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

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1. LESSIE BENNINGFIELD RANDLE,
Tulsa Race Massacre Survivor,

2. VIOLA FLETCHER,
Tulsa Race Massacre Survivor,

3. HUGHES VAN ELLISS, SR.,
Tulsa Race Massacre Survivor,

4. HISTORIC VERNON A.M.E. CHURCH, INC.,
a domestic not-for-profit corporation,

5. LAUREL STRADFORD,
great-granddaughter of J.B. Stradford,

6. ELLOUISE COCHRANE-PRICE,
daughter of Clarence Rowland and
cousin of Dick Rowland,

7. TEDRA WILLIAMS,
granddaughter of Wess Young,

8. DON M. ADAMS,
nephew and next friend of Dr. A.C. Jackson,

9. DON W. ADAMS,
great-grandson of Attorney H.A. Guess,

10. STEPHEN WILLIAMS,
grandson of A.J. Smitherman,

11. THE TULSA AFRICAN ANCESTRAL SOCIETY,
an unincorporated association,

Plaintiffs,

v.

1. CITY OF TULSA,
a municipal corporation,

Case No.: CV-2020-01179
Judge Caroline Wall

2. TULSA REGIONAL CHAMBER, a domestic not-for-profit corporation,

3. TULSA DEVELOPMENT AUTHORITY,

4. TULSA METROPOLITAN AREA PLANNING COMMISSION,

5. BOARD OF COUNTY COMMISSIONERS FOR TULSA COUNTY, OKLAHOMA,

6. VIC REGALADO, IN HIS OFFICIAL CAPACITY AS SHERIFF OF TULSA COUNTY,

7. OKLAHOMA MILITARY DEPARTMENT,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANT TULSA REGIONAL CHAMBER'S AMENDED GENERAL MOTION TO DISMISS AND BRIEF IN SUPPORT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Plaintiffs hereby submit this Brief in Opposition to the Amended General Motion to Dismiss filed by Defendant the Tulsa Regional Chamber (collectively, "the Chamber").[1] This opposition is one of six opposition briefs filed by Plaintiffs on June 1, 2021 (the "June 1 Oppositions") in response to the seven motions to dismiss filed by Defendants on March 12, 2021 (the "March 12 Motions"). Plaintiffs respectfully refer to the Court to Plaintiffs' Opposition to State of Oklahoma's Motion to Dismiss to an overall introduction to the June 1 Oppositions and a chart which shows where responses to arguments made in the March 12 Motions are responded to in the June 1 Oppositions.

INTRODUCTION

The Defendants have enlisted the only non-governmental entity defendant, the Chamber of Commerce, to argue that Plaintiffs' public nuisance claim should be dismissed for failure to state a claim as to all defendants. The reason is transparent: the Chamber's argument *directly contradicts* many of the positions that the other Defendants have taken or likely will take in the opioid litigations, particularly the State of Oklahoma's case, *State ex rel. Hunter v. Purdue Pharma, et. al.*, No. CJ-2017-816 (Ok. Dist. Ct. Nov. 15, 2019) (the "Opioid Litigations"). The Court should not fall for Defendants' strategic gambit of hoping the Chamber will carry its water on the public nuisance argument at the same time that the other Defendants take opposite positions in the Opioid Litigations.

In 185 paragraphs, the Petition carefully and robustly alleges that the Tulsa Race Massacre of 1921 (the "Massacre") has caused a public nuisance under Oklahoma's unique nuisance statute. What started on the evening of May 31, 1921 as one of the worst acts of

[1] Without requesting any consent from Plaintiffs or the Court, the Chamber inappropriately filed two separate motions to dismiss accompanied by two separate briefs, effectively permitting the Chamber to submit 43 pages of briefing. Plaintiffs submit responses to both motions, however Plaintiffs request that the Court disregard whichever motion by the Chamber was received by the Court second in terms of time.

domestic terrorism in the history of the United States has resulted in a nuisance that has continued to this day, resulting in severe health, education, and economic disparities faced by Black Tulsans. As the Petition alleges, this fact was acknowledged by Tulsa's Mayor Bynum when he stated: "[i]n Tulsa, the racial and economic disparities that still exist today can be traced to the 1921 race massacre." Pet. ¶ 1.[2]

Based on the pleadings before the Court, the Court cannot conclude without a doubt that Plaintiffs can prove no set of facts in support of their claim for relief. Indeed, just eighteen months ago in the Opioid Litigations, Judge Balkman found after a trial spanning 33 days, which included the testimony of 42 witnesses and 874 trial exhibits, that the pharmaceutical company defendants engaged in a deceptive marketing campaign designed to convince doctors and patients that prescription opioids were safe, precipitating a opioid crisis in Oklahoma. When doing so, Judge Balkman explained that "the law is clear that such conduct qualifies as the kind of act or omission that will sustain liability under Oklahoma's nuisance law." *State ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 9241510, at *12 (Okla. Dist. Ct. Nov. 15, 2019) (Trial Order).[3]

If the State was able to prove in the Opioid Litigation that a several-decades-long, statewide opioid crisis is a public nuisance, the Plaintiffs in this action must be afforded the opportunity to prove that the far more localized and specific public nuisance arising from the Massacre is also a public nuisance requiring abatement. Effectively acknowledging this, the Chamber does not focus on the statutory text or even attempt to distinguish the Opioid

[2] "Pet." refers to Plaintiffs' Amended Petition filed February 2, 2021.

