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

1. LESSIE BENNINGFIELD RANDLE, Tulsa Race Massacre Survivor, *et al.*, Plaintiffs,	)	
v.	)	Case No.: CV-2020-01179
	)	Judge Caroline Wall
1. CITY OF TULSA, a municipal corporation, *et al*., Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW ADDRESSING *STATE OF OKLAHOMA V. JOHNSON & JOHNSON*

Plaintiffs Lessie Benningfield Randle, Viola Fletcher, Hughes Van Elliss, Sr., the Historic Vernon A.M.E. Church, Laurel Stradford, Ellouise Cochrane-Price, Tedra Williams, Don M. Adams, Don W. Adams, Stephen Williams, and the Tulsa African Ancestral Society (collectively, "Greenwood Plaintiffs"),[1] by and through their undersigned counsel, respectfully submit this Supplemental Memorandum of Law addressing the Oklahoma Supreme Court's decision in *State of Oklahoma v. Johnson & Johnson, et. al*, 2021 OK 54, 499 P.3d 719 issued on November 9, 2021 ("*Johnson & Johnson*").

I. The *Johnson & Johnson Decision* Provides a Road Map for This Case to Proceed

The case before this Court is brought by a group of plaintiffs who include the last three known living survivors of the Tulsa Race Massacre of 1921. There is no question that the case itself is historically significant. But the legal question before the Court is a simple one: is it

[1] As this memorandum of law alternates frequently between discussions of the instant case before the Court and the opioid litigation, the moniker "Greenwood Plaintiffs" is used to make clear when the discussion relates to the plaintiffs in the instant case.

possible that the Greenwood Plaintiffs can prove a set of facts that support their public nuisance claim? *Edelen v. Bd. Of Comm'rs of Bryan Cty.*, 2011 OK CIV APP 116, ¶ 3, 266 P.3d 660, 663 (A motion to dismiss shall not be granted "unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief.")

The Supreme Court's decision in *Johnson & Johnson* shows that the answer to this question is a resounding "yes." In *Johnson & Johnson*, the Supreme Court cleared away the brush in the case law and charted a clear path for the Greenwood Plaintiffs to proceed by affirming the legal viability of public nuisance cases like the one pleaded by Greenwood Plaintiffs.

As the Supreme Court said, "[t]he question before the Court is whether the conduct of an opioid manufacturer in marketing and selling its products constituted a public nuisance under 50 O.S. 2011, ¶¶ 1 & 2." *Johnson & Johnson*, 2021 OK at ¶ 2, 499 P.3d at 721. In answering that question, the Supreme Court effectively did two things: (i) it explained what <u>is not</u> a public nuisance and (ii) it explained what <u>is</u> a public nuisance.

With respect to what <u>is not</u> a public nuisance, the Supreme Court found that Johnson & Johnson's "manufacturing, marketing, and selling of prescription opioids" could not be the "acts" that create a public nuisance because the resulting harm "sounds in products-related liability." *Id.* at ¶ 20, 499 P.3d at 725. The Court's decision repeatedly makes clear that its holding is limited to the interaction between products liability law and Oklahoma's public nuisance statute. *See, e.g.*, *id.* at ¶¶ 6, 8, 19, 33, 34, 499 P.3d at 722-25, 729-30. To reach its conclusion, the Supreme Court reviewed the history of the public nuisance law, considered how it intersects with the American product liability regime and expressly stated that it was relying on "three reasons not to extend public nuisance law to envelop J&J's conduct as an

opioid manufacturer." *Id.* at ¶ 23, 499 P.3d at 726. As explained below, *none* of those considerations are present in this case.

With regard to what <u>is</u> a public nuisance, the Supreme Court reviewed a century of decisional law when holding that "Oklahoma limits public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable." *Id.* at ¶ 18, 499 P.3d at 724-25. Here, Plaintiffs have alleged a public nuisance arising from both historical and ongoing acts that meet this definition. As alleged extensively in the Amended Petition[2], Defendants have "commit[ed] crimes constituting a nuisance" including, but not limited to, murder, arson, looting, land theft and domestic terrorism. *Id*.; *see, e.g*., Pet. ¶¶ 12(f), 26, 69, 76, 78, 117, 129, 138.[3] Defendants have "caus[ed] physical injury to property or participat[ed] in an offensive activity that rendered the property uninhabitable" by literally destroying the Greenwood neighborhood and displacing more than 9,000 Black residents, and destroying more than 1,500 homes and businesses and a litany of crimes and offensive activities since the Massacre, as detailed in Plaintiffs' petition. *Johnson & Johnson,* 2021 OK at ¶ 18, 499 P.3d at 724-25; *see, e.*g., Pet. ¶¶ 74, 88, 193.

