Nos. 22-3750/3751/2753/3841/3843/3844

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: NATIONAL PRESCRIPTION OPIATE LITIGATION ---------- TRUMBULL COUNTY, OH, et al Plaintiffs – Appellants, v. PURDUE PHARMA L.P., et al, Defendants and WALGREENS BOOTS ALLIANCE, INC., et al. (22-3750/3841) CVS PHARMACY, INC., et al (22-3751/3843) WALMART, INC. (22-3753/3844) Defendants-Appellants.	On Appeal from the Decision of the United States District Court for the Northern District of Ohio Originating Case Nos. 1:17-md-02804 1:18-op-45079 1:18-op-45032

BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION AND RETAIL LITIGATION CENTER INC.

James A. Wilson (0030704)
Danielle S. Rice (0093757)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay Street
Columbus, Ohio 43215
(614) 464-5606 (T)

Counsel for Amici Curiae

RULE 29(e) STATEMENT

Amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici or its members or its counsel made a monetary contribution to the brief's preparation or submission.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-3750, et al. Case Name: In re: Nat'l Prescription Opiate Litigation

Name of counsel: James A. Wilson and Danielle S. Rice

Pursuant to 6th Cir. R. 26.1, National Retail Federation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 8, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ James A. Wilson
Vorys, Sater, Seymour and Pease LLP
jawilson@vorys.com

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-3750, et al. Case Name: In re: Nat'l Prescription Opiate Litigation

Name of counsel: James A. Wilson and Danielle S. Rice

Pursuant to 6th Cir. R. 26.1, Retail Litigation Center Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 8, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ James A. Wilson
Vorys, Sater, Seymour and Pease LLP
jawilson@vorys.com

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Retail Federation ("NRF") is the world's largest retail trade association. It represents discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail encompasses the nation's largest private sector employer, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to annual gross domestic product. The NRF periodically submits amicus curiae briefs in cases raising significant legal issues for the retail community.

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 200 judicial proceedings of importance to retailers.

This case is important to amici's members because the trial court improperly placed the burden of addressing a public health crisis on a handful of retail pharmacies in a grossly disproportionate and arbitrary manner. Here, Plaintiffs inexplicably and selectively sued just five (out of the many) pharmacies that dispensed FDA-approved prescription opioid medications (pursuant to prescriptions) in two counties, and a jury determined the three non-settling pharmacies are liable to those two counties for the opioid crisis under a public nuisance theory. The NRF and RLC disagree that the theory of public nuisance should be applied in this context at all. *See State ex rel. Hunter v. Johnson & Johnson*, 2021 OK 54, ¶ 35, 499 P.3d 719, 730 (following the "clear national trend to limit public nuisance to land or property use" and rejecting "products-based public nuisance claims"); *see also In re Lead Paint Litig.*, 191 N.J. 405, 421, 924 A.2d 484, 494 (2007) (rejecting products-based public nuisance claims and holding "were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance"). Indeed, its use in this case and others like it demonstrates the weakness of allowing plaintiffs to use a theory of liability where they can avoid having to demonstrate causation.

Moreover, amici: (1) disagree that dispensing lawful, FDA-approved prescription opioid medications pursuant to facially valid prescriptions can possibly provide a basis for liability as a public nuisance or otherwise; (2) disagree that plaintiffs presented any properly admissible evidence that the defendant pharmacies dispensed prescription opioids that were not prescribed for legitimate medical purposes; and (3) further disagree that the scope of abatement awarded below (as to the alleged opioid crisis writ large) is reasonably related to the nuisance found by the jury (as to the alleged oversupply and diversion of prescription opioid medications dispensed by the defendant pharmacies only).

That said, this brief focuses only on the trial court's improper approach to apportioning the costs of abating the alleged nuisance after liability was found. Here, the trial court failed to consider all responsible actors, which include not only the doctors who wrote the prescriptions (some of whom have been sent to prison for their actions) that the pharmacies allegedly should not have filled, but also the state and federal government agencies charged with approving medications, regulating the volume of such medications available to the public, and policing alleged oversupply and diversion of prescription opioid medications (among many other responsible actors) in determining the amount for which the pharmacy industry should be liable to abate the opioid crisis. Moreover, the court held that three pharmacy retailers—who, even taken together, filled only a portion of prescriptions

for FDA-approved opioid medications in the affected counties—were jointly and severally liable to pay that ***entire*** industry amount.