[3] Even more recently, a public nuisance claim brought by the Cherokee Nation against pharmaceutical company defendants based on the public nuisance created by the opioid crisis survived a motion to dismiss in federal court in the Eastern District of Oklahoma, relying on many of Judge Balkman's conclusions of law in the *Purdue* case. *Cherokee Nation v. McKesson Corp.*, No. CIV-18-056-RAW, 2021 WL 1181176, at *5-7 (E.D. Okla. Mar. 29, 2021).

Litigations at all. Instead, the Chamber offers a host of reasons why the Court simply should not hear this case, which range from legal arguments that Judge Balkman expressly rejected in the Opioid Litigations to policy arguments that amount to the idea that any legal question involving race is a political question that the Court may not address. The Chamber even goes so far as to "unequivocally" condemn racism, Chamber Mot. 1[4], and then 14 pages later asks the Court to take judicial notice of *other* acts of racial violence in America – assuming all Black Americans are impacted by racial violence in the same way – and diminishing the harm inflicted upon Plaintiffs in *this* action. *Id*. at 15. The Chamber's demonstrable efforts to hide from the Statute and Opioid Litigations should not be ignored by the Court.

As of the date of this filing, the Plaintiffs, including the last three known living survivors, and the Greenwood community, have waited exactly one century for their day in court. Plaintiffs bring this action demanding Defendants abate the nuisance that began on the night of May 31, 2021. For courts of this State to read Oklahoma's nuisance statute broadly to abate the opioid crisis but narrowly to avoid adjudicating the merits of a race massacre would be difficult to comprehend.

ARGUMENT

Before the Court is a motion to dismiss brought under 12 O.S. § 2012(B)(6).[5] As the Court is aware, Oklahoma is a notice-pleading jurisdiction where "[m]otions to dismiss are generally disfavored." *Am. Nat'l Res., LLC v. Eagle Rock Energy Partners, L.P.*, 2016 OK 67, ¶ 6, 374 P.3d 766, 769. "Notice pleading does not require pleading every fact upon which a

[4] "Chamber Mot." refers to the Tulsa Regional Chamber's Amended Motion to Dismiss filed March 12, 2021.

[5] The Chamber does not actually cite 12 O.S. § 2012(B)(6) in its brief but, as best Plaintiffs can tell, the instant motion appears to be brought under 12 O.S. § 2012(B)(6), whereas Chamber's first motion is brought under 12 O.S. § 2012(B)(1).

claim is based, but merely a short and plain statement of the claim that will give fair notice of what the plaintiffs claim is and the grounds upon which it rests." *State ex rel. Okla. Corp. Comm'n v. McPherson*, 2010 OK 31, ¶ 25, 232 P.3d 458, 464-65.[6]

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." *Edelen v. Bd. of Comm'rs of Bryan Cty.*, 2011 OK CIV APP 116, ¶ 3, 266 P.3d 660, 663 (citations omitted). "Where not all claims appear to be frivolous on their face or without merit, dismissals for failure to state a claim upon which relief may be granted are premature." *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565, 569. If relief is possible under any set of facts which can be established and consistent with the allegations, a motion to dismiss should be denied. *Id.* Because Defendants cannot meet this stringent standard, their motions must be denied.

I. The Petition Adequately Alleges a Public Nuisance that Defendants Have Failed to Abate

Enacted in 1910, the Nuisance Statute permits actions seeking abatement of an unlawful act that "annoys, injures or endangers the comfort, repose, health or safety of others" or "[i]n any way renders other persons insecure in life, or in the use of property." 50 O.S. § 1.[7] Nuisances may be private or public.

Public nuisances are those "which affects at the same time an entire community or neighborhood." 50 O.S. § 2. The statute specifically authorizes individuals to bring actions to

[6] *See also* 12 O.S. § 2008(A)(1)-(2) (pleading code merely requires that the pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief" and a "demand for judgment for the relief to which he deems himself entitled").

[7] The statute also defines a nuisance as unlawful acts that "[o]ffends decency" or "[u]lawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway." 50 O.S. § 1.

abate a public nuisance if those individuals are "specially injur[ed]" by a public nuisance. 50 O.S. § 10.

The statute provides a time limitation for actions to abate a *private* nuisance, but there is no time limitation on actions to abate a *public* nuisance. *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."). Accordingly, actions may be brought to abate a public nuisance that has been ongoing for many decades. *See, e.g.*, *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).

As Courts and commentators have observed, Oklahoma's Nuisance Statute is uniquely broad in that it does not require any connection to real property, unlike the nuisance statutes of other states. Relying on that breadth and faithful to the statute's text, Oklahoma courts have for decades applied the Nuisance Statute to a broad range of conduct that "[a]nnoys, injures or engenders the comfort, repose, health or safety of others," most recently and notably in the Opioid Litigations. *See* 50 O.S. § 1.

For example, in 1908 a group of merchants and distributors conspired to manipulate the supply chains for essential products in Western Oklahoma, resulting in "lumber, fuel, and grain, three of the prime necessities of life" being "entirely monopolized and under the control

of these defendants." *Territory v. Long Bell Lumber Co.*, 1908 OK 263, ¶32, 99 P. 911, 920. The Court found that this anti-competitive behavior constituted a public nuisance as a result of the socioeconomic impact of price fixing on the community:

> The right of the citizens of that community to purchase or sell in an open and free market, shelter, warmth, or grain for food is by virtue of these combinations entirely denied by these defendants. **This great and invaluable public right is not only invaded, but absolutely destroyed.**

Id. (emphasis added.)

A. The Petition More than Adequately Alleges an Ongoing Public Nuisance under the Plain Terms of the Nuisance Statute

The Petition goes far beyond providing Defendants with notice of their claims. In exacting detail covering 185 substantive paragraphs of factual allegations, the Petition describes the nuisance at issue, which began with the events of the Massacre, one of the worst acts of domestic terrorism in the history of the United States, which began on the night of May 31, 2021, and continues to this day.