As forth below, the public nuisance claim pleaded by the Greenwood Plaintiffs clearly meets the criteria set forth in *Johnson & Johnson*.

II. What <u>Is Not</u> a Public Nuisance under *Johnson & Johnson*: Cases That Sound in Products Liability

Johnson & Johnson resolved an appeal of a lawsuit brought by the State of Oklahoma against the manufacturers of prescription opioids for their role in the creation of Oklahoma's

[2] "Pet." refers to Plaintiffs' First Amended Petition.

opioid epidemic. Before trial, the State settled with two of three defendants, and it proceeded to trial on its public nuisance claim against Johnson & Johnson, which sold only 3% of all prescription opioids in Oklahoma. *Johnson & Johnson*, 2021 OK at ¶ 6, 499 P.3d at 722-23.

After a 33-day bench trial, Judge Thad Balkman of the Cleveland County District Court found that Johnson & Johnson was liable under the public nuisance statute "for conducting 'false, misleading, and dangerous advertising campaigns' about prescription opioids" and instituted an abatement plan designed to address Oklahoma's ongoing opioid addiction epidemic. *Id.*

On November 9, 2021, the Supreme Court issued its opinion overruling the District Court. In its decision, which analyzed both the nature of products liability law and public nuisance actions, the Court found that "public nuisance and product-related liability" are "two distinct causes of action, each with boundaries that are not intended to overlap." *Id.* at ¶ 21, 499 P.3d at 725-26. The Supreme Court held that Oklahoma's public nuisance statute does not apply to harms that "sound[] in product-related liability" including "the marketing, selling, and overprescribing of opioids manufactured by [the defendant]." *Id.* at ¶¶ 8, 20, 499 P.3d at 723, 725.

The Supreme Court held that products liability should be litigated within the well-developed products liability regime that is designed to adjudicate such claims. *Id.* at ¶ 23, 499 P.3d at 726 ("Public nuisance is fundamentally ill-suited to resolve claims against product manufacturers."). The Supreme Court expressed concern that blurring the boundaries between products liability and public nuisance would effectively transform *every* products liability case into a public nuisance case, citing a North Dakota Supreme Court case for the proposition that applying public nuisance to product manufacturers would turn public nuisance "into a monster

that would devour in one gulp the entire law of tort." *Id.* at ¶ 22, 499 P.3d at 726 (quoting *Tioga Public School District No. 15 of Williams County, State of North Dakota v. United States Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)). But the Supreme Court was exceedingly clear that its holding was limited to the consideration of products liability claims, as it repeatedly took opportunities to restate the precise issue it was addressing.[4]

It goes without saying that the Greenwood Plaintiffs' case is not a products liability case, nor does it bear any resemblance to a products liability case. Moreover, unlike consumers of prescription opioids, the Greenwood Plaintiffs have no alternative legal route to address the community-based harms alleged in the Amended Petition. Nor is there any concern that by finding the Greenwood Plaintiffs have adequately alleged a public nuisance that the courthouse doors would be thrown open to a massive new class of public nuisance plaintiffs.

The 1921 Tulsa Race Massacre is the worst act of domestic terrorism in American history, resulting in the destruction of an entire neighborhood. Since the Massacre, Defendants have continued to unlawfully take or incumber property rights in the community and have continued to neglect, exploit, over-police, and treat disparately the community on a racially discriminatory basis to this very day.

In contrast to *Johnson & Johnson*, the Greenwood Plaintiffs' tethering of their claim to the collective harm visited upon an actual neighborhood satisfies the requirement under 50 O.S. § 2 that a public nuisance be that "which affects at the same time an entire community or

[4] *See Johnson & Johnson,* 2021 OK at ¶ 2, 499 P.3d at 721. ("The question before the Court is whether the conduct of an opioid manufacturer in marketing and selling its products constituted a public nuisance under 50 O.S. 2011, §§ 1 & 2."); ¶ 8 ("This Court has not extended the public nuisance statute to the manufacturing, marketing, and selling of products, and we reject the State's invitation to expand Oklahoma's public nuisance law."); ¶ 36 ("[T]his Court will not extend Oklahoma public nuisance law to J&J's conduct in the manufacturing, marketing, and selling of prescription opioids.")

neighborhood." There is a finite number of events in history that can be compared to the Massacre and fewer still that resulted in the actual destruction of an actual neighborhood.

