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

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' COMBINED OPPOSITION TO THE MOTIONS OF DEFENDANTS CITY OF TULSA AND TULSA METROPOLITAN AREA PLANNING COMMISSION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION

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Plaintiffs hereby submit this combined opposition to the March 12, 2021 motions of defendants City of Tulsa and Tulsa Metropolitan Area Planning Commission to dismiss Plaintiffs' First Amended Petition.[1] This opposition is one of six opposition briefs being filed by Plaintiffs on June 1, 2021 (the "June 1 Oppositions") in response to the seven motions to dismiss filed by the various defendants on March 12, 2021 (the "March 12 Motions"). Plaintiffs respectfully refer to the Court to Plaintiffs' Opposition to the Motion to Dismiss of Defendant State of Oklahoma *ex rel.* Oklahoma Military Department for an overall introduction to the June 1 Oppositions and accompanying chart that shows where each argument made in the March 12 Motions is responded to in the June 1 Oppositions.

INTRODUCTION

Defendants City of Tulsa ("City") and Tulsa Metropolitan Area Planning Commission ("TMAPC" and, together with the City, "Defendants") make four principle arguments for dismissal of Plaintiffs' First Amended Petition (the "Petition"), which seeks to rectify certain misconduct of the defendants stemming from the Tulsa Race Massacre of 1921 (the "Massacre") that decimated Tulsa's then-prosperous Greenwood district ("Greenwood")—specifically: (1) that the action is barred by the doctrine of laches; (2) that the action is barred under Oklahoma's Governmental Tort Claims Act, 51 O.S. §§ 151 *et seq.* (the "GTCA" or the "Act"); (3) that the Petition fails to allege a public nuisance claim as against TMAPC; and (4) that the Petition fails to adequately allege an unjust enrichment claim as against both the City and TMAPC. These arguments are addressed in turn below.

[1] "City Mot." refers to Defendant City of Tulsa's Motion to Dismiss Plaintiffs' First Amended Petition. "TMAPC Mot." refers to Defendant Tulsa Metropolitan Area Planning Commission's Motion to Dismiss Plaintiffs' First Amended Petition. "Pet." refers to Plaintiffs' First Amended Petition.

ARGUMENT

I. The Doctrine of Laches Provides No Basis for Dismissal

Defendants argue that the Petition should be dismissed as barred by laches. City Mot. 9-10; TMAPC Mot. 11-12. They can only argue as much, however, by misstating the controlling test for applying laches in Oklahoma, ignoring entire bodies of applicable case law and vastly oversimplifying the allegations set forth in the Petition.

At the outset, it is important to note that the *Alexander* case—which, as Defendants point out, was brought in 2003 by a group of Massacre survivors and descendants against certain of the defendants named in this case (including Defendant City) and was dismissed as time-barred on pretrial motions, *see* City Mot. 2-3; TMAPC Mot. 2-3[2]—has *no* bearing on this issue. *See Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004). *Alexander* did not even mention, let alone address, laches; only the statute of limitations was at issue. *Id.* at 1220. Moreover, that case did not involve *any* of the claims asserted by Plaintiffs here or *any* allegations of ongoing harm to the public, and was *not* resolved on the basis of the pleadings alone, *id.* at 1212-15, as Defendants' motions must be. As set forth below, all of these distinctions are critical with respect to Defendants' laches arguments.

For the multiple, independent reasons described below, the Court should refuse to permit the equitable laches doctrine to cut Plaintiffs off from further pursuing their claims—*especially* at these earliest stages of litigation.

[2] *See also* Motion to Dismiss Plaintiffs['] First Amended Petition and Brief in Support by Defendants Board of County Commissioners for Tulsa County and Vic Regalado, in his Official Capacity as Sheriff of Tulsa County ("BOCC Motion") 2-3.

A. The Laches Doctrine Does Not Apply in Public Nuisance Actions

As an initial matter, it is well-settled that, like statutes of limitations, the doctrine of laches simply does not apply in public nuisance actions.

In its 1911 decision in *Revard v. Hunt*, 1911 OK 425, 119 P. 589, the Oklahoma Supreme Court made clear that private litigants who sue to abate a public nuisance cannot be subject to a laches defense. The defendant in *Revard* was charged with maintaining fences that blocked access to certain public roads, and argued that the plaintiff's nuisance action was barred by laches (as well as the statute of limitations) because plaintiff failed to bring suit until more than ten years had passed since the fences had been built. *Id.* at ¶¶ 1-2, 119 P. at 589-90. Upon "much research and full consideration" and a thorough surveying of numerous authorities, the Court concluded that it was "not open to question in this [S]tate" that public nuisance claims are "exempted from the operation of the statute of limitations and of laches." *Id.* at ¶¶ 15-17, 119 P. at 592-93; *accord, e.g.*, *Kennedy v. Hawkins*, 1959 OK 53, ¶ 7, 346 P.2d 342, 345 (refusing to apply laches to private plaintiff's public nuisance suit); *Siegenthaler v. Newton*, 1935 OK 998, ¶ 17, 50 P.2d 192, 195, 197 (same); *Ruminer v. Quanilty*, 1947 OK 105, ¶ 16, 179 P.2d 164, 166-67 ("No non-user of the driveway can be held to have legalized the maintenance of obstructions thereon nor will the lapse of time legalize the existence of obstructions thereon nor estop one specially injured thereby from bringing an action for the abatement thereof ... No equities can arise in favor of an individual who takes possession of a public way and his occupancy is subject to the paramount right of the public *whenever asserted*.") (emphasis added); *see also generally State ex rel. Okla. Stud. Loan Auth. v. Akers*, 1995 OK CIV APP 75, ¶ 6, 900 P.2d 468, 469-70 (recognizing the

broader principle that a party "enforcing public rights" is subject to "neither the statute of limitations nor the equitable doctrine of laches").[3]

This rule is widely recognized across other jurisdictions as well. *See, e.g.*, *Clarke v. Boysen*, 39 F.2d 800, 818-19 (10th Cir. 1930); *Est. of Goldberg ex rel. Rubin v. Goss-Jewett Co.*, 738 F. App'x 897, 901 (9th Cir. 2018); *Wade v. Campbell*, 19 Cal. Rptr. 173, 177 (Cal. Ct. App. 1962); 66 C.J.S. NUISANCES § 174 (2021) ("[t]he doctrine of laches does not apply so as to defeat injunctive relief from a continuing nuisance") (collecting cases from other U.S. jurisdictions). That is so because the rule is a vestige of English common law—specifically, its proscription against laches being applied against an action by the sovereign. *See Guaranty Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 130 (1938); *Stanley v. Schwalby*, 147 U.S. 508, 514 (1893); *Okla. City Mun. Improvement Auth. v. HTB, Inc.*, 1988 OK 149, ¶ 5, 769 P.2d 131, 133, 137-38. As courts have reasoned, a private plaintiff asserting a public right effectively stands in the shoes of the sovereign, and thus "enjoy[s] the exalted plane [the sovereign] occupie[s] ... in such cases"—*i.e.*, being immune from laches and limitations defenses. *Revard*, 1911 OK at ¶¶ 14-16, 119 P. at 592-93; *see also Kennedy*, 1959 OK at ¶ 4, 346 P.2d at 345; *Siegenthaler*, 1935 OK at ¶ 6, 50 P.2d at 197.

Importantly, the Supreme Court has explained that this rule gained widespread acceptance in this country due to the "great public policy" it serves: "preserving the public rights, revenues, and property from injury and loss" caused by "the negligence of public officers." *Guaranty Tr.*, 304 U.S. at 132; *accord Stanley*, 147 U.S. at 514-15. In other words, the theory is that a private party seeking to vindicate public rights should never be barred by

[3] Notably, one of the defendants in this case acknowledges this precise rule in its motion to dismiss, albeit not in the context of a laches argument. *See* Tulsa Regional Chamber's Amended General Motion to Dismiss as to All Plaintiffs and Brief in Support ("Chamber Gen. Mot.") 12-13 (quoting *Revard*, 1911 OK at ¶ 17, 119 P. at 593); *see also id.* at 17-18 (citing *Revard* and its progeny approvingly).

laches because, given the nature of representative democracy, he was, at all times prior to initiating his suit, entitled to rely on the government to assert those rights on his behalf. A plaintiff therefore will not be estopped by virtue of a careless or ineffective government that fails to do what it is expected to, or should, do to protect a right belonging to its constituents. *See id.* at 514 (laches unavailable in public rights cases because of policy "forbid[ding] ... public interests ... [from] be[ing] prejudiced by the negligence of the officers or agents to whose care they are confided"); *Okla. City Mun.*, 1988 OK at ¶ 5, 769 P.2d at 133 ("the public's rights st[and] paramount 'no matter how lax the municipal authorities may have been in asserting [them]'") (quoting *Foote v. Town of Watonga*, 1913 OK 139, 130 P. 597).

In this critical respect (among others), this case differs from *Alexander*. That case did not allege a continuing public nuisance, but rather federal civil rights claims, constitutional claims and common-law tort claims—which, critically, were predicated entirely on allegations regarding the Massacre itself and events in its immediate aftermath, and which the plaintiffs *conceded* were time-barred absent tolling. *See Alexander*, 82 F.3d at 1211-13 & n.1. The issue of laches was therefore never raised in *Alexander*, in which the claims were only found barred under the applicable statutes of limitations. *Id.* at 1220; *see also Latimer v. City of Tulsa*, No. CJ-2004-4138 (Dist. Ct. Tulsa Cnty. Oct. 7, 2004) (virtually identical state action filed the following year was summarily dismissed as time-barred, as court felt "constrained to adopt the rationale [of *Alexander*]").

There could perhaps be no illustration clearer than this case as for why the no-laches-in-public-nuisance-suits rule exists. It plainly would be unjust to bar Plaintiffs' suit under laches when their "delay" in bringing it was in large part due to their rightful reliance on governmental actors, like Defendants, to abate the ongoing public harms flowing from the

Massacre. Regardless, even if the doctrine of laches *could* be invoked in public nuisance actions in general, it *still* would not apply here for the host of reasons set forth below.

