IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

A.D.A., as next friend of L.R.A.,
a minor child under the age of 18
Petitioner,
v.
Johnson & Johnson, et al.,
Respondents.

Docket No. 23-ICA-275

A.N.C., as next friend of J.J.S.,
a minor child under the age of 18,
Petitioner,
v.
Johnson & Johnson, et al.,
Respondents.

Docket No. 23-ICA-276

Trey Sparks,
Petitioner,
v.
Johnson & Johnson, et al.,
Respondents.

Docket No. 23-ICA-307

BRIEF OF RESPONDENTS MCKESSON CORP., AMERISOURCEBERGEN CORP., AMERISOURCEBERGEN DRUG CORP., CARDINAL HEALTH INC., H. D. SMITH LLC, H. D. SMITH HOLDINGS LLC, H. D. SMITH HOLDING CO., ANDA INC., JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC., NORAMCO, TEVA PHARMACEUTICALS USA, INC., ALLERGAN USA, INC., ALLERGAN SALES, LLC, ALLERGAN FINANCE, LLC, ABBVIE INC.

Jeffrey M. Wakefield (WVSB #3894)
Amy Rothman Malone (WVSB #10266)
FLAHERTY SENSABAUGH BONASSO PLLC
200 Capitol Street
Charleston, WV 25301
(304) 345-0200
jwakefield@flahertylegal.com

Timothy C. Hester (*pro hac vice*)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
thester@cov.com

Counsel for McKesson Corporation

Additional Counsel Listed on Next Page

Gretchen M. Callas (WVSB #7136)
Candice M. Harlow (WVSB #12496)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000
gcallas@jacksonkelly.com
charlow@jacksonkelly.com

Robert A. Nicholas (admitted *pro hac vice*)
Joseph J. Mahady (admitted *pro hac vice*)
Anne R. Bohnet (admitted *pro hac vice)*
REED SMITH LLP
1717 Arch Street, Suite 3100
Philadelphia, PA 19130
(215) 851-8100
rnicholas@reedsmith.com
jmahady@reedsmith.com
abohnet@reedsmith.com

Kim M. Watterson (admitted *pro hac vice*)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
kwatterson@reedsmith.com

Counsel for AmerisourceBergen Drug Corp. and AmerisourceBergen Corporation (n/k/a Cencora, Inc.)

Todd A. Mount (WVSB #6939)
Shaffer & Shaffer, PLLC
330 State Street
Madison, WV 25130
(304) 369-0511
tmount@shafferlaw.net

Brian T. Himmel (admitted *pro hac vice*)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
bhimmel@reedsmith.com

Counsel for H. D. Smith LLC, H. D. Smith Holdings, LLC, and H. D. Smith Holding Company

Steven R. Ruby (WVSB No. 10752)
Raymond S. Franks II (WVSB No. 6523)
CAREY DOUGLAS KESSLER & RUBY PLLC
707 Virginia Street East, Suite 901
Charleston, WV 25301
Telephone: (304) 345-1234
sruby@cdkrlaw.com
rfranks@cdkrlaw.com

Jennifer G. Wicht (pro hac vice)
William J. Donnelly (pro hac vice)
Williams and Connolly LLP
690 Maine Avenue, SW
Washington, DC 20024
Telephone: (202) 434-5000
jwicht@wc.com
wdonnelly@wc.com

Counsel for Cardinal Health, Inc.

John H. Tinney, Jr., Esquire (WVSB# 6970)
Keith A. Jones, Of Counsel (WVSB# 1923)
HENDRICKSON & LONG, PLLC
214 Capitol Street
Charleston, WV 25339
Tel.: (304) 346-5500
jtinney@handl.com
kjones@handl.com

Lauren E. O'Donnell, Esquire *(pro hac vice)*
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
Phone: (215) 569-5735
lauren.odonnell@blankrome.com

Counsel for Anda, Inc.

Marc E. Williams (WVSB #4062)
Robert L. Massie (WVSB #5743)
Shaina D. Massie (WVSB # 13018)
Alexander C. Frampton (WVSB # 13398)
NELSON MULLINS RILEY &
SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Telephone: (304) 526-3500
marc.williams@nelsonmullins.com
bob.massie@nelsonmullins.com
shaina.massie@nelsonmullins.com
alex.frampton@nelsonmullins.com

Counsel for Johnson & Johnson and Janssen Pharmaceuticals, Inc.