If a retailer is found partially liable for contributing to a nuisance by selling a product, it should only have the responsibility to fund abatement efforts in proportion to the volume of product it improperly sold. Indeed, in a case like this, where many pharmacies dispensed the same prescription opioid medications in the relevant counties—setting aside that the plaintiffs below failed to demonstrate that any prescription opioid dispensed by a defendant pharmacy was in fact improperly dispensed, much less actually diverted—a court should apportion abatement costs by the volume of prescription opioid medications each pharmacy dispensed that should not have been dispensed.

Absurd and highly inequitable results follow otherwise. Indeed, if the apportionment methodology reflected in the Abatement Order is permissible, the costs associated with what is alleged to be a widespread public health crisis resulting from a confluence of many factors (including the conduct of many different actors), will be dictated not by reason or equity but instead by the whim of political actors. This permits the imposition of crushing liability on *any* actor, regardless of market share or actual culpability. (*See* R. 4611, Abatement Order ("Order") at 54, n.63 (affirming idea that extremely small market share of 0.03% was not so de minimis as to preclude a finding of liability).

If Plaintiffs had instead brought this case against a small local pharmacy that filled a relatively small number of opioid prescriptions in Lake and Trumbull Counties, and even assuming all of such prescriptions were improperly dispensed, it would be absurd to hold that single mom-and-pop store liable to pay $600 million on behalf of all pharmacies (defendants or otherwise) to abate the public nuisance. It is no less absurd to hold these current defendants liable for the entire pharmacy industry.

ARGUMENT

For purposes of this case, two Ohio counties—Lake County and Trumbull County—brought public nuisance claims against three pharmacies: CVS, Walmart, and Walgreens (collectively, the "Pharmacy Defendants").[1] (R. 4611, Order at 3.) The case was bifurcated, with the question of liability tried to a jury in "Phase I." (*Id.*) After the jury found for Plaintiffs,[2] the case entered Phase II, where the scope of the abatement remedy was tried before the trial court. (*Id.*)

On August 17, 2022, the trial court issued its Abatement Order. (*Id.*) As described by the court, its task was to determine either (1) if abatement was possible and whether the costs of abatement could be apportioned among the defendants on some logical or reasonable basis or (2) if the defendants were jointly and severally liable for those costs. (*Id.* at 8.) Ultimately, the trial court accepted, with some limited exceptions, the Plaintiffs' abatement plan. The trial court made reductions to Plaintiffs' plan after finding that certain programs and interventions were not reasonably calculated to abate the issues. The court also reduced the total abatement amount to account for opioid addiction and abuse that would have occurred even in the absence of the Pharmacy Defendants' alleged conduct.

[1] Plaintiffs initially brought suit against two other pharmacy defendants that ultimately settled.

[2] The jury found the public nuisance to consist of oversupplying the communities with prescription opioids.

The trial court did recognize that some apportionment of abatement costs was proper and decided that each of the opioid manufacturer, distributor, and pharmacy sectors should be responsible for 1/3 of the total abatement cost. The trial court, however, failed to apportion any liability to many key players, including the "pill mill" doctors and other prescribers responsible for issuing the opioid prescriptions (some of whom have already been adjudged to bear liability), or to any of the many other persons responsible for the approval, regulation, sale and/or distribution of prescription opioid medications. Thus, the trial court found that the pharmacy sector, as a whole, was responsible for 1/3 of the total abatement cost[3]—$650.6 million over fifteen years—and held the three Pharmacy Defendants jointly and severally liable for the entire $650.6 million.

In so holding, the trial court compounded its original errors in applying public nuisance theory in the first place and bypassing the need to demonstrate causation

[3] As discussed below, apportioning 1/3 of the abatement award only to manufacturers, distributors, and pharmacies was itself error, as it failed to consider numerous other allegedly responsible actors, such as "pill mill" doctors and other prescribing physicians, street drug dealers re-selling stolen or otherwise illegally obtained prescription opioids, or other individuals engaged in illegal activity such as conspiring with "pill mill" doctors or fabricating and/or deceptively presenting fraudulent prescriptions, or otherwise stealing and selling/using legitimately dispensed prescription opioids. (*See, e.g.*, R. 4611, Order at 53 in (recognizing the role of "black market" drug dealers and individuals stealing prescription opioids from "the medicine cabinets of friends and family").

by: (1) failing to follow the guiding principle that joint and several liability is inappropriate where apportionment is possible; (2) rejecting a reasonable basis for apportionment among the Pharmacy Defendants; and (3) unjustly finding defendants with marginal share jointly and severally liable for an abatement award.