B. Defendants Fail to Establish a Laches Defense

Laches is an equitable defense against the tardy prosecution of stale claims. *Hedges v. Hedges*, 2002 OK 92, ¶ 8, 66 P.3d 364, 369; *Smith v. Baptist Found. of Okla.*, 2002 OK 57, ¶ 9, 50 P.3d 1132, 1138. "There is no bright-line rule for ascertaining when a claim becomes barred by laches or what delay is excusable"; rather, "[a]pplication of the doctrine is discretionary and varies with the facts and circumstances of each case." *Hedges*, 2002 OK at ¶ 8, 66 P.3d at 369; *accord Smith*, 2002 OK at ¶ 9, 50 P.3d at 1138.

The City and TMAPC assert that laches is an "equitable defense that prevents the advancement of claims after an 'inexcusable delay' for an 'unreasonable and unexplained length of time.'" City Mot. 9 (quoting *Parks v. Classen Co.*, 1932 OK 157, ¶ 29, 9 P.2d 432, 435); TMAPC Mot. 11 (same). This is an incomplete statement of the law. Rather, "[l]aches, in legal significance, is *not* mere delay, but delay that works a disadvantage to another." *Parks*, 1932 OK at ¶ 38, 9 P.2d at 436 (emphasis added). In other words, "unlike limitations, [it] is not a mere matter of time," but requires, in addition to inexcusable delay, an injury to the adverse party "arising out of some intermediate change of conditions." *Id.* at ¶ 30, 9 P.2d at 435; *see also Meadors v. Majors*, 1994 OK CIV APP 53, ¶ 38, 875 P.2d 1166, 1169 (laches is "*never* presumed merely from the lapse of time") (emphasis added).

Accordingly, to establish a laches defense, a defendant must show not only (1) an "unreasonable delay" by the plaintiff in pressing its rights, but also (2) "material[] prejudice[]" to the defendant resulting from such delay. *Hedges*, 2002 OK at ¶ 8, 66 P.3d at 369; *accord Olansen v. Texaco Inc.*, 1978 OK 139, ¶ 34, 587 P.2d 976, 985 ("On numerous occasions this Court has announced the rule that before a claim will be considered barred by

laches it must be shown that there has been an unreasonable delay in the enforcement of the claim and that by reason of this delay the defendant has been materially prejudiced."). As laches is an affirmative defense, *see* 12 O.S. § 2008(C)(12); *see also B&M Int'l Trading Co. v. Woodie Ayers Chevrolet, Inc.*, 1988 OK 133, ¶¶ 9-10, 765 P.2d 782, 783, parties invoking the doctrine—here, Defendants—have the burden of proof with respect to each of these elements. *Hedges*, 2002 OK at ¶ 8, 66 P.3d at 369; *Sullivan v. Buckhorn Ranch P'ship*, 2005 OK 41, ¶¶ 32-33, 119 P.3d 192, 202.

Finally, because laches is a "purely equitable" doctrine, *Phelan v. Roberts*, 1938 OK 139, ¶ 20, 77 P.2d 9, 12—with trial courts being afforded broad discretion to refuse to apply it depending on the "facts and circumstances in each case and according to right and justice," *Okla. City Fed. Sav. & Loan Ass'n v. Swatek*, 1942 OK 273, ¶ 19, 130 P.2d 516, 518; *see also Smith*, 2002 OK at ¶ 9, 50 P.3d at 1138; *Olansen*, 1978 OK at ¶¶ 11-12, 587 P.2d at 985-86—that same party must also establish that the equities tip in favor of the doctrine's application. *See Estrada v. Kriz*, 2015 OK CIV APP 19, ¶ 26, 345 P.3d 403, 411.

Defendants do none of these things and, as such, do not come remotely close to establishing a laches defense allowing for dismissal of the Petition.

1. There Is No Basis for a Laches Defense on the Face of the Petition

As an initial matter, because the laches inquiry is so dependent on the particular facts of a given case, it is ordinarily inappropriate for resolution on a motion to dismiss. *See, e.g.*, *Hitch Enters., Inc. v. Cimarex Energy Co.*, 859 F. Supp. 2d 1249, 1269 (W.D. Okla. 2012); *Patton v. Jones*, No. CIV-06-0591-F, 2006 WL 2246441, at *4 (W.D. Okla. Aug. 4, 2006); 5 CYC. OF FED. PROC. § 15:546 (2021) ("Equitable determinations involved in determining the

applicability of the doctrine of laches are more appropriately resolved at a late stage in a lawsuit ... Generally, therefore, laches cannot be raised by a motion to dismiss ...").[4]

As the Oklahoma Supreme Court explained in *Parks*, *supra* (a case which Defendants invoke in their briefing, *see* City Mot. 9; TMAPC Mot. 11), laches may only be raised and decided at the pleading stage where the petition *on its face* demonstrates the plaintiff is chargeable with laches, *Parks*, 1932 OK at ¶ 29, 9 P.2d at 435—*i.e.*, where it contains "affirmative" allegations showing not only delay, but the specific prejudice the defendant has suffered by reason of such delay. *Id.* at ¶ 41, 9 P.2d at 436; *accord*, *e.g.*, *Estrada*, 2015 OK CIV APP at ¶ 26, 345 P.3d at 411. Where "[s]uch unusual ... circumstances do not appear from the face of the petition, they must be pleaded by answer to be available." *Parks*, 1932 OK at ¶ 41, 9 P.2d at 436.

Parks illustrates the difficulties a defendant faces pressing a laches defense at the pleading stage. In *Parks*, the plaintiff contracted to purchase a lot from defendant in 1921, with the contract requiring him to make an up-front payment and pay off the balance of the purchase price in monthly installments. *Id.* at ¶ 4, 9 P.2d at 433. The plaintiff stopped making the required monthly payments in 1923, after a major flood had rendered the lot practically worthless. However, seven years later (in 1930), the plaintiff reappeared, seeking to tender to the defendant an amount sufficient to cover all delinquent payments, with interest and taxes thereon, in exchange for the deed to the lot. *Id.* at ¶ 10, 9 P.2d at 433, 436.

[4] As noted previously, among the many, key differences distinguishing this action from *Alexander* is the fact that in that case, the district court's decision (the decision later affirmed on appeal) was *not* made on the basis of the pleadings alone, *Alexander*, 382 F.3d at 1212-15, but on a significantly developed factual record—including, *inter alia*, "interrogatories and requests for admission pertaining to the statute of limitations issue" and a fact hearing at which the district court heard "testimony from three [expert] witnesses." *Id.* at 1212-13; *see also id.* at 1215 (based on the state of the record, the Court of Appeals stated that it "must review [p]laintiffs' accrual claim under a summary judgment standard" rather than the motion to dismiss standard). This is a critical distinction from the present case, especially given the fact-specific nature of any laches inquiry.

In its motion to dismiss, the defendant pointed out that the plaintiff had resurfaced upon the discovery of lucrative oil fields in the area, which had caused a sudden, substantial increase in the lot's value—and, thus, that the defendant would be prejudiced if forced to honor the original purchase price after receiving no payments for many years. *Id.* at ¶¶ 40-42, 9 P.2d at 436. The Court acknowledged that, if true, those facts would justify applying laches to the plaintiff's claim for specific performance. *Id.* Critically, however, it found dismissal was nevertheless improper because material facts—namely, the fact of the 1930 oil-field discovery—appeared nowhere in the petition itself and, therefore, it was not apparent from the face of the pleadings that the elements of laches were satisfied. *Id.*

Defendants also invoke *Osage Nation v. Board of Commissioner of Osage County*, 2017 OK 34, 394 P.3d 1224, as supporting the notion that laches can bar claims at the motion to dismiss stage. City Mot. 9-10; TMAPC Mot. 11. That case is readily distinguishable. There, unlike in *Parks*, the petition itself contained allegations illustrating both (1) why the plaintiffs had acted unreasonably in failing to assert their claims (to enjoin construction of defendants' wind energy facility) earlier, and (2) how that delay specifically prejudiced the defendants. *Osage Nation*, 2017 OK at ¶ 39, 394 P.3d at 1237, 1239. For example, the petition contained detailed allegations, and attached a number of lengthy exhibits, showing that the construction of the facility was a massive, "utility-scale" project, and that defendants had broken ground and made substantial progress—and, consequently, incurred substantial development and construction expenses—in the years between when plaintiff learned of the project's approval and the time it initiated suit. *Id.* at ¶ 34, 394 P.3d at 1235-37.

Here, by contrast, there is not *one allegation* in the Petition reflecting any such prejudice to Defendants caused by the purported delay, nor any allegation suggesting the

delay was unjustifiable. Dismissal is therefore unwarranted. *See Duane & Virginia Lanier Tr. v. SandRidge Mississippian Tr. I*, No. CIV-15-634-G, 2019 WL 1388584, at *5 (W.D. Okla. Mar. 26, 2019) ("While the Court may dismiss a claim on the pleadings based on an affirmative defense ..., it is only appropriate to do so when a plaintiff's pleadings 'admit[] all the elements of the affirmative defense by alleging the factual basis for those elements.'") (citation omitted).

2. Defendants Make No Attempt to Show They Were Materially Prejudiced by Reason of Plaintiffs' Purported Delay

Defendants do not even acknowledge that prejudice is an element of their laches defense (*see supra* p. 6)—and so, clearly, do not satisfy their burden of establishing it. Defendants do not, and cannot, point to a single allegation in the Petition suggesting *any* prejudice that either of them suffered as a result of the lapse of time at issue here. In fact, they do not even identify a single such prejudice in their briefs.[5] For this reason alone, the Petition cannot be dismissed for laches—no matter how long Plaintiffs waited to press their claims, or how unreasonable it was for them to do so.

Ample authority in this State makes clear that this defect—that is, Defendants' failure to point to any prejudice they suffered as a result of the alleged delay—is fatal to their purported laches defense. Indeed, Oklahoma courts routinely recognize that for laches to apply, the defendant must particularize how, specifically, the delay at issue caused him material prejudice. The decision of the Oklahoma Supreme Court in *Hedges*, *supra*, is particularly illustrative on this point.