As set forth in the Petition, beginning on May 31, 1921, Defendants committed acts of murder, looting, arson, and domestic terrorism – all acts committed 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 swore to protect. Pet. ¶¶ 51-60. Defendants' unlawful activity caused the death of at least 300 Black Tulsans, displaced 9,000 Black residents, and the destroyed 1,500 businesses. Pet. ¶¶ 74-76.

These acts resulted in the literal destruction of an entire American community, a prosperous community known as Greenwood and Black Wall Street. But the facts alleged in the Petition do not end there. Relying on official government records, the personal experiences

of the Plaintiffs and deposition testimony, and the work of social science scholars, the Petition describes both the immediate aftermath of the Massacre and the ensuing decades of neglect, indifference, and outright hostility shown by the Defendants to the community they destroyed. Pet. ¶¶ 112-174.

The acts carried out by the Defendants during the decades that followed the Massacre included confining Black Tulsans in internment camps in the immediate aftermath of the Massacre, embarking on discriminatory "urban renewal" programs from the 1950s to the 1970s, and constructing an interstate highway directly through the heart of Greenwood, bisecting the neighborhood from itself and displacing more Black Tulsans. Black Wall Street was leveled, never rebuilt, and actively prevented being rebuilt for over 100 years, having a profound effect on Black Tulsans, who – if not forced out of Tulsa entirely – have been largely displaced to the greater North Tulsa area.

That profound effect is still felt today, in a variety of observable and measurable ways, as alleged in detail in the Petition. Black Tulsa today is the most destitute section of the City. Pet. ¶¶ 109, 123-143. Black Tulsans live in ghetto conditions with some of the highest incidents of poverty, health, housing and food insecurity in the nation. Pet. ¶¶ 109, 113, 123-143. As a 2019 report produced by the City shows, unemployment among Black Tulsans is more than twice that of white Tulsans, the medium household income of white Tulsans is $20,000 more than Black Tulsans, Black students are nine times more likely than white students to be suspended from school; home ownership among Black Tulsans almost half of that among white Tulsans, and the rate of infant mortality is over four times that of the rate among white Tulsans. Pet. ¶ 174.

As alleged in the Petition and as has been widely acknowledged in Tulsa by leaders of the Chamber and other Defendants, including the City, there is a through-line from the Massacre to the conditions of Black Tulsans today:

- From Chamber President and CEO, Mike Neal: "The racism that enabled the massacre also shaped the economic disparities in our community." Pet. ¶ 170.

- From Mayor Bynum: "[R]acial and economic disparities [in Tulsa] that still exist today can be traced to the 1921 race massacre." Pet. ¶ 1.

- From Tulsa's *Equality Indicators 2018 Annual Report*: "Tulsa has a unique history relating to racial inequalities, perhaps most notable is the 1921 Tulsa race riot that destroyed what was then the wealthiest Black community in the country. . . . following the race riot, city leaders passed more zoning regulations mandating the races remained segregated." Pet. ¶ 173.

Given the level of robust detail in the Petition, no Defendant, including the Chamber, claims that it does not have notice of the nature of the claims brought against them. Nor does the Chamber or any Defendant argue that the allegations described above are not captured by the plain terms of the Nuisance Statute as "unlawful conduct" that "[a]nnoys, injures or endangers the comfort, repose, health or safety of others" or "[i]n any way renders other persons insecure in life, or in the use of property." 50 O.S. § 1. Indeed, it would be difficult to imagine conduct that more clearly satisfies the plain meaning of those terms.

Faced with this, the Chamber focuses its arguments on whether Plaintiffs can bring this case at all and whether this Court should hear this case at all.

B. Plaintiffs Have Adequately Alleged that the Public Nuisance Was "Specially Injurious" to Them

As noted above, the Nuisance Statute expressly authorizes private plaintiffs to step into the shoes of the state to bring an action seeking abatement of a public nuisance. 50 O.S. § 10; *Revard*, 1911 OK at ¶ 15, 119 P. at 593. Such a plaintiff must have sustained a "specially injurious" harm (or "special injury") that is different in kind from the public at large. 50 O.S.

§ 10; *McKay v. City of Enid*, 1910 OK 143, 109 P. 520, 522. The Chamber cites *no* case – because there is none – where a court granted a motion to dismiss a public nuisance claim based on failure to adequately allege a special injury. This Court should not be the first.

As the Chamber acknowledges, there is no "binding test" in the case law to determine when a nuisance is "specially injurious" to a private plaintiff. Chamber Mot. 13. For that reason alone, it would be inappropriate for the Court to determine that, as a matter of law at the pleadings stage, the Plaintiffs – who are survivors, descendants of survivors and others specifically affected by the Massacre – did not suffer a special injury sufficient to satisfy 50 O.S. § 10.

Indeed, even federal court where pleading standards are more exacting, special injury is generally considered a fact-intensive inquiry appropriate for later stages in a proceeding. *See, e.g.*, *Blocker v. ConocoPhillips Co.*, 380 F. Supp. 3d 1178, 1186–87 (W.D. Okla. 2019) (considering undisputed facts as to special injury on motion for summary judgment).