A. Joint and Several Liability is Not Appropriate Where There is a Reasonable Means of Apportionment.

This appeal should be governed by the general principle that joint and several liability is inappropriate where there is some reasonable means to apportion damages.

Ohio law follows the Restatement of Torts regarding apportioning damages: "tort-feasors generally will not be held jointly and severally liable where their independent, concurring acts have caused distinct and separate injuries to the plaintiff, ***or where some reasonable means of apportioning the damages is evident***.'" *Pang v. Minch*, 53 Ohio St. 3d 186, 195-96, 559 N.E.2d 1313 (1990) (emphasis added) (quoting *Ryan v. Mackolin*, 14 Ohio St. 213, 218-219, 43 O.O. 2d at 329, 237 N.E. 2d at 381 (1968)). The Sixth Circuit has held the same. *See United States v. Twp. of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998) ("The proper standards for divisibility come from the Restatement (Second) of Torts[.]").[4]

[4] Most, if not all, of the cases cited in this brief (and the trial court's order) involve the apportionment of damages, as opposed to an abatement award. The cases regarding damages are instructive, not only because the trial court's "abatement

This Court has looked to the Restatement (Second) of Torts, § 433A, to hold that "damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a ***reasonable basis for determining the contribution of each cause to a single harm***." *Id.* at 318 (emphasis added). From a practical (and fairness) perspective, this makes sense: "When the apportionment is made, each person contributing to the nuisance is subject to liability only for his own contribution. He is not liable for that of others[.]" Restatement (Second) of Torts, § 4840E, cmt b.

Although the trial court recognized these guiding principles, it erred in applying them. In determining the appropriate allocation of the abatement award for the Pharmacy Defendants, the court applied a burden-shifting framework under *Pang*. 53 Ohio St. 3d 197. *Pang* held that "where a plaintiff suffers a single injury as a result of the tortious acts of multiple defendants, the burden of proof is upon the plaintiff to demonstrate that the conduct of each defendant was a substantial factor in producing the harm." *Id.* If that burden is met, "the burden of persuasion shifts to the defendants to demonstrate that the harm produced by their separate tortious acts is capable of apportionment." The trial court erred by rejecting the Pharmacy Defendants' reasonable basis to approximate their contribution to the harm.

B. A Reasonable Basis Existed for Apportioning the Abatement Award.

Here, the Pharmacy Defendants demonstrated a reasonable basis for apportionment and the trial court erred by determining otherwise.[5] As the trial court noted, the Pharmacy Defendants presented expert testimony that "their responsibility for the harm attributable to improper dispensing [could] be [] apportioned according to their respective market share of prescription opioids dispensed in the counties at issue." (R. 4611, Order at 59.) The Pharmacy Defendants' expert's testimony added more granular detail in the form of market share calculations for the total share of MMEs (morphine milligrams equivalent) of alleged red-flagged opioid prescriptions dispensed.[6] (*Id.* at 60, n.75; *see also* R. 4593-3 at 591800.) Ultimately, the expert provided testimony related to the three Pharmacy Defendants, as well as two settling Pharmacy Defendants (Rite Aid and Giant Eagle), and a category labeled "non-defendants," which encompassed all other prescribing pharmacies in the relevant counties. (*Id.* at 59-60.)

[5] Amici submit that the best and fairest apportionment method would include an analysis of each participant's culpability, i.e., its market share of improperly dispensed opioid prescriptions (rather than just market share of *all* opioid prescriptions), which would be in accord with applicable laws and regulations. However, in the alternative and at a minimum, market share without adjusting for culpability is more fair than the joint and several approach chosen by the trial court. The remainder of this brief focuses on the approach chosen by the trial court.

[6] According to the Plaintiffs below, a red-flagged prescription is one for which—in the opinion of Plaintiffs' expert—there was inadequate documentation that the pharmacist resolved red flags as to the validity of the prescription before dispensing. *See* R. 4295 at 572078.

1. *It was reasonable to apportion damages without trying to a verdict the exact liability of all non-defendant pharmacies.*

Although "there is no consensus for "what constitutes a 'reasonable basis,'" the Restatement provides sound guidance. *Brighton*, 153 F.3d at 318.