In addition to those general considerations, the Supreme Court expressly identified "three reasons not to extend public nuisance law to envelop J&J's conduct as an opioid manufacturer" and devoted a section of its opinion to discuss each reason. Those reasons are (1) "[t]he manufacture and distribution of products itself rarely causes a violation of a public right," *Johnson & Johnson,* 2021 OK at ¶¶ 24-26, 499 P.3d at 726-27; (2) "a manufacturer does not have control of its product once it is sold," *Id.* at ¶¶ 27-32, 499 P.3d at 727-29; and (3) "a manufacturer cannot be held perpetually liable for its products," *Id.* at ¶ 33, 499 P.3d at 729.

The inapplicability of those "manufacturer" considerations to the public nuisance case pleaded by the Greenwood Plaintiffs is apparent on its face, but examination of the Supreme Court's reasoning further highlights why none of the concerns the Supreme Court expressed about public nuisance law extending into the realm of products liability are present here.

A. "The manufacture and distribution of products itself rarely causes a violation of a public right"

The first factor, and the factor that the Supreme Court devoted the most space addressing, was its determination that "the manufacture and distribution of products rarely cause a violation of a public right." As the Supreme Court held, the sale of prescriptions drugs is a lawful activity and, in most cases, the sale of prescription drugs has a beneficial outcome. Thus, there was nothing inherently unlawful in Johnson & Johnson's manufacturing and marketing of opioids. *Id.* at ¶¶ 24-26, 499 P.3d at 726-27.

The Supreme Court explained that the fact that some persons were affected negatively by the sale and marketing of a lawful product (either through their own use or the use of others),

did not violate any public right. Relying on *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004), an Illinois case where the court declined to apply public nuisance liability to a gun manufacturer, the Supreme Court found that there is no "public right to be free from the threat that others may misuse or abuse prescription opioids – a lawful product." *Johnson & Johnson*, 2021 OK at ¶ 26, 499 P.3d at 727.

This consideration does not apply to the public nuisance pleaded by the Greenwood Plaintiffs. Indeed, the Supreme Court cited the same 1908 case that the Greenwood Plaintiffs relied on in their opposition to the motion to dismiss, *Territory v. Long Bell Lumber Co.*, 1908 OK 263, ¶ 32, 99 P. 911, 920. *Johnson & Johnson*, 2021 OK at ¶ 24, 499 P.3d at 726; *see* Plaintiffs' June 1, 2021 Response to Defendant Tulsa Regional Chamber's Amended General Motion to Dismiss and Brief in Support at 5-6. The *Long Bell* Court found that a group of merchants and distributors had created a public nuisance by conspiring to manipulate the supply chains for essential products in Western Oklahoma. *Long Bell,* 1908 OK at ¶¶ 29, 34, 99 P. at 920-21.

In *Johnson & Johnson*, the Supreme Court relied on *Long Bell* for the proposition that public rights are not simply aggregates of many private harms, as is the case of the harms inflicted by opioid abuse and gun violence. *Johnson & Johnson*, 2021 OK at ¶ 26, 499 P.3d at 727. A public right is something the public communally enjoys such as, in the case of *Long Bell*, "[t]he right of the citizens of that community to purchase or sell in an open and free market, shelter, warmth, or grain for food." *Long Bell*, 1908 OK at ¶ 32, 99 P. at 920. Here, the Greenwood Plaintiffs are not alleging an "aggregate of private rights." Consistent with the plain text of the statute, the Greenwood Plaintiffs have alleged a collective communal harm

that began when Greenwood was destroyed in an abhorrent act of violence, and has continued to this day due to Defendants' ongoing unlawful and offensive conduct.

The Supreme Court also distinguished the individualized nature of opioid addiction from public nuisances which have been found to violate the public right of health, which include "diseased animals, pollution in drinking water, or the discharge of sewer water on property." *Johnson & Johnson*, 2021 OK at ¶ 25, 499 P.3d at 727 (citing *Okla. Water Res. Bd. v. Tex. Cty. Irrigation & Water Res. Ass'n*, 1984 OK 96, ¶15, 711 P.2d 38, 44; *City of Okla. City v. West*, 1931 OK 693, ¶ 15, 7 P.2d 888, 893; *One Hudson Super-Six Auto., Model J, No. 4197, Engine No. 39527 v. State*, 1920 OK 50, ¶ 21, 187 P. 806, 810). What made those kinds of nuisances different from the manufacturing of opioids was that "[s]uch property-related conditions have no beneficial use and only cause annoyance, injury, or endangerment. In this case, the lawful products, prescription opioids, have beneficial use in treating pain." *Id.*

Here, the Greenwood Plaintiffs' petition alleges a series of unlawful activities that have caused and continue to cause injury to persons and property. The Massacre itself was comprised of illegal acts that once deprived an entire neighborhood of the use of the neighborhood itself, when it was violently destroyed and rendered unlivable. The alleged acts do not have and have never had any lawful or possible beneficial purpose. Likewise, the Amended Petition alleges unlawful acts that continue into the present, each of which presently "annoys, injures, or endangers" the Greenwood Plaintiffs and the Greenwood community at large and renders them "insecure in life, or the use of their property." Accordingly, this factor, upon which the Supreme Court put the most emphasis in *Johnson & Johnson*, has no applicability here.

