewhere indicate they do not consider nuisance to be a tort under Oklahoma law. *See* Plaintiff's Resp. to Chamber's Motion to Dismiss (Standing), at p. 7. Nuisance falls under the category of tort and is guided by tort doctrines. *See Nichols v. Mid Continent Pipe Line Company*, 1996 OK 118, ¶¶ 8-11, 933 P.2d 272, 276-77.

Asking for money and labelling it "abatement" does not cure the failure to show an actual nuisance capable of abatement.

a. PLAINTIFFS DO NOT HAVE STANDING TO CLAIM ABATEMENT OF A PUBLIC NUISANCE BECAUSE THEY DO NOT SHOW THE SPECIAL INJURY REQUIRED BY 50 O.S. § 10.

Plaintiffs did not suffer special injury sufficient to place them in the elevated capacity of the state to bring an action for abatement of a public nuisance (assuming Plaintiffs adequately pled facts of nuisance at all). Plaintiffs excuse their clear lack of special injury by claiming that no Oklahoma court ever dismissed a public nuisance lawsuit for lack of a special injury.

Plaintiffs' Response cites *McKay v. City of Enid.* This case was dismissed for lack of sufficient special injury on a demur to the Petition (the equivalent of a Motion to Dismiss under the pleading code of the time). *See McKay v. City of Enid,* 1910 OK 143, cited on p. 9 of Plaintiffs' Resp. 50 Okla. Stat. § 10 states, "A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise." Plaintiffs did not plead any such special injury.

The Response also argues that "the violence visited upon Plaintiffs during and after the Massacre] destroyed *an entire neighborhood,*" pointing to widespread physical, economic, and cultural destruction across the whole of the community. *Id. at* p. 11. Plaintiffs effectively admit that they suffered injury of the same kind, manner, and character of the public at large. Accordingly, this Court must dismiss their claim for public nuisance for lack of the "special injury" requirement found in 50 O.S. § 10.

II. **PLAINTIFFS' CLAIM FOR NUISANCE MUST BE DISMISSED BECAUSE IT DOES NOT TIE TO USE OF PROPERTY OR PROPERTY RIGHTS AS REQUIRED BY OKLAHOMA LAW.**

Plaintiffs again invoke "Opioid Litigations" as a response to the longstanding Oklahoma case law tying actions for nuisance to land rights. In addition, Plaintiffs cite three cases to show

how nuisance has been applied to non-property issues. Those three cases do not stand for the proposition that nuisance can be separate from use of property or property rights. Two of them did tie the nuisance to property, and the third did not involve nuisance. *State ex rel. Field v. Hess*, 1975 OK 123 dealt with the unlawful sale of illegally obscene material at a bookstore, and only the unlawful activities on the property were enjoined while sales of legal materials on the premises were explicitly permitted; *Doyle v. State*, 1957 OK CR 93 was a criminal case for illegal possession of alcohol, and the only mention of "nuisance" was in an affidavit in support of a search warrant which was on appeal; *Jones v. State*, 1912 OK 806, 132 P. 319 dealt with illegal gambling, and the court found that "keeping a turf exchange, where persons daily congregate for the purpose of making bets and wagers on horse races run in other states or countries, is, under our statute, a public nuisance." *Id.* at 1912 OK 806 at ¶ 4, 132 P. at 320. Notably in *Jones*, the nuisance was *not* the illegal gambling itself, but rather the "keeping a turf exchange, where persons daily congregate"—which is the *improper use of land*. *Id.* Oklahoma law is clear: nuisance must be tied to the use of property or property rights. Without any such relationship to Plaintiffs' amorphous "nuisance," Plaintiffs' claim must be dismissed.

III. WHERE THIS COURT FINDS THAT OKLAHOMA'S NUISANCE SCHEME ENCOMPASSES THE ALLEGATIONS MADE BY PLAINTIFF, OKLAHOMA'S NUISANCE STATUTES ARE VOID FOR VAGUENESS.

Again Plaintiffs cite the "Opioid litigations" in response to Chamber's arguments on why the public nuisance scheme must be void for vagueness if this Court accepts that it encompasses Plaintiffs' allegations. That catchphrase is no more availing here than elsewhere.

a. OKLAHOMA'S CONSISTENT RULINGS TYING NUISANCE TO USE OF PROPERTY OR PROPERTY RIGHTS DICTATE THAT THE NUISANCE STATUTES MUST BE VOID FOR VAGUENESS WHERE PLAINTIFFS' ALLEGATIONS ARE ENCOMPASSED.