[5] Even if Defendants had, however, done so, that would not be enough to obtain dismissal of the Petition on laches grounds for the reasons discussed above. (*See supra* pp. 8-9.)

In *Hedges*, petitioner-mother waited six years before bringing an action against her ex-husband to recover approximately $50,000 in unpaid child-support obligations, *plus* $32,000 in interest accrued thereon. The Court rejected the ex-husband's arguments that laches barred the claim because, although the delay resulted in him "ow[ing] a substantial amount of accrued interest, his proof d[id] not demonstrate that the delayed institution of [the] proceeding[] placed him in a far more detrimental or disadvantaged position"—but "only that he would owe more money"—than he would have had the case been brought earlier. *Hedges*, 2002 OK at ¶ 11, 66 P.3d at 369-70; *see also, e.g.*, *Blackstock Oil Co. v. Caston*, 1939 OK 489, ¶ 17, 87 P.2d 1087, 1090 (court found defendant failed to sufficiently demonstrate prejudice element of laches even though record reflected that during period of delay, defendant was "expending large sums of money" to develop the lease sought to be cancelled, and that the plaintiffs knew as much); *see also generally In re Beaty*, 306 F.3d 914, 928 (9th Cir. 2002) ("generic claims of prejudice do not suffice for a laches defense").

Having specified not a single prejudice—the "core" factor of any laches inquiry, *see Kirk v. Cimarex Energy Co.*, No. CIV-11-384-W, 2014 WL 11352788, at *5 (W.D. Okla. Apr. 28, 2014)—Defendants are not entitled to dismissal of this action based on laches, regardless of the reasonableness (or *un*reasonableness) of any delay by Plaintiffs.

3. Defendants Cannot Show Unreasonable Delay by Plaintiffs

Given Defendants make no attempt to satisfy the "material prejudice" element of laches, the Court need not even reach the issue of whether the "inexcusable delay" element is met here. In any event, Defendants fall short of sustaining their burden on that front, as well.

As an initial matter, Defendants argue that "*Plaintiffs* cannot show that there was *no unreasonable delay* in asserting their claims." City Mot. 10; TMAPC Mot. 12 (emphasis added). Defendants, however, have it backwards. As laches is an affirmative defense, 12 O.S.

§ 2008(C)(12), it is incumbent on *Defendants* to show that the alleged delay was unreasonable, *not* on Plaintiffs to show otherwise. *See Hedges*, 2002 OK at ¶ 8, 66 P.3d at 369; *Sullivan*, 2005 OK at ¶ 33, 119 P.3d at 202; *see also, e.g.*, *Clark v. Clark*, 1930 OK 192, ¶ 6, 287 P. 721, 722 (defendants must plead affirmative defenses in answer; plaintiffs are not required to "anticipate" or "negat[e]" potential affirmative defenses in pleading claims); *Max Oil Co. v. Range Resources-Midcontinent, LLC*, No. CIV-16-539-W, 2016 WL 8929274, at *2 n.4 (W.D. Okla. July 15, 2016) ("Plaintiffs have no obligation to plead against affirmative defenses, including a statute of limitations defense."). Defendants do not and cannot do so.

(a) Plaintiffs' Compliance with Applicable Statutes of Limitations Suggests Reasonableness of "Delay"

As demonstrated in Plaintiffs' Opposition to the Tulsa Regional Chamber's Amended General Motion to Dismiss, Plaintiffs' claims are timely because there is no statute of limitations applicable to public nuisance claims. This strongly cuts against a finding of unreasonable delay for purposes of the laches test.

This State's courts routinely acknowledge that a delay that falls within the pertinent limitations period, or limitations periods for similar types of claims, is generally reasonable. *See, e.g.*, *Neff v. Calk*, 1947 OK 51, ¶ 4, 178 P.2d 624, 626 ("Ordinarily, the courts apply by analogy the period of limitations fixed by statute to the plea of laches."); *Hutchman v. Parkinson*, 1947 OK 373, ¶¶ 21-22, 187 P.2d 999, 1002-03 ("The [s]tatutes of [l]imitations may be made the gauge of stale claims and govern applicability of laches ... We believe § 95(2) ... is the applicable statute in the case at bar, and us[e] it as a gauge or yardstick for determining whether plaintiff is guilty of laches[.]"); *Ator v. Unknown Heirs*, 2006 OK CIV APP 120, ¶ 22, 146 P.3d 821, 828 ("Ator's [7-year] delay in initiating the present action was not unreasonable in light of the applicable [15-year] statute of limitations for both adverse

possession and inverse condemnation proceedings"). That is because, as this State's highest court has explained, "Equity must follow the law. It may not allow legal limitations to be abridged unless there are equitable considerations of a compelling nature which demonstrate prejudice-dealing delay." *Hedges*, 2002 OK at ¶ 8, 66 P.3d at 369.

Two recent decisions of the United States Supreme Court further underscore the inappropriateness of applying laches to claims filed within the statutory limitations period. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) and *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), the Court strongly implied that, at least for cases brought pursuant to a federal statute, laches may not be invoked if the case was brought within the statute of limitations.[6] Specifically, the Court explained that that conclusion is the only one that respects "both separation-of-powers principles and the traditional role of laches in equity." *SCA*, 137 S. Ct. at 960; *see also Petrella*, 572 U.S. at 678-79. As to separation-of-powers, the Court noted that "applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *SCA*, 137 S. Ct. at 960; *see also Petrella*, 572 U.S. at 678-79. Similarly, the rule it adopted comported with the traditional role of the laches defense, which "developed in the equity courts ... [a]s a gap-filling doctrine," applying to "claims of an equitable cast for which the Legislature ha[d] provided no fixed time limitation." *SCA*, 137 S. Ct. at 961; *see also Petrella*, 572 U.S. at 678. But "where there is a statute of limitations, there is no gap to fill." *SCA*, 137 S. Ct. at 961.

[6] Although these cases were technically decided in relation to claims brought under, respectively, the federal Copyright Act and the federal Patent Act, the Court's reasoning endorses a much broader application of the *Petrella*/*SCA* rule. *See SCA*, 137 S. Ct. at 960 ("In *Petrella*, ... [w]e ... h[eld] that laches cannot defeat a damages claim brought within the period prescribed by the Copyright Act's statute of limitations ... And in so holding, we spoke in broad terms[,] [*i.e.*,] ... '[i]n the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.'") (quoting *Petrella*, 572 U.S. at 679).

Although *Petrella* and *SCA* were decided with respect to the particular federal statutes at issue in those cases, the same reasoning applies here, where Oklahoma's legislature has specifically decided that for public nuisance claims, no limitations period is appropriate—reflecting the legislative policy determination that "[n]o lapse of time can legalize a public nuisance[] amounting to an actual obstruction of public right." 50 O.S. § 7; *see also Revard*, 1911 OK at ¶ 15, 119 P. at 592. Finding an "unreasonable delay" and applying laches, then, to a public nuisance suit would implicate the same separation-of-powers problems identified by the Supreme Court in *SCA* and *Petrella*. Doing so would also run counter to abundant federal case law that, like Oklahoma case law, consults against application of laches to claims filed within the prescribed limitations period. *See, e.g., RRW Legacy Mgmt. Grp., Inc. v. Walker*, 751 F. App'x 993, 996 (9th Cir. 2018) ("Absent 'highly unusual circumstances,' laches is not applied before the statute of limitations runs on the cause of action."); *FDIC v. Fuller*, 994 F.2d 223, 224 (5th Cir. 1993) (only in "extraordinary circumstances"—if ever—may "laches be asserted before [the] limitations [period] has run").

(b) Multiple, Legitimate Bases Justify Plaintiffs' Purported Delay in Filing Suit

Beyond their compliance with the applicable limitations period, there are multiple, legitimate bases justifying the alleged "delay" here.

First, although both the City and TMAPC complain that the relevant delay here dates back to the Massacre itself in 1921, *see* City Mot. 10; TMAPC Mot. 12, this position mischaracterizes the allegations in Plaintiffs' Petition—which pleads numerous, continuing wrongs committed by the City, TMAPC and their co-defendants in the years and decades that followed, *see, e.g.*, Pet. ¶¶ 88-89, 104, 109-13, 118-21, 137, 180-81, 184, including acts of unjust enrichment within just the past two years, *see id.* at ¶¶ 121, 177-85, 199-200. The City

and TMAPC simply ignore these allegations in connection with their laches arguments—thereby failing to satisfy their burden of showing inexcusable delay.

Second, even for those allegations that *do* date back to 1921, Defendants still cannot demonstrate the requisite unreasonable delay. Plaintiffs were entirely justified in bringing this suit at the time they did for a number of reasons, including, for example:

- Plaintiffs' reliance on their government to take steps to ameliorate the Massacre's lasting effects on Black Tulsans, without their needing to resort to litigation; and
- Plaintiffs' recent discovery of certain legal rights, and a meaningful avenue to press those rights, of which they were previously unaware.

As detailed below, each of these bases is on its own sufficient to justify Plaintiffs' purported delay in commencing this action, making laches inapplicable.

Plaintiffs' Justifiable Reliance on Defendants to Protect Their Rights. Any delay by Plaintiffs was justified due to their continued—and entirely appropriate—reliance on their government to protect their rights and remedy the injuries inflicted on Black Tulsans because of, and since, the Massacre. As alleged in the Petition, Defendants over time made promises to rebuild Greenwood and provide reparations to the community. *See, e.g.*, Pet. ¶¶ 96-97 ("Defendants promised in statements to the press[] 'to formulate a plan of reparation ... as quickly as possible'" and to take steps to "rehabilitat[e]" Greenwood). Those promises, of course, were empty—but Plaintiffs had no way of knowing as much, and understandably relied on these promises and assurances from the government.