B. "[A] manufacturer does not have control of its product once it is sold,"

The second factor that the Supreme Court considered was that "[a] manufacturer does not have control of its product once sold." The Supreme Court found that "[a] product manufacturer's responsibility is to put a lawful, non-defective product into the market" and beyond that there is "no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Johnson & Johnson*, 2021 OK at ¶ 27, 499 P.3d at 727-28.

Thus, once Johnson & Johnson had discharged its duty to put a lawful, non-defective product into the market, it had "no control of its products through multiple levels of distribution, including after it sold the opioids to distributors and wholesalers, which were then dispersed to pharmacies, hospitals, and physicians' offices, and then prescribed by doctors to patients." *Id*. at ¶ 29, 499 P.3d at 728. This consideration weighed against a finding that Johnson & Johnson was perpetuating an ongoing public nuisance.

Even more specifically, the Supreme Court found that the "[e]vidence at trial demonstrated that J&J sold only 3% of all prescription opioids statewide." *Id*. at ¶ 31, 499 P.3d at 729. The Supreme Court was clearly troubled by the fact that, nevertheless, the District Court found that Johnson & Johnson was responsible for the entirety of the state's opioid epidemic, thus making Johnson & Johnson "responsible for products it did not produce." *Id.*

By contrast, the Greenwood Plaintiffs have sued the parties who perpetrated the Massacre and who have inflicted more than 100 years of continued harm on the Greenwood community. The Greenwood Plaintiffs allege that those parties have control over the persons and property furthering the nuisance in the Greenwood and North Tulsa communities and possess the ability to abate said nuisance.

Even more to the point, however, the fact that Johnson & Johnson sold only 3% of the prescription opioids sold in Oklahoma was a fact that was deduced *at trial*. *Id.* The extent to

which the Defendants have the practical ability to abate the nuisance and how their respective responsibilities should be apportioned in any abatement plan is a fact that should be addressed at trial, with Plaintiffs bearing the burden of proof.

This Court, taking all facts alleged by Greenwood Plaintiffs as true and construing said allegations in the light most favorable to Greenwood Plaintiffs, as it must on a motion to dismiss, cannot say at this time that it is legally impossible for the Greenwood Plaintiffs to satisfy their burden.

C. "A manufacturer cannot be held perpetually liable for its products,"

As to the third factor, the Supreme Court briefly noted the application of public nuisance law to a drug manufacturer was inequitable, finding that "the district court held J&J responsible for products that entered the stream of commerce more than 20 years ago, shifting the wrong from the manufacturing, marketing, or selling of a product to its continuing presence in the marketplace." *Id.* at ¶ 33, 499 P.3d at 729. This had effectively permitted the State to side step the applicable statute of limitations to products liability, which is firmly established in Oklahoma. *Id.*

By contrast, the Greenwood Plaintiffs have alleged a continuing, ongoing public nuisance that began with the Massacre on the night of May 31, 1921 and has been exacerbated by Defendants' continued unlawful and offensive conduct ever since. Their cause of action remains valid until the nuisance is abated, as the Supreme Court previously has held. *See Revard v. Hunt*, 1911 OK 425, ¶15, 119 P. 589, 592 ("[N]o lapse of time can legalize a public nuisance amounting to an actual obstruction of public right.").

Nothing in *Johnson & Johnson* calls into question the long line of Oklahoma cases wherein courts repeatedly have found that actions may be brought to abate a public nuisance that has been ongoing for many decades. *See Meinders v. Johnson*, 2006 OK CIV APP 35, ¶¶

2-3, 30, 134 P.3d 858, 860, 867-69 (affirming evidence at trial was sufficient to show that "substantial mineral exploration under leases generally dating from the 1920s" resulting in "surface pollution from salt brine and mineral spills, as well as severe erosion" was a public nuisance requiring remediation and abatement in 2006); *Briggs v. Freeport-McMoran Copper & Gold, Inc.*, No. CIV-13-1157-M, 2015 WL 1461884, at *1, *3 (W.D. Okla. Mar. 30, 2015) (denying motion to dismiss public nuisance claim based on operations of smelting plant that began in 1916 and ceased in 1972).