When arguing that the Petition fails to allege a special injury, the Chamber offers two, inconsistent arguments. First, relying on *Schlirf v. Loosen*, 1951 OK 188, 232 P.2d 928, the Chamber fashions a novel argument that the specific acts of violence suffered by Plaintiffs in this case are *too specific* to constitute a special injury because they do not "flow" from the "public aspect" of the nuisance. Second, the Chamber argues that injuries suffered by the Plaintiffs are not distinguishable from Black Americans who have suffered racial violence in the United States. Each of those unavailing arguments is addressed below.

i. The Injuries Suffered by Plaintiffs as Result of the Violence of the Massacre is Not Incidental to the Public Nuisance

The Chamber argues that the Petition should be dismissed because "Oklahoma jurisprudence establishes that any 'specially injurious' harm must also flow from the public

aspect of the nuisance," Chamber Mot. 14 (relying on *Schlirf v. Loosen*; notably the "flow from the public aspect of the nuisance" proposition appears nowhere in the opinion). This "flow[ing] from the public aspect" argument, per the Chamber, means that "individually targeted prosecution, exile, kidnapping, false imprisonment and torture" suffered by the Plaintiffs during the Massacre cannot be the basis of a special injury because they "*did not* affect an entire community and were instead and unfortunately targeted upon individuals." *Id*. at 14-15. In other words, to the extent Plaintiffs are victims of the violent Massacre, such injuries are the result of being individually targeted by the Defendant's white mob, and thus are not the result of a public nuisance.

This argument is a loathsome, willful misreading of history. Moreover, it asks the Court to assume facts that are nowhere to be found in the pleadings. On the night of May 31, 1921, a white mob descended on the Greenwood community, intent on destroying the neighborhood, and its Black residents, and indiscriminately killed, injured, and left homeless thousands of individuals. The white mob did not arrive in Greenwood with a list of Greenwood residents they wished to target. Indeed, indiscriminate destruction and violence is the very nature of terrorism that was visited upon Greenwood. Taking Defendant's argument as true would render the violence perpetrated by Defendants no more discriminate than the harm perpetrated by the drug manufacturers in the Opioid Litigations. Further, as alleged in the Petition, Defendant's very actions during the Massacre, were applied indiscriminately. Pet. ¶¶ 72, 82, 85, 87.

In *Schlirf*, the plaintiff was an owner of a filling station situated near a highway. The defendant had constructed a wall near the highway that did two things (i) encroached on the highway by 10 inches, and (ii) blocked the plaintiff's filing station from view of the highway, hurting his business. The Court found that the fact that the wall blocked view of the filling

station could not constitute the basis for a special injury because it had nothing to with the fact that the wall encroached on the highway by 10 inches – the actual public nuisance. The fact that the wall blocked view of the filling station was merely incidental to the fact that the wall also happened to encroach on the highly by 10 inches.

There is no comparison here. The violence visited upon Plaintiffs during and after the Massacre is not incidental to the public nuisance. It begat the public nuisance. That violence destroyed an entire neighborhood in every sense of the word – physically destroyed, economically destroyed, and culturally destroyed – creating an ongoing public nuisance that Defendants must abate. Moreover, *Schlirf* was not decided on a motion to dismiss; rather, the Supreme Court was reviewing the trial court's ruling following a bench trial. The question of whether Plaintiffs have endured a special injury that is different from the public at large is naturally a factually intensive inquiry that would be inappropriate to resolve on a motion to dismiss.

ii. Plaintiffs Are Situated Differently from the Community at Large and Victims of "Other Racially Motivated Acts of Violence Throughout American History"

After attempting to cast aside the violence experienced by Plaintiffs in the Massacre as a basis for special injury based on facts that are outside the Petition and untrue, the Chamber argues that the remaining injuries suffered by the Plaintiffs leave them "situated no differently than the descendants of many other victims of the Massacre, or similar racially motivated acts of violence throughout American history." Chamber Mot. 15.[8] Notably, the Chamber cites no cases in this section and, yet again, assumes facts not in the pleadings.

[8] Presumably, this argument is not addressed to the Survivor Plaintiffs.

First, with respect to whether the Descendant Plaintiffs are situated differently from other descendants of survivors of the Massacre, this argument misses the mark. The fact that others may have injuries similar to the Descendent Plaintiffs does not negate the special injury of the Descendant Plaintiffs. The Descendant Plaintiffs do not purport to be the *only* individuals who are specially injured by the Massacre and the failure to abate the public nuisance it wrought. To be sure, there are many hundreds of other descendants. Notwithstanding that, the injury they have suffered is distinct from the injuries suffered by "the public at large," which, as the Chamber acknowledges, is the test.

In *Melton v. Oklahoma ex rel. University of Oklahoma*, the court, applying more exacting federal pleading standards, found that a public nuisance plaintiff had adequately pleaded a special injury. No. CIV-20-608-G, 2021 WL 1220934, at *10 (W.D. Okla. Mar. 31, 2021). There, the plaintiff was a freshman at the University of Oklahoma who resided in a dormitory containing toxic mold. The complaint alleged that "toxic mold was pervasive throughout the dormitory, not just her dorm room, and that the smell and related illnesses affected a considerable number of students living in the dormitory." *Id.* at *10. As to the plaintiff's special injury, the court found allegations that she had "suffered permanent physical, psychological, and cognitive damage in the multiple forms listed in her Complaint" were "sufficient to plead a public nuisance 'specially injurious' to Plaintiff" even though other students had been injured by that same nuisance. *Id.*

Likewise, Plaintiffs do not contend that they are the *only* individuals who were affected by the Massacre as a public nuisance. As *Melton* demonstrates, a special injury does not require that a plaintiff be the *only* party affected by a public nuisance. As direct descendants of survivors of the Massacre, the Descendant Plaintiffs are injured by the public nuisance in

specific, palpable ways not true of the community at large and not necessarily true of all Black Tulsans, as the Petition alleges in detail. Pet. ¶¶ 26-36. For example, Plaintiff Price's psychological trauma as it relates to the Massacre, the loss of generational wealth, and the false allegations against her ancestor, Dick Rowland, are separate and distinct from the harm suffered by community members generally. Pet. ¶ 31. Those Plaintiffs have adequately alleged to have suffered injuries different *in kind* from the community at large.