Plaintiffs' right to rely on their representatives in government to act to protect their rights on their behalf is the exact reason why courts in this State and across the country hold that laches is *per se* inapplicable to public nuisance claims, as discussed previously herein. As explained above, this rule was primarily designed to promote the public policy of

encouraging citizens to rely on our system of democratic, representative government to protect their rights, by preventing them from being equitably foreclosed from taking matters into their own hands if and when the government continually fails them. (*See supra* pp. 4-5.)[7]

Plaintiffs' Recent Discovery of Their Cause of Action. It is well-settled that laches will not apply against a plaintiff who, during the period of delay, lacked knowledge of his "right to proceed or [] cause of action." *Smith*, 2002 OK at ¶ 9, 50 P.3d at 1138-39. Plaintiffs' delay should therefore be excused here because Plaintiffs only recently became aware of their ability to pursue a cause of action for ongoing public nuisance.

Until very recently, Plaintiffs were unaware of any potential ability to proceed on a continuing public nuisance theory. It was only in 2017, after a number of Oklahoma public authorities—including several of the defendants here—initiated suits against various opioid manufacturers under such a theory, *see, e.g.*, *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 9241510, at *10-15 (Dist. Ct. Cleveland Cnty. Nov. 15, 2019); Petition at ¶¶ 207-15, *City of Tulsa v. Cephalon, Inc.*, No. CJ-2020 02705 (Dist. Ct. Tulsa Cnty. Sept. 2, 2020) ("*Cephalon* Pet."), that Plaintiffs became aware of it and its availability to them a means of pursuing relief for the many, substantial harms still befalling Black Tulsans a century after the Massacre. Having had no knowledge of this potential cause of action until 2017 or later, Plaintiffs cannot be faulted for not filing this action any earlier as a matter of Oklahoma law.

In other words, because Plaintiffs did not learn of their potential cause of action until 2017 (at best), they cannot be charged with unreasonably delaying filing this action under Oklahoma law. *See Smith*, 2002 OK at ¶ 14, 50 P.3d at 1138-39 (application of laches is

[7] Relatedly, as one defendant in this action point outs in its motion to dismiss, federal legislation has repeatedly been proposed to extend the statute of limitations for Massacre-related claims. *See* Chamber Gen. Mot. 20. This fact only further supports the inference that Plaintiffs were for a time relying on their government to take steps to protect them and their rights, and that it was reasonable for them to not bring suit at that time as a result.

inappropriate where plaintiff was unaware of an available cause of action); *Phelan*, 1938 OK at ¶ 17, 77 P.2d at 11-12 (laches will not apply unless claimant "had knowledge of his rights," as "one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded").

Indeed, courts have found delays to be justifiable, thereby defeating the application of laches, even where the plaintiff *did* have knowledge of the relevant law, but tactically delayed filing suit during the pendency of litigation that may have favorably changed the law to his advantage. *See, e.g.*, *In re Beaty*, 306 F.3d at 927 ("Delay for the purpose of awaiting a change of previously unfavorable law is reasonable delay for purposes of laches, and does not constitute a lack of diligence."); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 714 (2d Cir. 1993) (no laches because prior unfavorable court decisions constituted a legitimate excuse for delaying suit during pendency of cases in Supreme Court that had potential to improve plaintiff's prospects for success), *rev'd on other grounds sub nom. N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). The fact that recent opioid litigation revealed to Plaintiffs a favorable—and novel—legal theory is similarly a legitimate explanation for why they filed this action when they did.

4. Defendants Cannot Show That the Equities Tip in Their Favor

Finally, even assuming Defendants had satisfied the two necessary elements of laches—and they have not—it would still be inappropriate for the Court to dismiss the Petition on laches grounds. That is because laches is a purely equitable defense, and as such is unavailable to a party who has acted wrongfully. *See B&M*, 1988 OK at ¶ 13, 765 P.2d at 784 ("[E]quity cannot be invoked when its aid becomes through a party's own fault."); *Armstrong v. Maple Leaf Apts., Ltd.*, 436 F. Supp. 1125, 1150 (N.D. Okla. 1977) ("It is a firmly established rule of equity jurisprudence that he who seeks equity must do equity, that

only conscience, good faith and diligence can put equity into operation, and that he who comes into equity must come with clean hands."); *see also McGirt v. Oklahoma,* 140 S. Ct. 2452, 2482 (2020) ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

According to Plaintiffs' allegations, Defendants do not come into this dispute with clean hands—or anything even remotely close to them. On that basis alone, the Court can and should decline to permit them to take refuge in the laches doctrine. Courts can *always,* irrespective of whether the laches test is satisfied, exercise their discretion to refuse to apply the doctrine where justice so requires. *Estrada*, 2015 OK CIV APP at ¶ 26, 345 P.3d at 411. It is hard to imagine a case that could more clearly warrant the Court doing that.

For all the above reasons, the Court should refuse to dismiss the Petition on account of laches—a flexible, equitable doctrine aimed at preventing inequity, *not* furthering it.

II. The GTCA Is Inapplicable and Thus Cannot Be a Basis for Dismissal

The City and TMAPC both also argue that the Court must dismiss this action because Plaintiffs failed to satisfy the notice requirements and prescribed limitations period of the GTCA, which was enacted by the Legislature in 1985. *See* City Mot. 3-7; TMAPC Mot. 3-7. They likewise argue that, even had those requirements been satisfied, Plaintiffs fail to state a permissible claim against them under the GTCA, given the tort liability immunities it provides to political subdivisions of the State and employees thereof (such entities being collectively referred to herein as "state actors"). *See* City Mot. 7-9; TMAPC Mot. 10-11. However, those arguments are meritless because the GTCA *does not even govern the claims asserted in this action*.

As set forth below, the GTCA is wholly inapplicable here because it (1) only governs claims seeking monetary damages, but not the types of injunctive relief Plaintiffs seek here; and (2) applies only to a prescribed type of "tort" claim, a definition that does not encompass the public nuisance and unjust enrichment theories raised in the Petition.

A. The GTCA Has No Bearing on Claims for Equitable Relief Such as Plaintiffs'

Defendants' assertion that the GTCA bars Plaintiffs' claims is incorrect because the statute only governs claims for money damages (*i.e.*, damages designed to compensate for losses). Plaintiffs, however, seek only forms of equitable relief—namely, abatement and an accounting and disgorgement of defendants' unjust and ill-gotten profits. *See generally* Pet. Prayer for Relief (Pet. § XII) ("Prayer for Relief"). Accordingly, "the GTCA provides no bar to their action" and Plaintiffs had no obligation to "comply with the claims procedure provided in the Act." *Sholer v. State ex rel. Dep't of Pub. Safety*, 1995 OK 150, ¶ 15, 945 P.2d 469, 472-73; *see also Abab, Inc. v. City of Midwest City*, No. CIV-20-0134-HE, 2020 WL 9073568, at *1 (W.D. Okla. Sept. 1, 2020) (noting "claims for injunctive relief are not subject to the [GTCA]'s notice requirements" and thus finding plaintiffs could proceed with claim against city for injunctive relief despite never presenting a notice of claim, but striking their claim for money damages on that same basis).

1. Plaintiffs' Petition Seeks Only Equitable Remedies

As an initial matter, Defendants' repeated assertions that Plaintiffs are seeking "damages" here, *see, e.g.*, City Mot. 1, 5, 9; TMAPC Mot 1, 6, 10, are incorrect. Plaintiffs are seeking *no* money damages in this action, but *only* forms of equitable relief.

Specifically, Plaintiffs ask the Court to (1) issue an order directing the group of defendants to abate the public nuisance stemming from the Massacre, Pet. ¶ 1; (2) order an

accounting "of the unjust enrichment [d]efendants received by appropriating the historic reputation and legacy of the Massacre" for their own benefit, Prayer for Relief ¶ 10; and (3) order the creation of a "victims' fund" funded in an amount equal to (a) the estimated cost of the requested abatement, plus (b) the amount of defendants' unjust enrichment as determined by the requested accounting, *id.* at ¶¶ 6-7, 9, 11. All of these are equitable remedies, separate and distinct from forms of traditional money damages.

First, it is well-settled that abatement is a form of injunctive relief designed to eradicate (or at least reduce the effects of) an ongoing nuisance—*not* to compensate anyone monetarily for previously-inflicted harms. *See Walcott v. Dennes*, 1911 OK 285, ¶ 4, 116 P. 784, 785-86 (exclusive function of an injunction is affording *preventive* relief, *not* correcting past wrongs); *see also San Diego Unified Port Dist. v. Monsanto Co.*, No. 15cv578-WQH-JLB, 2018 WL 4185428, at *5 (S.D. Cal. Aug. 30, 2018) (recognizing "stark" distinction between abatement, as an equitable, forward-looking remedy, and money damages, as compensation for "prior accrued harm").

That is obviously the case here: Plaintiffs seek a general order of abatement, Pet. ¶ 1; Prayer for Relief ¶ 3, as well as an order directing defendants to, *inter alia*, develop property, facilities and programs for the Greenwood community, Prayer for Relief ¶¶ 12(b)-(d), (f), and create a scholarship program for descendants of Massacre victims, *id.* at ¶ 12(h). This is precisely the type of forward-looking relief that courts have routinely, throughout history, recognized *can* be pursued against state actors, notwithstanding sovereign immunity statutes or then-existing common law sovereign immunity. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 n.10 (1972) (despite sovereign immunity doctrine, "a municipality may be enjoined from creating or operating a nuisance[]"); *Frew ex rel. Frew v. Hawkins*, 540 U.S.

431, 435, 438-41 (2004); *JMA Energy Co. v. State ex rel. Dep't of Transp.*, 2012 OK CIV APP 55, ¶ 21, 278 P.3d 1053, 1058.

To be sure, Plaintiffs' requested order of abatement *does* include certain components that, if granted, would require defendants to expend funds. For example, Plaintiffs seek an order directing defendants to expend "all costs necessary" to abate the public nuisance caused by the Massacre and the continuing harms still being inflicted on the Greenwood community, Prayer for Relief ¶ 4, and ask the Court to require defendants to engage in activities like property development that undoubtedly would require significant expenditures, *see, e.g.*, *id.* at ¶¶ 12(b)-(f). However, the fact that Plaintiffs' requested relief, if granted, would entail some money flowing out of defendants' pockets does not morph the requested abatement into a form of compensatory relief or make it any less of an equitable remedy.