The comments to the Restatement recognize that there are some types of harm, "which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible." Restatement (Second) of Torts, § 433A, cmt d. One example provided is when the cattle of two owners trespass upon a plaintiff's land and destroy his crop. *Id.* The Restatement suggests that the harm may be apportioned among the owners of the cattle, "on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number." *Id.* Similarly, in another example provided by the Restatement, apportionment is possible when factories pollute a stream, as the harm can be "apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream." *Id.* Put simply, the law does not require perfect divisibility when determining if apportionment is appropriate—reasonable assumptions can be made.

Here, similar to the examples provided in the Restatement, a reasonable basis exists for apportioning the abatement award based on the volume of prescription

opioid medications dispensed by each Pharmacy Defendant.[7] This concept of apportionment—based on a defendant's alleged "contribution" to the harm—is consistent with both the Restatement, and this Court's precedent. As the Sixth Circuit explained in *Brighton*, "[d]ivisibility seeks to apportion liability based on relative contribution to harm, if such is reasonably ascertainable." 153 F.3d at 320. Particularly given that Plaintiffs below relied exclusively (and improperly) on what they called "aggregate proof"—*i.e.*, "proof" without any evidence that a particular prescription was in fact improperly dispensed, was in fact diverted, or did in fact cause any harm—apportionment could have and should have been made on a similar basis (though, again, the finding of liability was erroneous).

The trial court rejected this idea, though, stating that looking at market share "does not provide a reasonable basis for the Court to approximate the relative responsibility of the settling pharmacies and non-defendant pharmacies." (R. 4611, Order at 60.) Specifically, the trial court found that the number of "red-flagged opioid prescriptions dispensed" by each pharmacy was not a basis for apportionment because liability is premised on a pharmacy failing to investigate and resolve these

[7] As noted in Footnote 4, *supra*, the optimum apportionment method would include an analysis of each participant's culpability, *i.e.*, its market share of improperly dispensed opioid prescriptions (rather than just market share of all opioid prescriptions), which would be in accord with applicable law and regulations and the Restatement's "contribution to the harm" analysis.

red flags, and no such adjudication was made on this point with the settling and non-defendant pharmacies. (*Id.*) But, apportionment does not require adjudication for non-defendants, as evidenced by the trial court's decision to "assign" 2/3 of the abatement award to distributors and manufacturers, despite any finding on their culpability.[8] The trial court failed to explain (as it is inexplicable) why the abatement costs could not be apportioned to ***other*** alleged absent non-pharmacy participants as well—such as doctors and governmental agencies.

Furthermore, apportionment does not require absolute certainty—instead, defendants need only provide a "rough practical apportionment" based on the parties' relative contributions. W. Page Keeton et al., Prosser & Keeton on Torts § 52, at 345 (5th ed. 1984); *Bennis v. Gable*, 823 F.2d 723, 734 n.14 (3d Cir. 1987) (same); *Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 136 (4th Cir. 1987) (noting that rough practical apportionment is appropriate 'even where the harm is not divisible, but there is a reasonable and rational basis [for making a] fair apportionment among the causes responsible" (internal quotation marks and citations omitted)); *Sauer v. Burlington N. R.R.*, 106 F.3d 1490, 1494 (10th Cir. 1996) (noting that "apportionment can be proved without expert testimony" and "the

[8] This is also evidenced by the trial court's commentary on the number of opioid pills dispensed by the Pharmacy Defendants, without any regard to a prescription's actual legitimacy. (R. 4611, Order at 54-55, n.64.)

evidence need only be sufficient to permit a rough practical apportionment"). And, that is exactly what the Pharmacy Defendants did. While the volume of prescription opioid medications dispensed by each pharmacy in the Plaintiff Counties could have been a reasonable basis for apportionment, the Pharmacy Defendants took this one step further and provided market data for so-called "red-flag" prescriptions.

It cannot be the case that the Pharmacy Defendants, in advocating for apportionment, were required to try to prove the ***specific and exact*** liability of every pharmacy that was not a defendant in this action.[9] That is not even the standard to which the Pharmacy Defendants, themselves, were held—again, there was no evidence of any particular prescription from any particular Pharmacy Defendant having been improperly dispensed, having been diverted, or having caused any specific harm. If that were the law, it would pose a disproportionate hardship on every defendant defending a nuisance action. Indeed, the Restatement provides that in cases where there is "so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, [] the application of the rule may cause disproportionate hardship to defendants." *See* Restatement (Second) of Torts, § 433B.