Second, with respect to the Chamber's argument that the Plaintiffs are situated no differently from victims of "other . . . racially motivated acts of violence throughout American history," this argument is an absolutely extraordinary and grotesque position. Chamber Mot. 15. The Chamber asks the Court to *take judicial notice* of other large-scale examples of racially motivated attacks in the United States, proposing that all Black Americans who are victims of racial violence and trauma are not sufficiently distinct individuals or entities.

It is as offensive as it is incorrect to suggest that all Black injuries are the same. Each Plaintiff has distinct experiences and losses as a result of the Massacre, and experiences manifest differently given the individuality of each experience. Pet. ¶¶ 26-36; *see generally* Pet. Exs. 1, 2. Plaintiffs are not a monolithic group – and neither are Black Americans. Plaintiffs are seeking abatement of a public nuisance that plagues Tulsa, arising from an act of terrorism that occurred in Tulsa, which was uniquely covered up for nearly a century by Tulsa's leaders. For the Court to consider this indistinct from the experience of all Black Americans whose families are victims of racial violence would be an express endorsement of Defendant's outrageous considerations.

iii. The Court May Not Dismiss Plaintiff's Claim on the Basis that It Would Be Preferable for a Government Entity to Bring this Action

In its last argument on special injury, the Chamber states that even if the Massacre is an ongoing public nuisance, the "proper party to bring any such action is a governmental officer or body, such the City of Tulsa . . . and not the Plaintiffs." Chamber Mot. 17. That argument ignores that those authorities could not be expected to sue themselves, and is contradicted by the statute itself which specifically states "[a] private person may maintain an action for a public nuisance if it is specially injurious to himself but not otherwise." 50 O.S. § 10.

Even were the Court to agree as to what is preferable, it may not substitute its judgment for the statute that it is duty bound to apply. There is no basis in the law for a dismissal on the ground urged by the Chamber, and the Chamber cites no cases at all in the section in which it argues this point.

C. The Chamber's Remaining Arguments are Unavailing

The Chamber's remaining arguments all amount to policy reasons as to why the Court should decline to hear this case or legal arguments that were already expressly rejected in the Opioid Litigations. Each is addressed below.

i. A Public Nuisance Need Not Be Based on Unlawful Use of Property

The Chamber argues that the Nuisance Statute is limited to disputes related to real property. But, as the Chamber fails to mention in its brief, this exact argument already was made by the pharmaceutical company defendants in the Opioid Litigations and soundly rejected by the court as inconsistent with the statute's text. *See State ex rel Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 9241510, at *11 (Okla. Dist. Ct. Nov. 15, 2019).

In *Purdue Pharma*, Judge Balkman found that:

> The plain text of the [public nuisance] statute *does not limit* public nuisances to those that affect property. Unlike other states' statutes that limit nuisances to the "habitual use or the threatened or contemplated habitual use of any place,"

> Oklahoma's statute simply says, "unlawfully doing an act, or omitting to perform a duty."

2019 WL 9241510, at *11 (emphasis added). Judge Balkman got it exactly right: *There is no limitation in the Nuisance Statute to disputes involving real property*. Judge Balkman's decision is consistent with both the State of Oklahoma and the City of Tulsa's respective arguments in the Opioid Litigations. When it comes to the public nuisance, the Chamber has been made the sacrificial lamb. [9]

The Nuisance Statute contains four prongs connected by "or." Each of those prongs constitutes a public nuisance, separate and distinct from the others. *See Toch, LLC v. City of Tulsa*, 2020 OK 81, ¶¶ 24-25, 474 P.3d 859, 867 ("*or* is a 'disjunctive particle used to express an alternative or give choice of one among two or more things'"). Only the third and fourth prongs pertain to property: the third prong discusses land and waterways and the fourth prong mentions property in the disjunctive. 50 O.S. § 1[10] ("renders other persons insecure in life, *or* in the use of property") (emphasis added).

Consistent with the statutory texts, Oklahoma courts have applied the Nuisance Statute in a variety of non-property actions. *See e.g.*, *State ex rel. Field v. Hess*, 1975 OK 123, 540 P.2d 1165 (applying the nuisance statute to obscenity case); *Doyle v. State*, 1957 OK CR 93, 317 P.2d 289 (applying public nuisance to public intoxication); *Jones v. State*, 1912 OK 806, 132 P. 319 (applying public nuisance to public gambling).[11]

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[9] Notably, all defendants in this action incorporate each other's arguments by reference.

[10] The full text of 50 O.S. § 1 reads: "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities." *Id.*

[11] Even assuming *arguendo* that they do, the Petition demonstrates that Defendants "used real and personal property, private and public, including public roads, buildings and land of the State of Oklahoma to create [and

ii. The Nuisance Statute is Not Void for Vagueness

In another already-rejected argument borrowed from the pharmaceutical industry defendants in the Opioids Litigation (and vigorously opposed by Defendant the State of Oklahoma in those litigations), the Chamber argues that the Nuisance Statute is void for vagueness under the U.S. and Oklahoma Constitutions.