Indeed, in a public nuisance suit that the State, a defendant here, recently litigated against a number of opioid manufacturers, the Cleveland County District Court issued a comprehensive abatement order that it estimated would cost the defendant-manufacturers $465,026,711 to carry out. *Purdue Pharma*, 2019 WL 9241510, at *15, *21. Yet, the Court nevertheless recognized that the abatement was an "equitable ... remedy" that did not "compensate the State or any of its programs[] ... for past, present or future damages" nor "any past harm." *Id.* at *21; *accord Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (recognizing that under federal immunity doctrine, which permits suits against sovereigns for prospective injunctive relief but not for money damages, permissible injunctive relief often has significant "fiscal consequences to state treasuries ... [as] the necessary result of compliance," but that "[s]uch an ancillary effect on the state treasury" is not enough to trigger immunity); *see also Meinders v. Johnson*, 2006 OK CIV APP 35, ¶ 36, 134 P.3d 858,

869 (recognizing that abatement and money damages are separate, distinct forms of remedies available in Oklahoma public nuisance suits); 50 O.S. § 6 (same).

Second, Plaintiffs seek an accounting on their second claim, for unjust enrichment. *See* Prayer for Relief ¶ 10. It is well established that accounting is an equitable remedy. *See Utica Nat'l Bank & Tr. Co. v. Assoc. Producers Co.*, 1980 OK 172, ¶ 18 n.17, 622 P.2d 1061, 1065 n.17 (accounting is a remedy of "purely equitable cognizance"); *Hitch Enters.*, 859 F. Supp. 2d at 1258 ("[a]ccounting is an equitable remedy"). So is an order requiring a defendant to disgorge the amount of his unlawful enrichment. *See id.* ("[d]isgorgement [of unjust enrichment] is ... an equitable remedy" under Oklahoma law) (citing *Okla. Dep't of Sec. ex rel. Faught v. Blair*, 2010 OK 16, 231 P.3d 645); *United States v. Osage Wind, LLC*, No. 14-CV-704-GKF-JFJ, 2020 WL 3578351, at *7-8 (N.D. Okla. July 1, 2020) (characterizing "disgorgement of profits[] ... and unjust enrichment," as well as an "accounting" thereof, as forms of "equitable relief"). Indeed, Defendants themselves acknowledge—albeit not in the context of their GTCA-related arguments—that claims for unjust enrichment, and the restitution-like remedy they traditionally seek, sound in equity. City Mot. 12 (tacitly acknowledging "equitable," as opposed to "legal," nature of unjust enrichment claims; TMAPC Mot. 14 (same).

Third, Plaintiffs' requests for the creation of, and funneling of certain funds into, a "Tulsa Massacre Victims' Compensation Fund" (the "Fund"), *see* Prayer for Relief ¶¶ 6, 12, does nothing to change the calculus. In fact, it is modeled upon the "Opioid Lawsuit Abatement Fund" that was ordered by the *Purdue Pharma* Court as part of its abatement order against the opioid-manufacturer-defendants. *Purdue Pharma*, 2019 WL 9241510, at *21. Despite the name given to it in the Petition, the Fund, as envisioned by Plaintiffs, would

provide *no* compensation to Massacre victims or descendants for past injuries, and would *not* be made up of funds in an amount necessary to remedy prior harms. Rather, the Fund would reflect the total of (1) the amount the Court deems necessary for abatement; and (2) the amount by which Defendants have unjustly enriched themselves at Massacre victims' and descendants' expense, such as through misappropriation of victims' names and likenesses. Prayer for Relief ¶¶ 6-7, 9, 11. In other words, the Fund would hold only those monies necessary to effectuate *abatement* of the ongoing public nuisance and *disgorgement* of Defendants' ill-gotten gains—which, as explained above, are both equitable remedies.[8]

In sum, neither of the Petition's two claims looks to compensate Plaintiffs for past harms—which, for the reasons set forth below, places them squarely outside the GTCA's reach.

2. The GTCA's Plain Language Limits Its Scope to Claims for Money Damages

The plain language of the GTCA makes clear that it applies only where a plaintiff seeks to recover money damages from a state actor-defendant. By its express terms, the Act grants protection to state actors only with respect to claims in "tort," *see* 51 O.S. § 152.1(A)—which it defines as "a legal wrong[] ... *resulting in a loss* to any person, association or corporation as the proximate result of an act or omission of a political

[8] As noted, the *Purdue Pharma* Court required the creation of an "Opioid Lawsuit Abatement Fund" consisting of the $465,026,711 it deemed necessary to abate the nuisance in question. *Purdue Pharma*, 2019 WL 9241510, at *21. Courts also recognize that ordering disgorgement of a defendant's unjust enrichment is an equitable form of relief—*not* a form of money damages—even where the order dictates that the disgorged funds be used to compensate the defendant's victims. *See Osborn v. Griffin*, 865 F.3d 417, 461-64 (6th Cir. 2017) ("To put matters simply, we agree with Lord Coke, Blackstone, Justice Story, the Supreme Court, and the Second and Ninth Circuits, as well as numerous other commentators—an action seeking disgorgement is equitable in nature, even if the district court ultimately directs the funds to the victims of the defendant's conduct.") (collecting authorities); *see also Okla. Dep't of Sec.*, 2010 OK at ¶ 14, 231 P.3d at 654 ("Disgorgement is not for the purpose of compensating victims, although compensation of victims often results from disgorgement.").

subdivision or the state or an employee [thereof] acting within the scope of employment." 51 O.S. § 152(14) (emphasis added).[9]

The same limitation is echoed in Section 153—the section titled "Liability – Scope – Exemptions – Exclusivity"—which states:

> The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of employment subject to the limitations and exceptions specified in the [GTCA] and *only* where the state or a political subdivision, if a private person or entity, would be *liable for money damages* under the laws of this state.

51 O.S. § 153(A) (emphasis added). Those provisions evince a clear legislative intent that the statute apply only to claims for money damages to compensate plaintiffs for losses caused by the torts of state actors.

These are not the statute's only provisions that evince such an intent. There are, in fact, many others.[10] Of particular relevance here is the statutory definition of "claim." The City and TMAPC argue that the Court must dismiss the Petition because Plaintiffs failed to comply with the GTCA's notice requirements in Sections 156 and 157. *See* City Mot. 3-7; TMAPC Mot. 3-7. But the Act specifically defines "claim," and its definition—much like its definition of "tort"—is circumscribed so as to only reach claims for recovery of money damages. Specifically, the Act defines "claim" as "any written demand presented by a claimant or the claimant's authorized representative in accordance with this act to *recover money* from the state or political subdivision as *compensation* for an act or omission of a

[9] "Loss," meanwhile, is defined as "death or injury to the body or rights of a person or damage to real or personal property or rights therein." 51 O.S. § 152(8).

[10] For example, Section 154 places strict monetary caps on amounts that may be recovered by a claimant against a state actor. *See* 51 O.S. §§ 154(A), (C), (E). Section 159 provides for manners of enforcing money judgments obtained against state actors, *see* 51 O.S. § 159, and various sections contain provisions regarding state actors' rights and obligations with respect to purchasing and maintaining liability insurance and their rights of subrogation against carriers in connection with satisfying a money judgment, *see, e.g.*, 51 O.S. §§ 158, 160-63.

political subdivision or the state or an employee [thereof].” 51 O.S. § 152(4) (emphasis added); *see also* 51 O.S. § 156(B) (mandating claims be presented to pertinent state actor within one year “after the *loss* occurs”) (emphasis added).

As explained above, Plaintiffs are *not* asking to “recover money” from the City or TMAPC (or any other defendant) to “compensate” them for past injuries. What they are asking for is an order compelling defendants to abate the ongoing public nuisance they have created. This means that Plaintiffs *have* no “claim” to present under the terms of the statute, and so could not possibly have been obligated to comply with its notice provisions.

In contrast to the text’s repeated references to “compensation,” “money damages” and other such like terms, the Act is virtually silent with respect to claims for injunctive or other equitable relief. That silence is intentional. *See Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 31, 408 P.3d 183, 194 (“[w]here there is authority to speak, legislative silence may indicate its intent”).[11]

In any event, the Court cannot read into the statutory text something that is not there. *See Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 9, 432 P.3d 233, 237 (“The text of [a prior version of the] GTCA certainly didn’t expressly include tort claims arising from alleged deprivations of constitutional rights—and we have always said that ‘[i]mmunity cannot be read into a legislative text that is silent, doubtful or ambiguous.’”) (citations omitted); *Nguyen v. State*, 1990 OK 21, ¶ 11, 788 P.2d 962, 966-67 (Opala., J., concurring) (“[The State’s] argument calls on the judiciary to divine the presence of a shield against tort

[11] The GTCA is not *entirely* silent with regard to claims for injunctive relief; there is a single provision, added through amendments to the statute in 1999 and entitled “Liability of State for Y2K Failure,” which expressly shields state actors from any “claim or cause of action, including, without limitation, any civil action *or action for declaratory or injunctive relief*” based on allegations of computing system failures. 51 O.S. § 155.2(B) (emphasis added). This language illustrates that the Legislature knew how to address claims for injunctive relief where it wanted to do so.

liability from a 'doubtful, ambiguous or silent legislative text.' ... [Sovereign] immunity must now be anchored in a *clearly articulated* statutory exemption.") (citations omitted); *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 835 N.W.2d 160, 180 (Wis. 2013) (finding Wisconsin's sovereign tort immunity statute does not shield government actors from suits to abate nuisances because it speaks only to protecting against liability for money damages, but nothing about injunctive relief, noting "the remedy of omission does not lie with the courts").