At the motion to dismiss stage, the Court cannot conclude that the Massacre is too long ago in time for the public nuisance claim to be viable. Three of the Greenwood Plaintiffs were alive during the Massacre. For them and their families, the Massacre is not a remote historical event. And, in any event, the Court may not decide disputed questions of fact at this stage.

III. What Is a Public Nuisance under the *Johnson & Johnson*: Crimes and Offensive Activity that Renders Property Uninhabitable

To understand whether a public nuisance claim can apply in the context of drug manufacturing, in *Johnson & Johnson*, the Supreme Court reviewed the history of the cause of action, tracing its origins as a criminal remedy in 12th-century England, through its incorporation in the common law and its statutory codification in Oklahoma. *Johnson & Johnson*, 2021 OK at ¶¶ 13-19, 499 P.3d. at 723-25. During that review, the Supreme Court explained that public nuisance has been applied in an extraordinary variety of (still valid) contexts, including monopolistic behavior, smoking indoors, pollution, dance hall activities, and obscenity. *Id*. at ¶ 10 n. 13, 499 P.3d at 723.

The Supreme Court found that "[f]or the past 100 years, our Court, applying Oklahoma's nuisance statutes, has limited Oklahoma public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or

participating in an offensive activity that rendered the property uninhabitable." *Id*. at ¶ 18, 499 P.3d at 724-25.

It is difficult to imagine conduct that more squarely fits into the definition of "committing crimes constituting a nuisance" and "causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable" than the acts alleged in the Amended Petition by the Greenwood Plaintiffs, as is set forth below. Even a cursory examination of the Amended Petition shows that Defendants' have engaged in a series of ongoing criminal and offensive actions against Greenwood that once left the Greenwood neighborhood utterly inhabitable and that continue to cause harm to Greenwood residents and property.

1. "[C]rimes constituting a nuisance"

As alleged in detail in the Amended Petition, beginning on May 31, 1921, Defendants committed acts of murder, looting, arson, and domestic terrorism —by a mob of deputized men acting on behalf of, endorsed by, and encouraged by the City, County, and State. Soldiers, who were sworn to protect the public, joined the melee — at the behest of the City, County, and Chamber — and murdered and terrorized the Black citizens they had sworn to protect. Pet. ¶¶ 51-60. Defendants' unlawful activity caused the death of at least 300 Black Tulsans, displaced 9,000 Black residents, and then destroyed 1,500 businesses. Pet. ¶¶ 74-76.

Greenwood Plaintiffs have satisfied their burden in pleading "[c]rimes constituting a nuisance[.]" *Johnson & Johnson*, 2021 OK at ¶ 18, 499 P.3d at 724-25. They have alleged that:

- The Tulsa police "deputized and armed male citizens without regard for the safety and security of the African American residents of Greenwood. They kept no record of which civilians were issued weapons. Instead, the police

department ordered deputies and non-deputies alike to 'go home, get a gun, and get a nigger.'" Pet. ¶ 50.

- The City, County, and Chamber officials "sought the assistance of the local State National Guard units[,]" who assisted the police. Pet. ¶¶ 51-52.
- The deputized White mob "forced their way into Greenwood, **shooting**, **wounding**, and **killing** many African Americans, and **burning down** everything in their path." Pet. ¶ 53 (emphasis added).
- Rather than protect the African American Greenwood residents, as ordered, the National Guard fired on them and joined the White mob. Pet. ¶¶ 54, 57.
- The White mob, including State Guardsmen and deputized citizens, continued to fire on and **kill** African American men, women, and children. Pet. ¶ 59 (emphasis added).
- Using airplanes, Defendants dropped incendiary materials and bombs on the streets, homes, businesses, and people of Greenwood. Pet. ¶ 60.
- Newly deputized members of the Tulsa Police Department, County Sheriff's Office, City, Chamber, and County officials also **set fire** to Greenwood homes and businesses. Pet. ¶ 69 (emphasis added).
- The authority to take African American lives continued after the massacre, as "newly deputized White citizens were told that they were to 'go out and shoot any nigger you see, and the law'll be behind you.'" Pet. ¶ 65.
- Greenwood residents were **injured**, **killed**, or left homeless and forced to flee Tulsa. *Id.* (emphasis added).

- "Defendants were responsible for **stealing** and **destroying personal property** [then-]worth millions of dollars." Pet. ¶ 75 (emphasis added). In fact, "the White mob carefully stripped homes and businesses of all valuables before **setting fire** to the structures." Pet. ¶ 78 (emphasis added).
- Following the Massacre, Greenwood residents "were forcefully detained in what the *Tulsa World* called 'concentration camps.'" Pet. ¶ 83. Residents were required to "carry a green card bearing their White employer's name while out of the camp" and many "were forced to work for their White employer under the threat of violence and without pay." Pet. ¶ 84.