John H. Tinney, Jr. (WVSB# 6970)
Keith A. Jones (WVSB# 1923)
HENDRICKSON & LONG, PLLC
214 Capitol Street
Charleston, WV 25339
Tel.: (304) 346-5500
jtinney@handl.com
kjones@handl.com

Terry M. Henry *(pro hac vice)*
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
Phone: (215) 569-5644
terry.henry@blankrome.com

Counsel for Teva Pharmaceuticals USA, Inc.

Jon B. Orndorff (WVSB 7763)
Kelly Calder Mowen (WVSB 12220)
Gordon L. Mowen, II (WVSB 12277)
ORNDORFF MOWEN PLLC
135 Corporate Centre Drive, Suite 524
Scott Depot, WV 25560
Jon.Orndorff@om-pllc.com
Kelly.Mowen@om-pllc.com
Gordon.Mowen@om-pllc.com
(866) 481-2765 (t)

Jenny A. Hergenrother (pro hac vice)
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street, Suite 4900
Atlanta, GA 30309
Jenny.Hergenrother@alston.com
(404) 881-4977 (t)

Counsel for NORAMCO

Tim J. Yianne (WV State Bar #8623)
Patricia M. Bello (WV State Bar #11500)
LEWIS BRISBOIS BISGAARD & SMITH, LLP
707 Virginia Street E., Ste. 1400
Charleston, West Virginia 25301
Tel. 304.553.0166
Tim.yianne@lewisbrisbois.com
Patricia.Bello@lewisbrisbois.com

Counsel for Allergan Finance, LLC, Allergan USA, Inc., Allergan Sales, LLC, and AbbVie Inc.

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Plaintiffs' claims were dismissed as a matter of law, on multiple and independent grounds, by the Mass Litigation Panel ("MLP"). Plaintiffs offer no basis for reversal of the MLP's carefully reasoned ruling, which is fully supported by well-established case law and by Plaintiffs' own allegations in their Complaints. This Court should affirm the MLP's dismissal of these cases.

STATEMENT OF THE CASE

The Complaints in the three cases on appeal assert tort claims brought by or on behalf of individuals who allegedly suffer from the effects of Neonatal Abstinence Syndrome ("NAS") due to their birth mothers' use and misuse of opioids during their pregnancies.[1] The Complaints name as Defendants manufacturers of prescription opioids (or their ingredients), distributors of prescription opioids, a consulting firm, and the West Virginia Board of Pharmacy.

These three Complaints were transferred for adjudication by the MLP along with 18 others raising nearly identical NAS-related claims.[2] *See State ex. rel. AmerisourceBergen Drug Co. v. Moats*, 245 W. Va. 431, 436, 859 S.E.2d 374, 379 (2021) (the MLP's role "is to efficiently manage and resolve mass litigation, like the Opioid Litigation").

On January 27, 2023, Defendants in these three cases (and in the other closely related NAS cases before the MLP) moved to dismiss for failure to state a claim on which relief could be

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[1] Three cases are consolidated in this appeal—*A.D.A. v. Johnson & Johnson et al.*, Civil Action No. 21-C-110 MSH, *A.N.C. v. Johnson & Johnson et al.*, Civil Action No. 22-C-73 MSH, and *Sparks v. Johnson & Johnson et al.*, Civil Action No. 23-ICA-307. In the *A.D.A.* and *A.N.C.* cases, Plaintiffs are next friends suing on behalf of minor children. In *Sparks*, Plaintiff is no longer a minor and has sued on his own behalf.

[2] The Chief Justice of the West Virginia Supreme Court of Appeals transferred the *A.D.A.* matter and other NAS-related cases to the MLP. Administrative Order, Supreme Court Case Nos. 22-MLP-02, 22-613 (W. Va. Aug. 9, 2022). Subsequently, the Presiding Judge transferred the *A.N.C.* and *Sparks* cases to the MLP. Order Granting Mot. to Transfer, Case No. 22-C-9000 NAS (Oct. 19, 2022); Order Granting Mot. to Transfer, Case No. 22-C-9000 NAS (April 18, 2023).

granted. Certain Defendants also moved to dismiss for lack of personal jurisdiction. The MLP (Moats, J.; Swope, J.) heard oral argument on March 24, 2023, JA 00181, and granted Defendants' Motions to Dismiss the Complaints with prejudice, by Order dated April 17, 2023. JA 00001–9. The Complaint of Plaintiff Trey Sparks was separately dismissed in an Order dated June 2, 2023. JA 00155–56.