3. Authoritative Case Law Demonstrates that GTCA Reaches Only Claims for Monetary Damages

In light of this statutory language, Courts in this State have repeatedly held that the GTCA reaches only claims for money damages, and *not* claims for equitable forms of relief like those sought here. *See, e.g.*, *Barrios*, 2018 OK at ¶ 9 n.13, 432 P.3d at 237 n.13 ("[T]he GTCA c[annot] ... affect claims ... seeking only prospective injunctive relief"); *Abab*, 2020 WL 9073568, at *1 ("claims for injunctive relief are not subject to the [GTCA]'s notice requirements"); *Feenstra v. Sigler*, No. 19-CV-00234-GKF-FHM, 2019 WL 6040401, at *12 (N.D. Okla. Nov. 13, 2019) (recognizing the GTCA does not "appl[y] to suits seeking only equitable relief"); George J. Meyer, *Sovereign Immunity for Tort Actions in Oklahoma: The Governmental Tort Claims Act*, 20 TULSA L.J. 561, 576 (2013) (noting that the GTCA governs only "claims for 'money damages' ... brought against [state actors]," but not "other claims of relief") (quoting 51 O.S. § 153(A)); *see also Gay Activists All. v. Bd. of Regents of Univ. of Okla.*, 1981 OK 162, ¶ 30, 638 P.2d 1116, 1123 (making "important" distinction that "for the purpose of the injunction [being sought], the Board of Regents[] ... can be enjoined ... [but] [f]or the purpose of monetary damages, ... the Board enjoys ... sovereign immunity").

Indeed, neither the City nor TMAPC—nor any other defendant that argues for dismissal under the GTCA—cites to a single case applying the GTCA to claims for equitable

relief. The cases cited in support of defendants' GTCA arguments all involved traditional tort claims by plaintiffs seeking to recover money damages for injuries sustained in accidents involving state actors,[12] or are entirely irrelevant,[13] save for one. The one exception is *Burghart v. Corrections Corp. of America*, 2009 OK CIV APP 76, 224 P.3d 1278, which is cited in the BOCC Motion. In that case, the plaintiff-prisoner sued the defendant-correctional facility seeking compensatory damages for alleged violations of his constitutional rights, as well as declaration that defendant violated those rights and an injunction preventing future violations. *Id.* at ¶¶ 1-9, 224 P.3d at 1279-80. The Court dismissed the claim for equitable relief entirely based on the plaintiff's failure to exhaust certain administrative remedies required of prisoners under 57 O.S. § 566.5, *not* on GTCA grounds. *Id.* at ¶¶ 12-17, 224 P.3d

[12] *See Tuffy's Inc. v. City of Oklahoma City*, 2009 OK 4, 212 P.3d 1158 (nightclub owner sued city for negligence and tortious interference arising out of incident at club in which city police officers allegedly attacked and assaulted customers); *Crockett v. Cent. Okla. Transp. & Parking Auth.*, 2010 OK CIV APP 30, 231 P.3d 748 (negligence action brought by passenger injured on defendant's bus); *Shanbour v. Hollingsworth*, 1996 OK 67, 918 P.2d 73 (personal injury action alleging injuries from snowplow accident); *State ex rel. Coffey v. Dist. Ct. of Okla. Cnty.*, 1976 OK 29, 547 P.2d 947 (landowner sued for money damages after his home was damaged by defendant's firing of 19-gun salute during gubernatorial inauguration); *Johns v. Wynnewood Sch. Bd. of Educ.*, 1982 OK 101, 656 P.2d 248 (action on behalf of minor student against school board to recover for injuries sustained during recess due to lack of school supervision); *Mansell v. City of Lawton*, 1995 OK 81, 901 P.2d 826 (suit for damages arising out of sewer line backup); *Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, 432 P.3d 233 (inmate claims for money damages against correctional facilities based on alleged unconstitutional seizures); *Fehring v. State Ins. Fund*, 2001 OK 11, 19 P.3d 276 (action against State Insurance Fund seeking money damages); *Martin v. Johnson*, 1998 OK 127, 975 P.2d 889 (public school teacher brought action against school district alleging, *inter alia*, sexual harassment and intentional infliction of emotional distress alleged inflicted on-the-job); *Nail v. City of Henryetta*, 1996 OK 12, 911 P.2d 914 (plaintiff sued for injuries inflicted in altercation with police officer); *Stout v. Cleveland Cnty. Sheriff's Dep't*, 2018 OK CIV APP 11, 419 P.3d 382 (victim attacked by police dog brought personal injury action against sheriff's department); *Vanderpool v. State*, 1983 OK 82, 672 P.2d 1153 (plaintiff sued for money damages after being struck by a rock thrown by a state employee); *Slawson v. Bd. of Cnty. Comm'rs*, 2012 OK 87, 288 P.3d 533 (plaintiff sued for injuries resulting from car accident); *Simington v. Parker*, 2011 OK CIV APP 28, 250 P.3d 351 (suit for money damages for alleged intentional infliction of emotional distress); *Carswell v. Okla. State Univ.*, 1999 OK 102, 995 P.2d 1118 (chemistry student sued state university alleging harm from chemical exposure); *see also Pellegrino v. State ex rel. Cameron Univ.*, 2003 OK 2, 63 P.3d 535 (GTCA did *not* apply to claims for tortious interference against government employees); *Bosh v. Cherokee Cnty. Bldg. Auth.*, 2013 OK 9, 305 P.3d 994 (GTCA did *not* apply to detainee's damages action based on jailhouse assault).

[13] *Wilborn v. State*, 1923 OK CR 222, 224 P. 214 (criminal action predating enactment of GTCA); *Okla. Agric. & Mech. Coll. v. Willis*, 1898 OK 17, 52 P. 921 (action predating GTCA).

at 1282. By contrast, the Court found the plaintiff's *damages* claims barred due to his failure to present a notice of claim as required under GTCA §§ 156 and 157. *Id.*[14]

4. The Historical Context in Which the GTCA Was Enacted Further Supports Limiting Its Reach to Claims Seeking Monetary Relief

The statutory language, and above-referenced case law construing it, is reason enough for this Court to hold that the GTCA does not govern Plaintiffs' claims. But even further support for that conclusion is found by looking to the pertinent historical context that led to the GTCA's enactment and the general public policy justifications for sovereign immunity.

The doctrine of sovereign immunity developed under the common law, both in Oklahoma and in other U.S. states, largely following the enactment of the Eleventh Amendment to the federal Constitution, which immunizes states from being sued in federal court by citizens of a different state. U.S. CONST. amend. XI; *see also* Meyer, 20 TULSA L.J. at 563. The Eleventh Amendment was passed largely due to Congress's concerns about permitting litigants to obtain "judgments ... against the state[s'] treasuries" at a time many states were in debt from the Revolutionary War. *Id.*[15]

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[14] As the *Burghart* Court explained:

> The notice required by the GTCA was a mandatory prerequisite to Burghart's filing of *his claim for tort damages*. The record before us does not show that Burghart has complied with the notice provisions of the GTCA, nor does Burghart allege that he has complied. We therefore find that the district court was without jurisdiction to hear the *portion* of Burghart's case *seeking tort damages* against [defendant] CCA and its employees.

Id. at ¶ 13, 224 P.3d at 1282 (emphasis added).

[15] More specifically, the amendment was enacted in response to Congress's "renewed ... concerns" about states being sued by citizens of different states, who could thereby obtain judgements against state treasuries—a "special concern to early [U.S.] legislators because of the size of the state debts that had accumulated during the Revolutionary War. Legislators feared that permitting a state to be sued by a private citizen would result in a flood of suits brought against various states by creditors who wished to collect on outstanding war debts, thereby draining funds from the state treasuries." *Id.* As a result, and "[w]ishing to avoid either higher taxes or complete bankruptcy of state treasuries," Congress passed the Eleventh Amendment in 1795. *Id.*

Against this backdrop, the doctrine of sovereign immunity was developed under state common law as a means of shielding state actors from being sued in tort *for money damages*. Under the common-law doctrine, state actors were not granted immunity, however, from other types of suits, such as actions seeking injunctive relief. *See Fid. Labs. Inc. v. Oklahoma City*, 1942 OK 289, ¶ 12, 130 P.2d 834, 836 (while an action to "enjoin[]" the city from taking certain actions would be permissible, "an entirely different question [wa]s presented whe[re] damages against the city, rather than injunctive relief ... [wa]s sought" because "[i]n connection with damages the doctrine of sovereign immunity [wa]s of controlling importance"); *see also Illinois*, 406 U.S. at 108 n.10 (in case arising under federal common law, noting that "[w]hatever may be a municipality's sovereign immunity in actions for damages, ... actions seeking injunctive relief stand on a different footing," as "[t]he cases are virtually unanimous in holding that municipalities are subject to injunctions to abate nuisances," *i.e.*, that "a State that causes a public nuisance is suable ... [and] may be enjoined from maintaining a nuisance"); *Bostco*, 835 N.W.2d at 180 ("public policy considerations that have prompted courts to grant substantive immunity for monetary damages do not apply with equal force to actions for declaratory or injunctive relief").[16]

[16] Sovereign immunity developed similarly at common law in other U.S. jurisdictions, and was ultimately adopted statutorily in those jurisdictions, as well. At present, many other states have sovereign liability immunity statutes that, like Oklahoma's, differentiate between compensatory damages and equitable remedies such as abatement, and have accordingly been construed by their courts as having no impact whatsoever on a plaintiff's ability to sue state actors for equitable relief. *See, e.g.*, *Cobbley v. City of Challis*, 59 P.3d 959, 963 (Idaho 2002) ("a claim for abatement of a nuisance" is "not [] an action to recover damages ... subject to the notice requirements of the [Idaho] Tort Claims Act"); *Peterson v. Putnam County*, No. M2005-02222-COA-R3-CV, 2006 WL 3007516, at *11 (Tenn. Ct. App. Oct. 19, 2006) ("a nuisance-type claim that seeks *damages* against a governmental entity must be brought under the terms of the [Tennessee Governmental Tort Liability Act]," whereas "an *equitable action to abate* a nuisance created by a governmental entity is permitted outside of [the] terms of the GTLA"); *Bostco*, 835 N.W.2d at 178 (recognizing purpose of Wisconsin's corollary statute is "to limit the dollar amount of recovery to be paid for damages" and thus that it plainly "ha[s] no bearing on the availability of equitable relief such as abatement"); *Rattner v. Planning Comm'n*, 548 N.Y.S.2d 943, 947 (N.Y. App. Div. 1989) ("compliance with the notice of claim requirements [of New York's statute] ... is not necessary ... where an action is brought in equity to restrain a continuing act"); *State v. Eight Cities & Towns*, 571 A.2d 27, 29 (R.I. 1990) (notice requirement of Rhode Island act did not apply to action in equity; statutory notice