Oklahoma's jurisprudence limits claims for nuisance to circumstances involving use of

property or property rights. In addition to the legal *requirement* that nuisance claims involve property, the property arguments also show that no reasonable person, in light of Oklahoma Supreme Court decisions spanning more than a century, would have imagined that the allegations of Plaintiffs would fall within the scope of a public nuisance.

On this point, Plaintiffs argue that, in light of the "Opioid Litigations" and the three cases cited in section 1.C.i. of their response brief (*Hess*, *Doyle*, and *Jones*), all Defendants must have been on notice of the alleged absurd breadth of the nuisance statutes. As a matter of due process, defendants do not need notice prior to suit being filed, defendants need notice of a statute's meaning prior to undertaking act complained of. All of Plaintiffs' cited authority except for *Jones v. State*, 1912 OK 806, 132 P. 319 was handed down decades after the Massacre. As to *Jones*, that court held that the nuisance was not the illegal gambling itself, but rather the use of the *property* as a gambling venue. *Id.* at ¶ 4, 132 P. at 320. Further, even if "Opioid Litigations" had any precedential authority, defendants would only be put on notice of the statute's alleged breadth for actions and omissions taking place after November 15th, 2019.

b. AS A MATTER OF LAW, IF SOCIETAL ILLS ARE COVERED BY OKLAHOMA'S NUISANCE STATUTES AS ALLEGED BY PLAINTIFFS, THEN THERE IS NO LIMIT TO THE CONDUCT PROHIBITED BY TITLE 50 AND IT IS THEREFORE VOID FOR VAGUENESS.

No reasonable person of common intelligence or understanding could have conceived that title 50 of the Oklahoma statutes would permit recovery for societal ills. Plaintiffs respond that they do not seek recovery for societal ills such as systematic racism, and instead seek only "recovery based on specific, unlawful acts that occurred in Tulsa and continue unabated in Tulsa." *See* Plaintiffs' Resp. at p. 17. Plaintiffs fail to allege "specific, unlawful acts" of Chamber which "continue unabated in Tulsa", and the Amended Petition makes clear they seek recovery for societal ills far beyond what occurred during the Massacre.

In the alternative, Plaintiffs assert that even if they are seeking recovery for societal ills, that recovery is covered by the nuisance statutes. Plaintiffs offer three cases: *State ex rel. Field v. Hess*, 1975 OK 123, 540 P.2d 1165; *Balch v. State ex rel. Grigsby Co.*, 1917 OK 142, 164 P. 776; and *Territory v. Long Bell Lumber Co.*, 1908 OK 263, 99 P. 911. These cases provide no safe harbor.

Hess, previously cited on the issue of property, concerned whether the running of an adult bookstore rose to the level of "offending decency" under 50 O.S. § 1.[3] First, the Court of Civil Appeals did not actually find the running of the adult bookstore (which would be the "societal ill") to be nuisance. *Hess*, 1975 OK 123 at ¶ 16, 540 P.2d at 1170-71. Instead, it found that unlawful use of the property to sell illegally obscene material (specifically identified items which did not encompass all of the adult material sold by the store) to be a nuisance and thus limited the injunction to only enjoin sale or distribution by the bookstore of those specifically unlawful materials. *Id.* Additionally, *Hess* specified particular unlawful conduct (in violation of a state statute) which "offends decency" under 50 O.S. § 1. *Id.* at ¶ 3, 540 P.2d at 1167-68. In this case, Plaintiffs do not allege any current unlawful conduct by Chamber.