On May 31, 2023, the MLP issued an Order and Opinion (the "Final Order") detailing its bases for dismissal. JA 00094–128. On June 27, 2023, the MLP issued a substantively identical Order and Opinion detailing the bases for dismissal of the *Sparks* Complaint. JA 00157–178. The MLP held that:

1. Plaintiffs could not establish proximate causation because their alleged injuries were too remote from Defendants' alleged conduct and because, based on Plaintiffs' own allegations, the birth mothers' ingestion of opioids was the sole proximate cause of the alleged injuries, JA 00117–120;

2. Plaintiffs lacked standing to assert claims for public nuisance, JA 00107–110;

3. Plaintiffs could not state a claim for negligence because, as a matter of law, Defendants did not owe a duty of care to Plaintiffs, JA 00113–117;

4. Plaintiffs' claims for civil conspiracy and punitive damages failed because neither was supported by a viable underlying tort claim, JA 00122–23;

5. Plaintiffs could not state fraud claims for lack of proximate causation, JA 00121–122; and

6. Plaintiffs' claims against the Board of Pharmacy were barred by the public duty doctrine and on grounds of qualified immunity, JA 00123–127.

The MLP further noted that Defendants had advanced 15 other grounds for dismissal, JA 00126–127, which it did not need to reach given its dismissal of Plaintiffs' claims in full and with prejudice on the grounds summarized above and discussed in more detail below.

Plaintiffs appealed all 21 cases dismissed by the MLP's Order, including the three cases before the Court on this appeal.[3]

STATEMENT OF FACTS

Because the MLP resolved these cases on motions to dismiss, it "construe[d] the complaint[s] in the light most favorable to the plaintiff[s], taking all [well-pleaded] allegations as true." JA 00101 (quoting *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008)). The MLP's Final Order summarized the "pertinent allegations" of the complaints, JA 00102–105, which included that:

1. Plaintiffs "are private parties";

2. Plaintiffs "are suing as the next friends or guardians" of the individual minors "who allegedly suffer from the effects" of NAS "purportedly caused by exposure to opioids during their birth mothers' pregnancies" (the "Minors"[4]);

3. The birth mothers of the Minors "were generally prescribed opioid medications by one or more treating physicians . . . based upon the treating provider's independent medical judgment," and "consistently filled their prescriptions for opioid medications";

4. "Some birth mothers" of the Minors "also obtained opioids through the diversion of opioids from prescriptions written for others and, in certain cases, from criminal drug dealers"; and

[3] From among the 21 cases dismissed by the MLP's Final Order, 18 are subject to a stay arising from bankruptcy proceedings involving one of the pharmacy defendants, and therefore are not before the Court on this appeal. Should the Court affirm the MLP's Final Order on any of the grounds articulated for its dismissal of the three Complaints at issue on this appeal, that affirmance should likewise resolve all of the remaining 18 stayed cases. Further, there are additional grounds for affirmance of the MLP's dismissal of those 18 stayed cases beyond the issues presented on this appeal.

[4] The MLP used the term "Minors" to refer to this group, although it noted that certain of the Minors were no longer minor children and were suing on their own behalf. JA 00098.

5. The birth mothers of the Minors "continued to obtain and use opioids during their pregnancies," both "through prescriptions written by doctors for the birth mothers and through the diversion of opioids from prescriptions written for others."

The MLP noted that, according to Plaintiffs' own allegations, the "Minors' NAS diagnoses resulted from their birth mothers' consumption of opioids during their pregnancies with the Minors and would not have occurred unless the birth mothers ingested opioids during pregnancy." JA 00105.[5] The MLP further noted that, based on Plaintiffs' allegations, Defendants' "alleged conduct and the Minors' alleged injuries are separated by the actions of third parties," including (1) "doctors who conducted patient examinations and wrote prescriptions for patients," (2) "individuals who in some instances illegally diverted prescription medications to illicit channels," and (3) "the Minors' birth mothers who ingested opioids during their pregnancies." *Id*.

On this appeal, Plaintiffs take no issue with the MLP's restatement of these factual allegations from Plaintiffs' Complaints.