The Oklahoma Supreme Court ultimately abrogated common-law sovereign immunity in *Vanderpool v. State*, 1983 OK 82, 672 P.2d 1153—but in doing so, openly urged the Legislature to close the gap by passing tort immunity legislation protecting state actors. *See id.* at ¶¶ 17-23, 672 P.2d at 1156; *see also Barrios*, 2018 OK at ¶¶ 7-9, 432 P.3d at 237. The Legislature quickly responded by enacting the GTCA. *See also Fehring v. State Ins. Fund*, 2001 OK 11, ¶ 10, 19 P.3d 276, 278-80, *overruled on other grounds*, *Gowens v. Barstow*, 2015 OK 85, 364 P.3d 644. As such, the GTCA is commonly viewed as having effectively overridden the *Vanderpool* ruling—*i.e.*, that "[a] state or local governmental entity is liable for *money damages* for injury or loss of property, personal injury or death caused by the negligence or wrongful act or omission of any government entity or any employee or agent of the government entity while acting within the scope of the government entity's office." *Vanderpool*, 1983 OK at ¶ 21, 672 P.2d at 1156 (emphasis added); *see also* 51 O.S. § 153 (statutory language tracks *Vanderpool* ruling). In other words, the GTCA was intended to "undo" the *Vanderpool* ruling, which opened the door for state actors to be sued for *money damages* but said nothing at all about suits against them for equitable relief.[17]

5. Public Policy Considerations Imply GTCA Is Circumscribed to Suits for Money Damages

Finally, the conclusion that the GTCA does not reach claims for equitable relief, such as those asserted by Plaintiffs here, is supported by the public policy underlying the concept

provision applicable only "in a monetary [damages] context"); *see also Corbin v. Fed. Reserve Bank of N.Y.*, 458 F. Supp. 143, 146 (S.D.N.Y. 1978) ("[the] claim is not for money damages and consequently is not barred by the ... [Federal Tort Claims Act]").

[17] The *Vanderpool* Court did, however, clarify that its holding did *not* concern claims against state actors for other forms of relief, namely, exemplary damages. *Vanderpool*, 1983 OK at ¶ 23 n.10, 672 P.2d at 1157 n.10 ("Enunciation of the foregoing rule is not to be construed as abrogating or modifying our holding in [1976 case] pertaining to the non-liability of governmental sub-divisions including municipalities for exemplary damages, and the reasons therein set forth for denying such a recovery.").

of sovereign immunity: to protect taxpayer dollars from being depleted paying damages awards to tort claimants. *See Nguyen*, 1990 OK at ¶ 3, 788 P.2d at 964 (enactment of the GTCA "ma[de] major policy statements" with respect to the "cloak protecting public funds from tort claim liability"); *Feenstra*, 2019 WL 6040401, at *12 (legislature's decision to allow tort suits against state actors "is, after all, a decision as to whether the People's tax dollars should be used to *pay money damages* to those who successfully sue the state") (emphasis added); *see also supra* n.15. No such concern is present in an action that, like this one, does look to recover money damages from a public entity.

B. Plaintiffs' Claims Are Not "Torts" Under the GTCA

In addition to only governing claims for money damages, the GTCA further only applies to claims brought by "an injured plaintiff to recover against a governmental entity in tort." *Parker v. City of Tulsa*, No. 16-CV-0134-CVE-TLW, 2016 WL 4734655, at *3 (N.D. Okla. Sept. 9, 2016); *see also* 51 O.S. § 153. It has *no* application to claims that, like Plaintiff's, do *not* sound in tort.

The GTCA specifically defines "tort" as "a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee [thereof] acting within the scope of employment." 51 O.S. § 152(14). The City and TMAPC argue that this definition encompasses *any* claim other than a claim for breach of contract. City Mot. 4; TMAPC Mot. 5. That plainly is not so.

The City and TMAPC incorrectly focus on just the first part of the statutory definition of "tort"—*i.e.*, that a tort is a claim based on a violation of some non-contractual legal duty—to the exclusion of the rest of the definition, which, namely, requires the legal violation to

have "*result[ed] in a loss*" to the claimant. 51 O.S. § 152(14) (emphasis added). As set forth in Section II(A)(1), *supra*, the claims asserted in the Petition seek only prospective injunctive relief, and are not alleged to have resulted in, and do not seek compensation for, any monetary "loss" within the meaning of the Act.

Among other things, Defendants contend that the statutory definition of "tort," as amended by the Legislature in 2014—at which time the Legislature clarified that "torts" encompassed violations of legal duties imposed by "statute" or by "the Constitution of the State of Oklahoma," not just those imposed "by general law, or otherwise," *see Barrios*, 2018 OK at ¶ 10, 432 P.3d at 238—supports their view that "tort" reaches all claims except claims for breach-of-contract. City Mot. 5; TMAPC Mot. 5-6. That is an incorrect reading of the statute, and one that finds no support in the pertinent case law.

The Oklahoma Supreme Court directly addressed this language in *Barrios* and did not come close to finding that any non-contract-based wrong fell within the scope of the post-2014 GTCA. Rather, the Court found only that the Legislature had amended the definition of "tort" in a manner that plainly captured constitutional *torts*. *Barrios*, 2018 OK at ¶¶ 7-10, 432 P.3d at 237-38. The Court did not hold, as the City and TMAPC would have it, that the amendment captured any constitutional *wrong*. That is because in *Barrios*—unlike here—the plaintiffs sought recovery of "money damages" as compensation for prior wrongs committed against them, a fact that the Court emphasized a number of times throughout its opinion. *See, e.g.*, *id.* at ¶¶ 9-14, 432 P.3d at 238-39.

Relatedly, the City and TMAPC argue that because Plaintiffs' Petition "requests the Court to issue an Order under 50 O.S. § 1 to abate a public nuisance," it "involves a duty imposed by statute" and thereby qualifies as asserting a "tort" under the GTCA. City Mot. 5;

TMAPC Mot. 5. Here again, the City and TMAPC are asking the Court to read out the important qualifier that, to constitute a "tort," there must be claimed "losses" resulting from the wrong(s) at issue. *See* 51 O.S. § 152(14).

Contrary to Defendants' assertions, the fact that a case involves the violation of a duty imposed by statute does *not* necessarily mean it involves a tort for purposes of the GTCA. *See Sweeten v. Lawton*, 2017 OK CIV APP 51, ¶¶ 24-27, 404 P.3d 885, 892-93 (claim for statutory replevin is not a tort under the GTCA); *Barton v. City of Midwest City*, 2011 OK CIV APP 71, ¶¶ 18-25, 257 P.3d 422, 426 (statutory proceeding for inverse condemnation not subject to the GTCA); *Sholer*, 1995 OK at ¶¶ 15, 17, 945 P.2d at 473 (GTCA was "no bar to [plaintiffs'] action" that "s[ought] refunds of fees collected [from them] in excess of those allowed by [licensing] statute"); *Helm v. Bd. of Cnty. Comm'rs*, 2019 OK CIV APP 68, ¶ 11, 453 P.3d 525, 525 (action against county for failure to comply with statutory obligation to pay county commissioner backpay was not a GTCA "tort").

Particularly illustrative is the recent decision from the appellate division in *Helm*. There, the Court found that the plaintiff's non-compliance with the GTCA's notice provisions was not a proper basis for dismissal, as the plaintiff's claim—which sought an injunction compelling the defendant-county to pay him earned salary and benefits, as it was statutorily required to do—did not meet the GTCA' s definition of "tort." *Id.* at ¶ 4, 453 P.3d at 525. As that Court held, while the statute at issue imposed a duty on the county to pay backpay under certain circumstances, it did not give private parties, like the plaintiff, the right to "maintain an action to recover damages" for such violations. *Id.* at ¶¶ 7, 10, 453 P.3d at 525. Simply put, "liability created by statute[] ... is not necessarily a tort" as defined by the GTCA. *Id.* at ¶ 5, 453 P.3d at 525.

Also incorrect is Defendants' contention that public nuisance qualifies as a tort under the GTCA. Both the City and TMAPC assert that "Oklahoma law is clear that nuisance is a tort for which the provisions of the GTCA are applicable," for which they both cite only *State ex rel. Coffey v. District Court of Oklahoma County*, 1976 OK 29, 547 P.2d 947. City Mot. 5; TMAPC Mot. 5. *Coffey*, however, does not even remotely support their position—let alone make it "clear" that that position is accepted as a matter of Oklahoma law:

First, the *Coffey* decision *predated* the GTCA,'s enactment, so plainly had *nothing* to do with whether a public nuisance claim could be considered a "tort" for purposes of the Act.

Second, the Court did not even hold more generally that public nuisance claims are considered tort claims in Oklahoma; it merely acknowledged that "it *ha[d]* been held"—by a *Kansas* state court—"that a nuisance is a tort, or at least involve[s] tortious conduct." *Coffey*, 1976 OK at ¶ 16, 547 P.2d at 950 (citing *Woods v. Kan. Tpk. Auth.*, 472 P.2d 219 (Kan. 1970)).

Third, Defendants' reliance on *Coffey* is further misguided given that the underlying Kansas case, *Woods*, did not truly involve a nuisance claim, but rather was a personal injury action whereby the plaintiff sought to recover damages for injuries sustained in a car accident caused by the state's negligence in leaving loose gravel on the turnpike where the plaintiff was driving. *Woods*, 472 P.2d at 220-21. In other words, *Woods* clearly involved a tort claim that was mistakenly referred to at times as a nuisance claim.