2. "[C]ausing physical injury to property or participating in an offensive activity that rendered the property uninhabitable"

Nor can there be any question that the Greenwood Plaintiffs have sufficiently alleged "injury to property" or "offensive activity" that rendered property uninhabitable.[5] In explaining this category, the Supreme Court expressly relied on and endorsed the validity of cases where the nuisance was based on past conduct that created ongoing, real harm to property. For example, the Supreme Court relied on *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, ¶8, 933 P.2d 272, 276, wherein a nuisance was created by Exxon's burying of substances used in drilling activities caused harmed to livestock when the toxic substances from the drilling eventually rose to the surface. *Johnson & Johnson*, 2021 OK at ¶¶ 15-16, 499 P.3d at 721

[5] Notably, despite its focus on property-related nuisances, the Supreme Court expressly rejected an argument made by Johnson & Johnson (and advanced by Defendants in this action) that all nuisances *must* be property-based. In response to a statement made in the dissent, the majority opinion stated that it was "not limiting public nuisance to a defendant's use of real property. . .[t]his Court relies on Oklahoma precedent, and the limitations set by Oklahoma case law guide our consideration of whether J&J's conduct created a public nuisance." *Johnson & Johnson*, ¶ 18

As the Court will recall, when opposing Defendants' motion to dismiss, the Greenwood Plaintiffs have relied on this very line of cases for the proposition that long-standing public nuisances can properly be the subject of a public nuisance claim. *See* Plaintiffs' June 1, 2021 Response to Defendant Tulsa Regional Chamber's Amended General Motion to Dismiss and Brief in Support at 5 (*citing Meinders*, 2006 OK CIV APP 35, ¶¶ 2-3, 30, 134 P.3d 858, 860, 867-69 (mineral exploration from 1920s created nuisance requiring mediation and abatement in 2006); *Briggs*, No. CIV-13-1157-M, 2015 WL 1461884, at *1, *3 (W.D. Okla. Mar. 30, 2015) (smelting plant in operation from 1916 to 1972 created public nuisance)). *Johnson & Johnson* is an express statement by the Supreme Court that cases based on ongoing, decades-long harm to property remains a viable cause of action in Oklahoma.

The Amended Petition contains extensive allegations regarding the harm and offensive conduct visited upon Greenwood, which literally left the neighborhood uninhabitable, including, among other things:

- Using airplanes, Defendants dropped incendiary materials and bombs on the streets, homes, businesses, and people of Greenwood. Pet. ¶ 60.
- Newly deputized members of the Tulsa Police Department, County Sheriff's Office, City, Chamber, and County officials also set fire to Greenwood homes and businesses. Pet. ¶ 69.
- The 40-square-block area of Greenwood, roughly four square miles, filled with homes and businesses, was reduced to ash and rubble. Pet. ¶ 67.
- **"Over 150 businesses were destroyed and over 1,200 houses burned down."** Pet. ¶ 77 (emphasis added).

- "Defendants have imposed or supported policies that stifled the ability of all Greenwood residents impacted by the Massacre to rebuild and thrive, except to the extent that development and preservation would benefit the parts of Tulsa that are predominantly White." Pet. ¶ 88.
- "Defendants City, County, and Chamber unreasonably, unwarrantedly, and/or unlawfully pushed for and enacted changes in fire regulations and zoning laws that illegally **deprived Greenwood community members of their property** without due process of law." Pet. ¶ 98 (emphasis added).
- Defendants' actions that interfered with Greenwood residents rebuilding efforts "left survivors of the Massacre to live in makeshift tents as their shelter into the winter, subjecting them to cold, filth, and disease for up to a year after the Massacre." Pet. ¶ 105.
- "In 1923, Defendants again used zoning laws to impede the reconstruction of the Greenwood neighborhood." Pet. ¶ 112.
- Through the 1950s, Defendants undertook actions ensuring "that many of the black residents of Greenwood lived in ghetto-like conditions." Pet. ¶¶ 113-15.
- "The City and County, after participating in the burning and looting of Greenwood, refused to enforce housing codes, and thereby neglected their duty to ensure that Greenwood residents had access to suitable housing. . . . [These] acts and violations of their municipal duties made houses prone to rapid deterioration and led to substandard conditions and blight that threatened the health, comfort, and safety of the Greenwood neighborhood and community and rendered residents insecure in their lives and property." Pet. ¶ 117.