As the Chamber argues, the "accepted federal-law test of vagueness is whether the language of the enactment conveys, with respect to conduct one is expected to follow, sufficiently definite warning so that men 'of common intelligence or understanding' will not have to guess at the statute's meaning." Chamber Mot. 7 (quoting *In re Daniel H.*, 1979 OK 33, ¶ 11, 591 P.2d 1175, 1177. In other words, statutes must be clear enough to give ordinary people "fair notice of the conduct a statute proscribes." Chamber Mot. 7 (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018)).[12] Under this rubric, the Chamber argues that "no reasonable person would have been put on notice that [the Nuisance Statute] in any way related" to the allegations in the Petition. Chamber Mot. 11.

As an initial matter, the Nuisance Statute has been applied broadly, with no better recent example than the Opioid Litigations. Further, the Chamber cites *no* case where the

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perpetuate] this nuisance." *State ex rel Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 9241510, at *11 (Okla. Dist. Ct. Nov. 15, 2019). Angry white mobs, deputized by Defendants, murdered, maimed and terrorized, Black Tulsans with their weapons. Pet. ¶¶ 50-60. The Chamber created and produced identification cards to identify interned Black Tulsans who were detained without due process. Pet. ¶¶ 85-86. Defendants took Black Tulsans' property and redistributed it without due process. Pet. ¶ 98. Defendants have used public highways to further segregate and disadvantage the community and isolate resources to the southern, predominantly white areas of the city. Pet. ¶¶ 144-146. Thus, not only do Defendants falsely assert that public nuisance claims require property of possessory interests in law, but they also plainly disregard their own use of property to create and sustain the public nuisance in Black Tulsa.

[12] As an initial matter, finding a statute unconstitutionally void for vagueness is a tall order. "A statute is presumed to be constitutional and will be upheld unless it is clearly, palpably, and plainly inconsistent with the Constitution." *In re Daniel H.*, 1979 OK 33, ¶ 11, 591 P.2d 1175, 1177. That is particularly so where, as here, the statute in question imposes only civil and not criminal penalties. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212-13 (2018) (quoting *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982)).

Nuisance Statute was found to have been applied in an unconstitutionally vague way. Indeed, "[a] statute is presumed to be constitutional and will be upheld unless it is clearly, palpably, and plainly inconsistent with the Constitution." *In re Daniel H.*, 1979 OK at ¶ 10, 591 P.2d at 1177.

The principal basis by which the Chamber argues that the Nuisance Statute is unconstitutionally vague is to rely on its argument that "nuisance actions are intended to concern possessory interests in land." Chamber Mot. 8. Thus, the Chamber contends, no person of ordinary intelligence is on fair notice of that they may be liable under the Nuisance Statute for acts that do *not* concern real property. However, as set forth above, that argument was expressly rejected in the Opioid Litigations and there is sufficient Oklahoma case law applying the Nuisance Statute to non-property based claims. *See supra* I.C.i. Defendants cannot in good faith claim that they have not been given fair notice.

The Chamber asserts categorically that "no reasonable person could conceive" that the Nuisance Statute could "permit recovery for societal ills such as systemic racism." Chamber Mot. 10. But the Petition does not seek recovery for "systemic racism." Rather, Plaintiffs seek recovery based on specific, unlawful acts that occurred in Tulsa and continue unabated in Tulsa. And, the notion that the Nuisance Statute was not meant to address "societal ills" is simply incorrect. *See, e.g. State ex rel. Field v. Hess*, 1975 OK 123, ¶ 12, 540 P.2d 1165, 1170 (finding adult bookstore to be public nuisance because of its "tendency to reach the impressionable young and reasonable capability of encouraging or causing anti-social behavior especially in its impact on young people"); *Balch v. State ex rel. Grigsby Co.*, 1917 OK 142, ¶ 7, 164 P. 776, 778 (finding a "bawdyhouse" to be a public nuisance because it caused "lascivious characters, both men and women, to congregate about his business, and indulge in

lewd, boisterous, and indecent acts."); *Territory v. Long Bell Lumber Co.*, 1908 OK 263, ¶¶ 30-36, 99 P. 911, 920-21 (price fixing caused by illegal monopolies constituted a public nuisance).

Of course, the Court does not need to look any further than the recent Opioid Litigations to understand that "societal ills" may be addressed by public nuisance laws. In other states nuisance laws have been applied to the manufacturing and distribution of guns,[13] tobacco manufacturers,[14] and even the emission of greenhouse gases.[15]

iii. Plaintiffs Seek Abatement of the Public Nuisance, not Money Damages

The Chamber argues in the alternative that, if the Court were to conclude that Plaintiffs' nuisance claim may proceed, it should proceed only as to abatement and limit money damages to those arising in the last two years. As set forth in greater detail in Plaintiffs' response to the City and Planning Commission's motion to dismiss, the *only* remedy that Plaintiffs seek through the nuisance remedy is abatement; no money damages are sought. *See* Plaintiffs' Opp'n to City and TMAPC MTD.[16]

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[13] *City of Cincinnati v. Beretta U.S.A. Corp*., 768 N.E.2d 1136 (Ohio 2002) (manufacturers and distributors of guns can be sued under the public-nuisance doctrine for making guns available to criminals and minors); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 252 F.R.D. 130 (E.D.N.Y. 2008) (sales practices of a gun dealer could be a public nuisance).

[14] The specter of public nuisance suits led to multi-billion dollar settlement between 46 states, 5 U.S. territories, and the District of Columbia and five of the largest tobacco manufacturers. *Master Settlement Agreement*, PUBLIC HEALTH LAW CENTER, MITCHELL HAMLINE SCHOOL OF LAW, https://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf (last visited May 28, 2021).