Balch concerned statutes which "provide that a place where intoxicating liquors are sold or kept for sale or barter, or where persons congregate for the purpose of drinking such liquors, is a public nuisance." *Balch*, 1917 OK 142 at ¶ 6, 164 P. at 777. Further, evidence was presented which showed that the defendant "was engaged in the violation of the prohibitory liquor laws of the state of Oklahoma" and "was guilty of selling cigarettes to minors," which were statutorily prohibited unlawful acts. *Id.* at ¶ 7, 164 P. at 778. As in *Hess*, specific, unlawful

[3] Note that this action was brought by the district attorney for Comanche County as a public officer and on behalf of the citizens, thus a finding of "special injury" was not necessary to bring an action for abatement of a public nuisance.

acts were identified and those specific, unlawful acts were enjoined by the action for abatement. *Id.* Lawful acts on the property—even if they were societal ills—were explicitly permitted. *Id.*

Long Bell Lumber concerned violation of the Sherman Anti-Trust Act of 1890 and violation of a territorial act on the same subject which was passed six months later. *Long Bell Lumber*, 1908 OK 263 at ¶¶ 1-20, 99 P. at 913-16. These laws created "unlawful" acts which defendants committed, and which the Court found "constituted . . . a public common nuisance, which annoyed, injured, and endangered the comfort and safety of others, and in many ways rendered at the same time the people residing in that community and neighborhood where they existed insecure in the use of their property." *Id.* at ¶ 34, 99 P. at 920-21. As in both *Hess* and *Balch*, the Court limited the abatement to those activities which they are not entitled to do, which should be protected on the part of others, and which is "denounced by the law as a crime." *Id.* at ¶ 35, 99 P. at 921.

IV. THE POLITICAL QUESTION DOCTRINE AND PLAINTIFFS' LACK OF A CLAIM CAPABLE OF REDRESS REQUIRE DISMISSAL.

Plaintiffs refer to their Response to Chamber's Motion to Dismiss (Standing) in addressing the Political Question Doctrine and Redressability. Defendant Chamber similarly incorporates its Reply to these arguments here, as made in Chamber's Reply in Support of Motion to Dismiss (Standing) and is filed concurrently with this Reply.

V. PLAINTIFFS' CLAIM FOR NUISANCE IS BARRED BY OKLAHOMA'S STATUTE OF LIMITATION.

In response to the arguments related to the imposition of the statute of limitations applicable to nuisance, Plaintiffs assert this is merely a "policy" determination.

The statute of limitations applies to bar recovery of damages stemming from a nuisance. *See Moneypenney v. Dawson*, 2006 OK 53, 141 P.3d 549, 552 n. 3 (citing 12 O.S. § 95(A)(3)).

Plaintiffs assert that they seeking no "damages," and only seek abatement. The remedies sought by Plaintiff for the alleged nuisance are not "abatement". Plaintiffs' Amended Petition demands "[p]ayment for all outstanding claims presented by Greenwood residents as a direct result of losses sustained in the Massacre that were denied by Defendants or insurance companies because of Defendants' misrepresentation of the Massacre." *See* Amended Petition, Sect. XII, ¶ 12(a). Plaintiffs request payment of money into a fund (to be paid out to Plaintiffs via "benefits"), construction of a hospital, and immunity from taxes and expenses. *Id.* at Sect. XII. Plaintiffs' legal positions in their Response cannot even be rectified with specific relief requested in their Amended Petition. At a minimum, all of Plaintiffs' requests for monetary damages, regardless of how they are couched, framed, or dressed up, must be dismissed due to the running of Oklahoma's statute of limitations.

This result has already occurred in litigation related to the 1921 Massacre. Suits have already been brought to recover for many of the ills for which Plaintiffs are seeking recovery. *See Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004) (affirming summary judgment against plaintiffs pursuing civil rights violations arising from the Massacre based on the application of the two year statute of limitation); *Latimer v. City of Tulsa*, CJ-2004-4138 (Tulsa County, Okla.) (dismissed pursuant to minute order entered stating "the Court is constrained to adopt the rationale [in *Alexander v. Oklahoma*] . . . which declares that the Tulsa Race Riot Plaintiff's [sic] suit time is barred")(appeal dismissed in *Latimer v. City of Tulsa*, No. 103,918 (Okla. Sup. Ct., Oct. 8th, 2007)). The present case is similarly time barred.

VI. PLAINTIFFS' CLAIM FOR UNJUST ENRICHMENT IS UNAVAILABLE AND MUST BE DISMISSED BECAUSE THERE IS ADEQUATE REMEDY AVAILABLE AT LAW, PLAINTIFFS HAVE FAILED TO ALLEGE ANY RELEVANT WRONGDOING ON BEHALF OF DEFENDANT CHAMBER, AND PLAINTIFFS LACK CAPACITY TO BRING ACTIONS ON BEHALF OF BLACK WALL STREET, GREENWOOD, AND NORTH TULSA.

a. PLAINTIFFS' CLAIM FOR UNJUST ENRICHMENT MUST BE DISMISSED BECAUSE AN ADEQUATE REMEDY AT LAW IS AVAILABLE THROUGH 12 O.S. § 1449.