[9] Nonetheless, amici note that the Pharmacy Defendants' assertion that they presented "extensive undisputed evidence that the other pharmacies in the pharmacy sector contributed to the nuisance." (Consolidated Br. for Appellants at 112-14.)

The Pharmacy Defendants met their burden of showing that a reasonable means of apportionment existed by providing expert testimony on market share data, and then exceeded that burden by providing market share data focused only on the alleged "red-flagged" prescriptions on which the Plaintiffs below relied so heavily. To require more would impose an undue hardship on defendants in these types of cases, such that joint and several liability would be improper.

2. *The Court was able to roughly apportion damages among industries. Its refusal to do so among Defendant Pharmacies is inconsistent with its own analysis.*

Perhaps the best evidence that a reasonable means of apportioning the abatement award existed is that the trial court *did* roughly apportion the abatement costs as to some (but far from all) of the participants in the prescription opioid medication supply chain and regulatory scheme—entities like manufacturers, distributors, and pharmacies, as well as prescribers (who wrote the prescriptions that allegedly should not have been filled), state and federal regulators (who approve the use of prescription opioid medications and set quotas for their manufacture and supply), law enforcement, and more:

> The Court further concludes it is equitable and fair to allocate one-third of the recoverable abatement costs to the Pharmacy Defendants for the harm caused by improper dispensing conduct in the Counties. This allocation takes into account the fact that conduct of all three categories of actors along the pharmaceutical supply chain—that is, manufacturers, distributors, and dispensers of prescription opioids—contributed to the nuisance in this case, and ***it would be inequitable to hold the Pharmacy Defendants liable for more than one-third share***.

(R. 4611, Order at 4 (emphasis added).)

It was undisputed by all parties—as well as Plaintiffs' experts—"that the oversupply of prescription opioids was not caused solely by the Pharmacies; rather, the improper conduct of others, chiefly including Manufacturers and Distributors, also contributed to creating the nuisance." (*Id.* at 56.) As such, the Court found apportionment of the abatement award was proper among the different ***types*** of defendants—essentially assigning 1/3 of the responsibility to each category of defendant. But for reasons that were never explained, this same apportionment analysis was not done as between the Pharmacy Defendants **or** between other alleged actors—most notably, "pill mill" and other prescribing physicians and government actors—who were inexplicably not included in the apportionment at all.

It is particularly telling that the Pharmacy Defendants sought apportionment based on data and market share, yet the trial court rejected this method by saying "virtually no evidence has been presented with respect to the anti-diversion efforts of any non-defendant pharmacies." (R. 4611, Order at 60.) In other words, the trial court found that because the liability of other non-defendant pharmacies was not before the jury, apportionment was not possible. And the trial court made the same finding as it related to other responsible actors, despite opining that "from the outset, it has been readily apparent that the opioid crisis was caused by a confluence of failures by virtually everyone." (*Id.* at 59, n.73.) Specifically, the court declined for

purposes of apportionment to "assign responsibility to other categories of actors, including government regulators, prescribing doctors, and individuals who diverted prescription opioids after the drugs were dispensed," holding that the evidentiary record did "not provide a reliable basis for the Court to allocate responsibility to any other categories of actors, or to weigh the responsibility of one sector in the pharmaceutical chain more heavily than another." (*Id.*)

And yet, the trial court recognized it could roughly assign 1/3 of the responsibility to manufacturers, 1/3 of the responsibility to distributors, and 1/3 of the responsibility to pharmacies. The court's failure to apply that same rough apportionment to the Pharmacy Defendants is an arbitrary distinction that constitutes error.

C. The Trial Court's Failure to Apportion Damages Leads to Unfair Results.

1. The joint and several liability award is unfair and unjust to retailers.

According to the defense expert, the three Pharmacy Defendants collectively distributed less than 34% percent of all dispensed opioids in Trumbull County, and 50.7% in Lake County.[10] (R. 4593-3 at 591800, R. 4593-4 at 591801). The trial court never rejected that expert opinion but instead, as explained above, declined to "further apportion Defendants' responsibility on the basis of market share" and held

[10] Although there are many inherent problems in plaintiffs' definition of "red flagged opioid prescriptions," the Pharmacy Defendants had an even smaller market share when looking at that category.

the three Pharmacy Defendants "jointly and severally responsible ***for the entire portion of abatement costs allocated to the pharmacy sector.***" (R. 4611, Order at 61-62 (emphasis added).)