SUMMARY OF ARGUMENT

The MLP's Final Order dismissing Plaintiffs' claims is based on multiple independent and equally dispositive grounds—all of which are fully supported by controlling law. Plaintiffs have not offered a sufficient basis to reverse any one of those holdings, much less all of them.

All of Plaintiffs' claims sound in tort, and therefore require a showing of proximate causation. The MLP held that, as a matter of law, Plaintiffs could not establish proximate causation, for two reasons. First, the Minors' alleged injuries—which Plaintiffs alleged were

[5] Plaintiffs' brief confirms this allegation of the Complaints. *See* Br. 3–4 ("A.D.A. is the parent and legal guardian of [a child] . . . born dependent on opioids due to prenatal exposure"; "A.N.C. is the parent and legal guardian of . . . a child born dependent on opioids ingested by his mother during pregnancy"; "Trey Sparks was born addicted to opioids as a result of *in utero* exposure to . . . opioids prior to his birth").

caused by the birth mothers' ingestion of opioids during pregnancy—were too remote from Defendants' alleged conduct to be a proximate cause of the purported harms because Plaintiffs' own Complaints allege that Defendants' conduct is separated from the Minors' alleged injuries by the independent actions of multiple third parties. JA 00117–120. Plaintiffs' argument that their injuries were foreseeable misses the point; under West Virginia law, remote causes of injury cannot establish proximate causation regardless of whether they may have been foreseeable.

The MLP also held that Plaintiffs could not establish proximate causation for another, separate reason: Plaintiffs' own allegations established that the birth mothers were the sole proximate cause of the Minors' alleged injuries, because the Minors could not have developed NAS unless the birth mothers ingested opioids while they were pregnant with the Minors. JA 00120–121. Plaintiffs offer no meaningful response to this dispositive point. Under controlling West Virginia law, the birth mothers' act of ingesting opioids during pregnancy is the sole proximate cause of the alleged injuries, thereby barring Plaintiffs' tort claims against Defendants.

The MLP's holdings on proximate causation are dispositive of this appeal because each of Plaintiffs' tort claims requires this essential element. The MLP also correctly rejected Plaintiffs' tort claims for separate and independent reasons beyond proximate causation, which provide additional bases to affirm the MLP's dismissal of Plaintiffs' claims.

To start, the MLP correctly held that Plaintiffs could not assert a public nuisance claim. It is an established principle of West Virginia law that private parties cannot sue for public nuisance unless they show "an injury different from that inflicted upon the public in general, not only in degree, but in character." *Callihan v. Surnaik Holds. of W. Va, LLC*, No. 2:17-cv-04386, 2018 WL 6313012, at *5 (S.D.W. Va. Dec. 3, 2018) (quoting *Int'l Shoe Co. v. Heatwole*, 126 W. Va. 888, 888, 30 S.E. 2d 537, 540 (1944)). Plaintiffs cannot establish any such special injury. As the

MLP correctly held, the injury that these Plaintiffs allege—physical harm resulting from opioid exposure—is not "different in character" from the injuries suffered by other West Virginia infants exposed to opioids *in utero*, not to mention other West Virginia residents potentially harmed by their exposure to opioids. JA 00109. As the MLP emphasized, public nuisance claims are typically brought by public actors, and the "special injury" requirement is intended to prevent repeated, duplicative public nuisance claims by individual private litigants all suffering from the same general alleged injury—precisely what would happen here if every child born with NAS in West Virginia could assert a separate tort claim for public nuisance. JA 00109–110.

The MLP also correctly held that Plaintiffs could not assert a negligence claim because, as a matter of law, Plaintiffs cannot establish that Defendants owed a duty of care to Plaintiffs. JA 00113–117. As the MLP recognized, determining the bounds of the duty of care does not involve solely questions of foreseeability and must take account of policy considerations, including the risks of imposing "limitless liability." *McNair v. Johnson & Johnson*, 241 W. Va. 26, 39, 818 S.E.2d 852, 865 (2018) (quotation omitted). The MLP properly concluded that it would "stretch[] the concept of due care too far" to find that Defendants owed a duty of care to Plaintiffs, because doing so would allow "any private party in this State," "no matter how far removed from any Defendant or its alleged conduct," to claim that Defendants "owed that party a duty of care in their activities." JA 00115. The MLP was correct in its judgment that such an expansive concept of duty of care would run contrary to public policy concerns about "limitless liability."