- Through the "taking of prime real estate owned by Greenwood's Black residents perpetuated by the Defendants' acts that diminished the enjoyment by Greenwood residents of their property and further eroded Greenwood's tax base, negatively affecting residents, businesses, and schools in the Greenwood and North Tulsa communities." Pet. ¶ 148.
- Through the Urban Renewal program, Defendants "destroyed Greenwood's bustling business district and pushed thousands of its Black residents further into North Tulsa." Pet. ¶ 151.
- Defendants participated in and enabled "redlining" activities in Greenwood to the detriment of Black Tulsa residents." Pet. ¶ 154.
- On January 25, 2021, Defendants City of Tulsa and Tulsa Development Authority admitted that, as a result of "forced segregation, job discrimination, and the 1921 Race massacre that devastated Tulsa's prosperous Black economy, Black Tulsans suffer deep and crushing economic disparities."[6] Pet. ¶ 175.

In short, Defendants leveled what was then called "Black Wall Street" and have actively prevented attempts at rebuilding it for over 100 years. These shameful actions have had a profound effect on Black Tulsans, who — if not forced out of Tulsa entirely — have been largely displaced to the greater North Tulsa area. While it is impossible to fully quantify the magnitude of the harm the Defendants' actions have caused (and will continue to cause until the nuisance is abated), the Plaintiffs' petition methodically specifies ways in which, as

[6] It should be noted that both of these Defendants are primary causes of the forced segregation and the 1921 Race Massacre.

Tulsa Mayor G.T. Bynum acknowledged, the "racial and economic disparities [in Tulsa] that still exist today can be traced to the 1921 race massacre." Pet. ¶ 1.

IV. Defendants' Policy Arguments are Unavailing

On November 29, 2021, two Defendants, the City of Tulsa and the Tulsa Metropolitan Area Planning Commission, submitted a response to Plaintiffs' November 10, 2021 Notice of Supplemental Authority. *See* Defs. City of Tulsa and TMAPC's Resp. to Pls.' Supplemental Authority ("COT/TMAPC Response").

First, it is notable that the City of Tulsa is taking the position that the "reasoning in the J&J Decision for not holding manufacturers perpetually liable" compels dismissal of the Amended Petition given that the City of Tulsa itself has its own public nuisance lawsuit against opioid manufacturers and is based on a legal theory identical to the one pursued by the State against Johnson & Johnson. COT/TMAPC Response at 1-2. The City of Tulsa has not, to date, withdrawn that lawsuit based on the reasoning in the *Johnson & Johnson*. *See City of Tulsa v. Cephalon, Inc. et al*, Docket No. 1:21-op-45024 (N.D. Ohio). If the City of Tulsa has not withdrawn its identical opioid suit following *Johnson & Johnson*, then it cannot credibly assert that *Johnson & Johnson* compels dismissal of the Greenwood Plaintiffs' suit.

Turning to the substance of what the City of Tulsa and the TMAPC argued, the Court should note that the majority opinion in *Johnson & Johnson* is 39 paragraphs long. Tellingly, in their reply, the City of Tulsa and TMAPC cites to *only* the 39th paragraph, which is effectively a coda that the Supreme Court added *after* its conclusion paragraph.

Paragraph 39 contains what might best be described as contextual considerations that the Court offered at the very end of a long decision, but the City of Tulsa cites it as if it reflects the Supreme Court's central holding. In paragraph 39, the Supreme Court expressed misgivings about courts "manag[ing] public policy matters that should be dealt with by the

legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems." *Johnson & Johnson*, 2021 OK at ¶ 39, 499 P.3d at 731.

Paragraph 39 is not an instruction by the Supreme Court to lower courts to dismiss any nuisance lawsuit that has public policy implications. Nor would any such instruction make sense. By definition, public nuisances are those "which affects at the same time an entire community or neighborhood." 50 O.S. § 2. *Every* public nuisance claim is about a harm inflicted upon a community or neighborhood. Indeed, in Paragraph 39, as Defendants themselves quote, the Supreme Court held "[t]he Court has allowed public nuisance claims to address discrete, localized problems, not policy problems." *Johnson & Johnson*, 2021 OK at ¶ 39, 499 P.3d at 731 (quoted in COT/TMPAC Response at 1).

The Greenwood Plaintiffs do not ask the Court to enter the domain of the legislative or executive branches. All Plaintiffs do here is ask the judiciary to allow them to prove a statutory violation, which is undoubtedly within this Court's ambit.

Unlike a statewide public health crisis, the nuisance alleged by the Greenwood Plaintiffs is in fact a "discrete, localized" problem that has occurred in a single neighborhood in a single city in Oklahoma. As Plaintiffs have demonstrated in the Amended Petition, their opposition to the Motions to Dismiss, and at oral argument, Defendants committed multiple discrete acts of property damage and wrongdoing that require abatement. Those wrongs, committed by multiple legal actors, taken one-by-one, each fits within a traditional public nuisance framework and each demands, in justice and under blackletter law, that the defendants abate the nuisance. *See* Pls. Opp'n to Chamber Amended Mot. to Dismiss at 5.