[15] *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (defendants' production of greenhouse gases created nuisance by contributing to global warming) (vacated on other grounds on grant of rehearing en banc, 598 F.3d 208, en banc appeal dismissed for lack of quorum, 607 F.3d 1049 (5th Cir. 2010)). *See also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd* 564 U.S. 410 (2011) (leaving the issue of state nuisance law to be considered on remand).

[16] "Plaintiffs' Opp'n to City and TMAPC MTD" was filed on June 1, 2021 in response to Defendants City of Tulsa and TMAPC Motions to Dismiss. Defendants City and TMAPC consented to Plaintiffs filing a joint response to their Motions to Dismiss.

iv. The Public Nuisance is Redressable Through an Abatement Plan and the Political Question Doctrine Does not Apply

The Chamber argues that the abatement sought by Plaintiffs is not redressable by this Court and, for similar reasons, the Court should decline to consider this case under the Political Question Doctrine, a narrow federal court doctrine. The Chamber acknowledges that the redressability issue "mirrors" the standing issues raised in the Chamber's first motion to dismiss and refers to its standing briefing to address the redressability. Accordingly, Plaintiffs' refer to their standing brief to address this question, and, in that brief, Plaintiffs also address the Political Doctrine Question issue, which is related closely to the doctrine of standing.

v. The Court Should Reject the Chamber's Request that the Court Impose an Extra-Legal Time Limitation for Policy Reasons

In its final argument, the Chamber argues that, as a matter of policy, the Court should apply a statute of limitations to Plaintiff's claims, citing to the fact that survivors of the Massacre previously brought cases seeking reparations for the Massacre in *Alexander v. State*, 382 F.3d 1206 (10th Cir. 2004), and citing to the Seventh Circuit's decision in *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006), wherein the court applied a limitations period to tort claims brought by descendants of enslaved people.

This argument is not an appeal to policy. Rather, it is a request that the Court simply disregard the law. For over 100 years, Oklahoma has had a nuisance statute. That statute expressly authorizes actions to abate public nuisances. There is no time limitation on the abatement of a public nuisance. *See* 50 O.S. § 7. The Court may not decide that this legal avenue is not available to Plaintiffs, particularly on a motion to dismiss, simply as a matter of policy. The Chamber cites no authority for the imposition of an extra-legal time limitation that

does not otherwise exist. Nor does the Chamber adopt the laches argument made by other defendants, which Plaintiffs address in other briefs. *See* Opp'n to City and TMAPC MTD.

If the Court is inclined to consider policy on this motion, it should consider the fact that one hundred years ago, a thriving Black neighborhood was destroyed in an act of horrific violence and never rebuilt, giving rise to a public nuisance that "annoys, injures or endangers the comfort, repose, health or safety of" of Black Tulsans to this day. Plaintiffs, including three survivors of the Massacre, are before the Court seeking abatement of that public nuisance. The Court need not now decide if Plaintiffs have carried their burden of proof, as that is a question for another day. The Court need only decide today if "it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief." *Edelen*, 2011 OK CIV APP at ¶ 3, 266 P.3d at 663 (quoting *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 10, 151 P.3d 132, 136). Plaintiffs have offered the Court sufficient facts, and these facts support Plaintiffs' long ride toward justice.

II. The Petition Adequately Alleges Unjust Enrichment

In the second of its two claims, Plaintiffs alleges unjust enrichment against the City, the TDA, the Planning Commission, the County, and the Chamber. "The term 'unjust enrichment' describes a condition resulting from the failure of a party to make restitution in circumstances where it is inequitable." *Lapkin v. Garland Bloodworth, Inc*., 2001 OK CIV APP 29, ¶ 7, 23 P.3d 958, 961 (citations omitted). Oklahoma law recognizes unjust enrichment as a ground for recovery based on equitable considerations. *Id.* As set forth in detail in the Complaint, Defendants are seeking to profit from the Massacre by promoting the events of the Massacre for their economic gain at Plaintiffs' expense. Pet. ¶¶ 177-184. The petition alleges that Defendants have used the history of the Massacre, the names and likeness of survivors and descendants of the Massacre victims to promote tourism and economic development that in no

way redresses the past atrocities committed by them. Pet. ¶ 179. Defendants, who acquired most of the land that comprised the Historic Greenwood Community as a result of the Massacre and continued degradation of the Greenwood community, are now building a "cultural tourism" district that includes the $30 million Greenwood Rising History Center. Pet. ¶ 182. The purpose, and indeed the effect, of this "cultural tourism" district, including the History Center, is and will be to create tourist revenue for Defendants and their associated white property owners in and around the historic Greenwood district. The Black residents of Greenwood and North Tulsa, including the survivors and descendants of the Massacre, will reap no direct benefit as a result of the exploitation of their history. Instead, Defendants are using the trauma and terror they inflicted upon the survivors and descendants of the Tulsa massacre for their economic gain deriving Plaintiffs of monies that, in equity, should go to Plaintiffs and the Greenwood community. If this does not rise to the level of injustice and inequity required to state a claim for unjust enrichment, it is hard to imagine a set of facts that do.

In general, unjust enrichment consists of "(1) the unjust (2) retention of (3) a benefit received (4) at the expense of another." *Okla. Dep't of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶ 22, 231 P.3d 645, 658-59. Unjust enrichment is an equitable claim and is a recognized ground for recovery in Oklahoma when a party shows enrichment to another coupled with a resulting injustice. *See Horton v. Bank of Am., N.A.*, 189 F. Supp. 3d 1286, 1289 (N.D. Okla. 2016).

The Chamber do not actually address these elements in their motion to dismiss. Instead, the Chamber argues that (i) Plaintiffs have an adequate remedy at law for appropriation of likeness, (ii) Plaintiffs have not identified any "wrongdoing" by the Chamber, and (iii)

Plaintiffs do not have "authority" to sue on behalf of Greenwood or North Tulsa. All of these arguments fail.