Significantly, *Coffey* is the *only* case that the City and TMAPC invoke to support their claim that "Oklahoma law is clear that nuisance is a tort" under the GTCA. In other words, they do not identify a single case that actually determined a public nuisance claim was subject to the Act. Further, whereas Plaintiffs' public nuisance claim is brought pursuant to

Title 50 of the Oklahoma Statutes—*i.e.*, the title on "Nuisances," 50 O.S. §§ 1 *et seq.*—there is an entirely separate title, Title 76, governing "Torts," *see* 76 O.S. §§ 1 *et seq*.

More fundamentally, Plaintiffs' public nuisance claim is not a tort because, as set forth in Section II(A)(1), *supra*, in bringing the claim Plaintiffs seek only abatement of an ongoing public nuisance, as opposed to compensatory damages. Defendants' stubborn insistence that the public nuisance claim here falls under the GTCA can only be the result of their overlooking, or ignoring, the critical "resulting in loss" element in the statutory text.

In similar fashion, neither Defendant's motion to dismiss points to any law (Oklahoma or otherwise) to support their position that Plaintiffs' unjust enrichment claim is a "tort" governed by the GTCA. City Mot. 5; TMAPC Mot. 6.[18] That is because they cannot.

It is well-settled that unjust enrichment is not a tort, but rather "a *condition* which results from the failure of a party to make restitution in circumstances where not to do so is inequitable, *i.e.*, the party has money in its hands that, in equity and good conscience, it should not be allowed to retain." *Okla. Dep't of Sec.*, 2010 OK at ¶ 22, 231 P.3d at 658; *see also, e.g.*, *In re Amending & Revising Okla. Unif. Jury Instructions – Civ.*, No. 2009-41, 2009 OK 26, ¶ 8, 217 P.3d 620, 624 (Apr. 29, 2009) (claim for unjust enrichment sounds in "quasi-contract" and "is generally equitable" in nature).

Indeed, in the context of determining whether a claim fell under the GTCA, and therefore whether the plaintiffs were required to comply with its notice provisions, the Oklahoma Supreme Court has unequivocally stated that an unjust enrichment claim "lies not in the law of contract or tort but rather in the substantive law of restitution," *Sholer*, 1995 OK at ¶ 3, 945 P.2d at 479—and, therefore, can be brought against state actors notwithstanding

[18] Indeed, Defendants at the same time appear to concede that unjust enrichment is *not*, in fact, a tort. (*See supra* p. 22 (noting admissions of both the City and TMAPC that unjust enrichment claims sound in equity).)

the GTCA. *Id.* at ¶¶ 6-15, 945 P.2d at 472; *see also Stites v. DUIT Constr. Co.*, 1995 OK 69, ¶ 23, 903 P.2d 293, 299-300 & n.23 (characterizing "restitution" as an "equitable" remedy that only restores the plaintiff to his rightful position and does not "*create, enlarge or reduce* the defendant's liability" or "effect ... the terms of [an] underlying judgment").

For all the foregoing reasons, Plaintiffs have not asserted claims within the GTCA's definition of "tort." For that reason, as well, Plaintiffs' claims are not subject to the Act, and they had no obligation to follow its procedural requirements before initiating the instant suit.

* * *

In sum, the claims Plaintiffs assert here (1) seek only equitable—and no monetary—relief; and (2) are not "torts" covered by the GTCA. Accordingly, the GTCA is wholly inapplicable in this case, and any and all arguments pressed by the City and TMAPC based on the Act, including those addressed above and any and all others, should be rejected. The GTCA simply is irrelevant here, and thus cannot constitute a basis for dismissal.

III. The Petition Adequately Alleges a Public Nuisance Claim Against TMAPC

TMAPC claims that the Petition fails to state a cognizable public nuisance claim against TMAPC. TMAPC Mot. 8. The City does not make any such argument, perhaps because on September 2, 2020, the City initiated its own public nuisance suit against 30+ pharmaceutical industry defendants alleging that they had caused a public nuisance in the form of the opioid crisis and stated that "Tulsa brings this action to protect the health, safety, and welfare of all of its residents." *Cephalon* Pet. ¶ 7. It would be inconsistent for the City to now take an unduly restrictive view of public nuisance law.

TMAPC argues that it cannot be the cause of the public nuisance at issue because it did not exist at the time the Massacre. TMAPC Mot. 8. That is no basis for dismissal. First, the Petition specifically alleges that TMAPC was created in 1957 and that it is a "a successor

organization to the City and Tulsa County." Pet. ¶ 20. Oklahoma law is clear that, upon taking control of or neglecting an ongoing nuisance, a party may incur liability by failing to abate it. *See* 50 O.S. § 5 ("Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by the former ... is liable therefor in the same manner as the one who first created it."); *see also Union Tex. Petroleum Corp. v. Jackson*, 1995 OK CIV APP 63, ¶¶ 24-26, 909 P.2d 131, 141 (holding public nuisance claim against successor-operator could be litigated if subsequent environmental study demonstrated successor-operator could have removed pollution by its predecessor).

Second, the Petition alleges that the public nuisance began in 1921 with the destruction of the Greenwood district, but has continued unabated since that time on account of the actions and neglect of the defendants. The Petition thoroughly describes the ongoing nuisance and alleges substantial conduct that took place after 1957. *See, e.g.*, Pet. ¶ 140 ("Throughout the 1950s, 1960s, and 1970s, [d]efendants unreasonably, unwarrantedly, and/or unlawfully implemented or promoted discriminatory policies of 'urban renewal' and urban planning initiatives without regard for the health and safety needs of the Greenwood and North Tulsa communities and Black Tulsans."); *id.* at ¶ 160 ("[defendants] continued to underserve the Greenwood and North Tulsa communities throughout the 1990s and 2000s"). Despite its protestations, TMAPC is plainly on notice of the claims against it, which is all that is required at this stage.

IV. The Petition Pleads a Viable Unjust Enrichment Claim

In the second of their two claims, Plaintiffs allege unjust enrichment against the City and TMAPC, among other defendants. In identical sections of their briefs, the City and TMAPC make what are effectively hand-waving arguments that state categorically, with very little argument, that the Petition fails to adequately allege this claim. City Mot. 10-12;

TMAPC Mot. 12-14. Not so. The Petition more than adequately puts Defendants on notice of the claim against them, which is all it is required to do at this stage.

"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. Oklahoma law recognizes unjust enrichment as a ground for recovery based on equitable considerations. *Id*. As detailed in the Petition, Defendants have been *profiting* off of the Massacre by promoting the events of the Massacre for their own economic gain, at Plaintiffs' expense. Pet. ¶¶ 177-84. The Petition alleges that Defendants have exploited—and continue to exploit—the historical significance of the tragic and inhumane attack, as well as the names and likeness of its victims, to promote tourism and economic development that in no way redresses the past atrocities committed by Defendants. *Id.* at ¶ 179.

For example, Defendants, who acquired most of the land that comprised the historic Greenwood community as a result of the Massacre and have engaged in continued acts of degradation of that community, are now building a "cultural tourism" district that includes the $30 million Greenwood Rising History Center. *Id.* at ¶ 182. The purpose, and indeed the effect, of this "cultural tourism" district and History Center is and will be to generate tourism revenue for Defendants to use for their own benefit and/or the benefit of White property owners in and around Greenwood. *Id.* The Black residents of Greenwood and North Tulsa, including the survivors and descendants of the Massacre, will, on the other hand, reap *no* direct benefit as a result of this exploitation of their history. Put simply, Defendants are capitalizing on the trauma and terror they have inflicted upon Black Tulsans for their own economic gain, and are depriving Plaintiffs of monies that, in equity, belong to Plaintiffs and

the Black 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.*, 2010 OK at ¶ 22, 231 P.3d at 658. 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).

Defendants do not actually address these elements in their motions to dismiss. Instead, they say that "[s]imply *being* in some way connected to a historical event does not provide a person with unlimited rights to seek compensation in any way related to that historical event." City Mot. 12; TMAPC Mot. 13 (emphasis added). Plaintiffs are not claiming to have "unlimited rights" to all compensation related to the Massacre—but they *are* the ones who were actually affected by the Massacre and, as a matter of equity, should share in the largesse that Defendants are amassing in connection with it. Indeed, in its opioid-related litigation against a number of pharmaceutical companies, the City has alleged, as unjust enrichment, that those companies "received a benefit in the form of billions of dollars in revenue from the sale of prescription opioids to treat chronic pain" and "retained that benefit at the expense of Tulsa, who has borne, and who continues to bear, the economic and social costs of [those companies'] scheme." *Cephalon* Pet. ¶¶ 236, 238. Apparently the City believes it should be afforded the opportunity to prove "social costs" as unjust enrichment in that case, but that Plaintiffs should have *no* like opportunity to prove that Defendants' profiting off of a Massacre that they themselves inflicted on Plaintiffs likewise constitutes unjust enrichment.

Tellingly, none of the cases Defendants cite in this respect are cases in which a court dismissed an unjust enrichment claim on a motion to dismiss, and they provide *no* basis for the Court to conclude that Plaintiffs cannot possibly prove a set of facts giving rise to liability that is consistent with the allegations in their Petition. For the same reason, Defendants' argument that Plaintiffs have an adequate remedy at law for "appropriation" does not justify dismissal at this stage. *See* City Mot. 12; TMAPC Mot. 14. 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 to be adjudicated at trial, not on a motion to dismiss.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the motions to dismiss of Defendants City and TMAPC be denied, allowing discovery to proceed and allowing the parties to build a 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.[19] Plaintiffs also request oral argument be heard on Defendants' motions.

[19] As set forth more fully in Plaintiffs' Opposition to the Motion to Dismiss of Defendant State of Oklahoma *ex rel.* Oklahoma Military Department, to the extent the Court grants any or all of the defendants' motions, it has a mandatory duty to grant Plaintiffs leave to amend the Petition if its defect(s) 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.").

Respectfully submitted,

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