Plaintiffs assert that unjust enrichment is still available, even if an adequate remedy at law exists. This position cannot be reconciled with the multiple Oklahoma Supreme Court decisions holding to the contrary. *See Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 18, 164 P.3d 1028, 1035 citing *Robertson v. Maney*, 1946 OK 59, ¶ 7, 166 P.2d 106 ("Where the plaintiff has an adequate remedy at law, the court will not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment."); *Krug v. Helmerich & Payne, Inc.*, 2013 OK 104, ¶ 43, 320 P.3d 1012, 1024 ("We have answered that a plaintiff may not pursue an equitable remedy when the plaintiff has an adequate remedy at law.").

Plaintiffs wish to distinguish these cases by arguing that these are all contract cases, and thus the rationale and language therein is inapplicable to an appropriation case under 12 O.S. § 1449. Plaintiffs' position stands in direct opposition to the language used by the Court. The Court could have stated "[w]here the plaintiff has an adequate [contractual remedy], the court will not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment," or "a plaintiff may not pursue an equitable remedy when the plaintiff has an adequate remedy [under contract]." The Court did not use this language, opting instead to state that *equitable remedies, such as unjust enrichment, are generally unavailable where an adequate remedy at law is present.* This is not a question of fact, it is a question of law predicated upon Plaintiffs' limited causes of action and their lack of support under Plaintiffs' own allegations. Plaintiffs' claim for unjust enrichment must be dismissed where an adequate remedy at law is available under 12 O.S. § 1449.

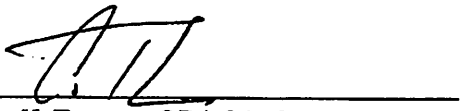
b. THERE IS NO ACTIVE WRONGDOING SUFFICIENT TO JUSTIFY PLAINTIFFS' REQUESTED RELIEF OF A CONSTRUCTIVE TRUST TO REMEDY THE ALLEGED UNJUST ENRICHMENT.

Plaintiffs respond with two arguments to the lack of active wrongdoing by Chamber: first, that *Faught v. Blair*, 2010 OK 16, 231 P.3d 645 is factually distinguishable because those defendants were innocent of any wrongdoing; and second, that retention of any benefits may independently satisfy the requirement of active wrongdoing. Both rebuttals can be summarily rejected because they do not address the argument made by Chamber. The test on a Motion to Dismiss is whether Plaintiffs have pled active wrongdoing which would permit the imposition of a constructive trust for *Plaintiffs' benefit.* As detailed in the underlying General Motion to Dismiss, there is no allegation that *Plaintiffs'* images or likenesses have been used in any way by the Chamber. Instead, the alleged appropriations are of the image, history, and reputation *of the communities of Black Wall Street, Greenwood, and North Tulsa*—entities or concepts who are not parties to this case. Accordingly, Plaintiffs fail to plead that they are entitled to imposition of a constructive trust because they have failed to allege any active wrongdoing by Defendant Chamber against the Plaintiffs.

c. PLAINTIFFS FAIL TO ALLEGE ANY RIGHT TO BRING SUIT ON BEHALF OF BLACK WALL STREET, GREENWOOD, OR NORTH TULSA, AND THUS AN ACTION FOR UNJUST ENRICHMENT ON BEHALF OF THESE ENTITIES IS IMPERMISSIBLE.

As to whether Plaintiffs have legal authority to sue on behalf of Black Wall Street, Greenwood, or North Tulsa, Plaintiffs make no arguments. Instead, Plaintiffs simply appeal to "equity" and erroneously claim that their lack of entitlement to bring an action on behalf of non-party (and potentially non-existent) entities is an issue of fact. Plaintiffs' cite no support for this position. Accordingly, Defendant Chamber reasserts its arguments made in the underlying General Motion to Dismiss, and ask this Court to dismiss Plaintiffs' unjust enrichment claims seeking recover for appropriation of the images and likenesses of non-party or non-existent entities.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2021, a true and correct copy of the above and foregoing was sent to the following via U.S. Mail, with correct postage fully prepaid thereon:

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