A determination by this Court that the alleged harms cannot be addressed because they are a "policy problem" would be an unfortunate continuation of American courts finding that harms visited upon Black Americans are political, while harms visited upon whites are private harms that can be addressed by courts. And indeed, the Amended Petition alleges at length the injury and personal harm that provides the Greenwood Plaintiffs their standing to pursue this action, including the destruction of family homes (Pet. ¶¶ 32, 34) and the murder of family members (Pet. ¶ 129).

Furthermore, the fact that certain defendants are government entities does not absolve them of liability and grant them the ability to assert that an effort to hold them accountable for wrongdoing is "political." It is not the law that a municipal or other government institution may engage in blighting property within a neighborhood—including by its criminal acts—and then claim that remedying that property damage is a political act because the institution that engages in the acts of property damage is a public one.

By allowing this case to proceed, the Court is not making a policy choice. It is making a decision about the legal sufficiency of the Amended Petition.

V. Conclusion

For the foregoing reasons and in light of *Johnson & Johnson*, Plaintiffs request that the Court deny Defendants' Motion to Dismiss.

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Respectfully submitted,

SOLOMONSIMMONSLAW

/s/ Kymberli J. M. Heckenkemper
Damario Solomon-Simmons, OBA# 20340
Kymberli J. M. Heckenkemper, OBA # 33524
601 S. Boulder, 600
Tulsa, Oklahoma, 74119
(918) 551-8999 - Phone
(918) 582-6106 - Facsimile
dss@solomonsimmons.com
kheckenkemper@solomonsimmons.com

-and-

BRYAN & TERRILL
J. Spencer Bryan, OBA # 19419
Steven J. Terrill, OBA #20869
3015 E. Skelly Dr., Suite 400
Tulsa, Oklahoma 74105
(918) 935-2777 - Phone
(918) 935-2777 - Facsimile
jsbryan@bryanterrill.com
sjterrill@bryanterrill.com

-and-

Eric J. Miller, BAR #194237
Professor and Leo J. O'Brien Fellow
Burns 307
919 Albany Street
Los Angeles, California 90015
(213) 736 –1175 - Phone
eric.miller@lls.edu

-and-

MAYNARD M. HENRY, SR., ATTORNEY AT LAW, P.C.
Maynard M. Henry, Sr., BAR #VSB39266
10332 Main Street, #308
Fairfax, Virginia 22030
(703) 593-2773 - Phone
(800) 234-6112 - Facsimile
mhenryesquire@cox.net

-and-

JOHNSON | CEPHAS LAW
Lashandra Peoples-Johnson, OBA# 33995
Cordal Cephas, OBA#33857
3939 S. Harvard Ave., Suite 238
Tulsa, Oklahoma 74135
(918) 877-0262 - Phone
lashandra@johnsoncephaslaw.com
cordal@johnsoncephaslaw.com

-and-

SCHULTE ROTH & ZABEL LLP
Michael E. Swartz
Sara E. Solfanelli
Randall T. Adams
Angela A. Garcia
Ekenedilichukwu Ukabiala
919 Third Avenue
New York, New York10022
(212) 756-2471 - Phone
michael.swartz@srz.com

-and-

SCHULTE ROTH & ZABEL LLP
McKenzie E. Haynes
Brandon Faske
901 Fifteenth Street, NW, Suite 800
Washington, District of Columbia 20005
(202) 729-7485 - Phone
mckenzie.haynes@srz.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 31st Day of January 2022, I served the foregoing by email and U.S. Mail to the following:

Mr. David O'Melia
Mr. Gerry Bender
City of Tulsa Legal Department
175 E. 2nd Street, Ste. 685
Tulsa, OK. 74103
domeilia@cityoftulsa.org
gbender@cityoftulsa.org

Kevin McClure
State of Oklahoma, Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73104
kevin.mcclure@oag.ok.gov

Jot Harley
Jot Hartley Law Firm, PLLC
177 W. Delaware Ave.
Vinita, OK 74301
jothartley@gmail.com
Attorney for Tulsa Development Authority

Kevin Wilkes
Hall Estill
320 S. Boston Ave., Ste. 200
Tulsa, OK. 74103
kwilkes@hallestill.com

John H. Tucker
Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC
P.O. Box 21100
Tulsa, OK 74121-1100
jhtucker@rhodesokla.com

/s/ Kymberli J. M. Heckenkemper
Kymberli J. M. Heckenkemper