First, with respect to the argument that Plaintiffs have an adequate remedy at law, the Chamber claims that Plaintiffs have an adequate remedy for appropriation of likeness under 12 O.S. § 1449. The Chamber cites no case where an Oklahoma court determined on a motion to dismiss that an unjust enrichment claim must be dismissed due to a purported overlap with 12 O.S. § 1449 and in the cases cited by Defendants, the court found an adequate remedy at law based *in contract between the relevant parties*. And in any event, Plaintiffs' allegations are not limited to the appropriation of images or likeness and, to the extent an adequate remedy at law does exist, such a question depends on facts and circumstances that should be adjudicated at trial, not on a motion to dismiss.[17]

Second, the Chamber argues that Plaintiffs fail to allege "active wrongdoing" by the Chamber. Putting aside the fact that this is not a recognized requirement to allege a claim for unjust enrichment, the Chamber imprudently cites to *Faught v. Blair*, a case about disgorging money from *innocent and unwitting investors in a Ponzi-scheme* who didn't realize they were profiting from a Ponzi-scheme. *Blair*, 2010 OK at ¶ 3, 231 P.3d at 659. To state the obvious, the Chamber is not an unwitting participate in a Ponzi scheme. As the Petition more than adequately alleges, the Chamber was an active participant in the Massacre and the degradation of Greenwood for the Decades that followed.[18]

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[17] What is more, the remedies provided in the statute are for money damages for profits attributable from the unauthorized use of an individual's likeness. A damages remedy is inadequate to enjoin the Defendants from the continued use of Plaintiffs' story and trauma. *See Quarles v. Little River Energy Co.*, No. 00-CV-913-GKF-PJC, 2008 WL 185715, at *2 (N.D. Okla. Jan. 18, 2008) (holding "A suit in equity will not lie where the plaintiff has a plain, adequate and complete remedy at law. **But the remedy must be complete, practical and efficient**") (emphasis added).

[18] In any event, in allowing the claim for restitution to go forward (in the form of a constructive trust) with regard to investors in the Ponzi-scheme who received disproportionate payments under the scheme, the court in *Faught* held that "unjust enrichment based upon 'innocent misrepresentation or non-disclosure' may be used to

Finally, citing to authority whatsoever, the Chamber argues that Plaintiffs do not have "any legal authority or right to sue on behalf of Black Wall Street," implying that the Plaintiffs should have thought to trademark "Black Wall Street" before its destruction in the Massacre. Chamber Mot. 23. Once again, unjust enrichment is an equitable doctrine and at trial this Court can determine whether, as a matter of equity, the actual persons affected by the actual Massacre should participate in the largesse that the Chamber and the other defendants have accumulated using the association with the memory of the Massacre.

If the Chamber wishes to argue that Plaintiffs do not have "legal authority" to bring this claim on behalf of certain purported brands like "Black Wall Street," that is an argument that the Chamber can make before this Court at trial and the Court consider in its analysis of the equities. But at the pleading stage, the Petition has put the Chamber on the claims asserted against it and that is all that is required at this stage.[19]

CONCLUSION

For the reasons set forth herein, this Court should deny the Chamber's General Motion to Dismiss the Petition, allowing discovery to proceed and allowing the parties to build a

justify restitution" and to satisfy these principles, "the [plaintiff] must prove that an innocent investor's conduct of possessing a Ponzi-scheme profit is, by itself, active wrongdoing or possession against equity and good conscience sufficient to justify a constructive trust imposed by a District Court." *Faught, Okla. Dep't of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶ 23, 231 P.3d 645, 650, 659. Similarly here, Defendants retention of the money and assets accumulated in using the likeness of victims and survivors of the Massacre is the wrong doing in and of itself. *See id.* Plaintiffs have alleged that the wrongdoing on the part or the Defendants is their wrongful enrichment to monies that in equity, do not belong to them at the expense of the victims and survivors of the Massacre.

[19] Indeed, in its case against the pharmaceutical companies in the opioid litigations, the City has alleged for unjust enrichment that "Defendants received a benefit in the form of billions of dollars in revenue from the sale of prescription opioids to treat chronic pain" and that "Defendants retained that benefit at the expense of Tulsa, who has borne, and who continues to bear, the economic and social costs of Defendants' scheme." City of Tulsa Opioid Compl. ¶¶ 235-240. ("City of Tulsa Opioid Compl." refers to the City of Tulsa's complaint filed against several pharmaceutical companies on September 2, 2020). Apparently the City believes it should afforded the opportunity to prove "social costs" as unjust enrichment in the opioid litigations, but Plaintiffs should to have the opportunity to prove that fundraising off of a Massacre that happened to them by others is also unjust enrichments.

complete record on which this Court can address each of the issues presented by Plaintiffs' claims. In the alternative, this Court should grant Plaintiffs leave to amend to cure any defect in the Petition.[20] Plaintiffs also request oral argument be heard on this motion.

Respectfully submitted,

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[20] As set forth more fully in Plaintiffs' Opposition to the State of Oklahoma's Motion to Dismiss, if the Court grants any or all of Defendants' motions, the Court has a mandatory duty to grant Plaintiffs leave to amend the Amended Petition if the defect can be remedied. 12 O.S. § 2012(G) ("[o]n granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied . . . . ."); *Kelly v. Abbott*, 1989 OK 124, ¶6, 781 P.2d 1188, 1190 ("Because the statute provides that the trial court 'shall' grant leave to amend if the defect can be remedied, the duty is mandatory.").

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