In so doing, the trial court stated that focusing on market share for the Pharmacy Defendants omits the relevance of allegedly improper dispensing conduct. (*Id.* at 60.) The trial court explained:

> [F]or liability to attach, a particular pharmacy must have failed to investigate and resolve red flags before dispensing the medication. Here, the jury found the improper dispensing conduct of each of the three Pharmacy Defendants, evidenced by their systemic failures to investigate and resolve red-flag prescriptions, was a substantial factor in creating the nuisance caused by oversupply and diversion of prescription opioids. No such adjudication has been made with regard to the settling pharmacy defendants, and virtually no evidence has been presented with respect to the anti-diversion efforts of any non-defendant pharmacies.

(*Id.*) As noted previously, Amici disagree that dispensing lawful, FDA-approved prescription opioid medications pursuant to facially valid prescriptions can support liability, and disagree that the scope of abatement awarded below is reasonably related to the nuisance found by the jury. Regardless, though, as explained above, apportionment ***does not*** require adjudication for non-defendants. And the trial court's decision to ignore market share of the Pharmacy Defendants because it did not adjudicate ***other*** actor's culpability, was error. Ultimately, market share provides a reasonable basis for apportionment. The trial court's failure to consider

this was fundamentally unfair and, from a practical perspective, creates enormous and insurmountable problems for retailers in the future.

This is illustrated by the logic of the Abatement Order itself. In the Order, the trial court reaffirmed that an idea of an "extremely small market share of 0.03% was not so de minimis" as to preclude a finding of liability. (R. 4611, Order at 54, n.63.) Under the trial court's reasoning, if a jury found that a pharmacy with 0.03% of market share had engaged in improper dispensing conduct and "substantially" contributed to the public nuisance, it would be liable (under joint and several liability) for the entirety of the $600+ million dollar abatement award, without any regard to its market share.[11] This may not be what the trial court intended, but there are no limiting principles in its opinion such that this situation would be precluded from the trial court's holding. It goes without saying that small retailers would never be able to bear this kind of risk, and it is inequitable to impose that type of grossly disproportionate liability on any business.

[11] This again underscores why the public nuisance theory should not apply to a case like this, where retailers have no idea what type of nuisance liability they may ultimately face. *See, e.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 2021 OK 54, ¶ 37, 499 P.3d 719, 731 (holding that without limitations on public nuisance liability, "businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products, i.e., will a sugar manufacturer or the fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution").

2. The trial court tried to evade this inherent unfairness by confusing liability concepts with apportionment considerations.

The trial court recognized this inequity, but simply brushed it aside, stating: "[t]he fact that an individual Defendant may have dispensed a relatively small percentage of total prescription opioids does not show the impact of its misconduct was insubstantial." (R. 4611, Order at 54.) This misses the point. The question of whether any defendant's conduct was substantial goes to whether that defendant can be found to hold any liability for the alleged nuisance.[12] *Pang*, 53 Ohio St. 3d at 197. It does not answer the question of whether it is appropriate for that single defendant to be held liable for the entire abatement award. The trial court's awareness that an individual defendant may have "dispensed a relatively small percentage of total prescription opioids" confirms both that (1) such defendant cannot reasonably be held responsible for the entire alleged nuisance, and (2) a reasonable basis for apportioning damages based on market share exists. The trial court's conflation of the standard for liability ("substantial contributing factor") and the standard for apportionment (a reasonable means of apportioning the damages)

[12] As additional support for its decision, the trial court cited cases in which liability was found despite defendants possessing a small market share. (R. 4611, Order at 54, n.63.) Again, though, liability and apportionment are distinct concepts, and the trial court erred by conflating the two.

was not a proper basis for holding the Pharmacy Defendants jointly and severally liable.

CONCLUSION

For the reasons explained above, the theory of public nuisance should not have been applied in this context. Having wrongfully applied it, though, the trial court also misapplied the law in holding the Pharmacy Defendants jointly and severally liable.

Respectfully Submitted,

/s/ James A. Wilson
James A. Wilson (0030704)
Danielle S. Rice (0093757)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay Street
Columbus, Ohio 43215
614.464.5606 (T)
614.719.5039 (F)
jawilson@vorys.com
dsrice@vorys.com

Counsel for all Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 6 Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) because this brief contains 4779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

/s/ Danielle S. Rice
Danielle S. Rice (0093757)

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served electronically through this Court's CM/ECF system upon all parties and/or counsel of record on this 8th day of December 2022. Notice of this filing is sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Danielle S. Rice
Danielle S. Rice (0093757)