The MLP also correctly held that, as a matter of law, Plaintiffs could not assert a claim for fraud, which also requires proximate causation. JA 00121. And given its holdings that Plaintiffs could not assert claims for negligence, public nuisance or fraud, the MLP also correctly held that Plaintiffs could not assert a claim for civil conspiracy, because a conspiracy claim requires an

underlying tort to support it. JA 00122. The MLP also correctly held that Plaintiffs could not assert a claim for punitive damages, which is not a separate cause of action under West Virginia law and requires an underlying tort that Plaintiffs could not establish. JA 00122.

Finally, Plaintiffs fail to show that the MLP abused its discretion by dismissing Plaintiffs' claims with prejudice and without leave to amend. The MLP dismissed Plaintiffs' claims based on legal deficiencies that cannot be cured by amendment. Further, Plaintiffs cannot raise this issue for the first time on appeal because they never filed a motion for leave to amend, even after the MLP issued its April 17 Order dismissing Plaintiffs' claims and before the MLP issued its Final Order on May 31 (or its subsequent final Order in the *Sparks* case on June 27). To the contrary, during oral argument before the MLP, Plaintiffs specifically disavowed any request to amend their Complaints. JA 00353. Even now, Plaintiffs do not explain what would be accomplished by amendment. Nor could they, given the purely legal deficiencies in their claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Defendants respectfully request that the issues raised on this appeal be addressed in oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. Defendants further submit that the Court should allow 30 minutes per side for oral argument, to ensure a full consideration of the legal issues raised on this appeal.

ARGUMENT

I. THE MLP CORRECTLY DISMISSED PLAINTIFFS' CLAIMS FOR LACK OF PROXIMATE CAUSATION.

As the MLP emphasized, "each of Plaintiffs' claims sounds in tort and requires proof of proximate causation." JA 00117. *See Strahin v. Cleavenger*, 216 W. Va. 175, 183, 603 S.E.2d 197, 205 (2004) (proximate causation a required element of negligence claim); *Valentine v. Wheeling Elec. Co.*, 180 W. Va. 382, 385 n.4, 376 S.E.2d 588, 591 n.4 (1988) (proximate causation

a required element of public nuisance claim); *White v. Wyeth*, 227 W. Va. 131, 140, 705 S.E.2d 828, 837 (2010) (proximate causation a required element of fraud claim).

The MLP found that, as a matter of law, Plaintiffs could not establish proximate causation for two separate reasons: (1) their alleged injuries are too remote from Defendants' conduct to establish proximate causation, JA 00117–120, and (2) the conduct of birth mothers in ingesting opioids during their pregnancies was the sole proximate cause of Plaintiffs' alleged injuries. JA 00120–121. The Court need go no further than these dispositive holdings on proximate causation to affirm the dismissal of Plaintiffs' Complaints.

A. Plaintiffs' Alleged Injuries Are Too Remote from Defendants' Conduct to Establish Proximate Causation.

Under established West Virginia law, a defendant's conduct "must be a proximate, ***not a remote***, cause of injury" to establish proximate causation. *Metro v. Smith*, 146 W. Va. 983, 990, 124 S.E.2d 460, 464 (1962) (emphasis added). "[T]he doctrine of remoteness is a component of proximate causation," *Aikens v. Debow*, 208 W. Va. 486, 492, 541 S.E.2d 576, 582 (2000) (quotation omitted), and "remote causes of the injury" are not "actionable," *Webb v. Sessler*, 135 W. Va. 341, 349, 63 S.E.2d 65, 69 (1951).

Applying these principles, the MLP correctly held that the alleged injuries suffered by the Minors *in utero*—which, under Plaintiffs' allegations, necessarily occurred ***after*** those medicines were prescribed by doctors, ***after*** those medicines were dispensed by pharmacies, ***after*** those medicines were used either medically pursuant to a prescription or were stolen or sold illegally to third parties, and ***after*** the birth mothers chose to ingest those opioids during pregnancy—were too remote from Defendants' alleged conduct to establish proximate causation. JA 00119. As the MLP explained, "Defendants' alleged conduct . . . is necessarily multiple steps removed from Plaintiffs' claimed injuries," and the "numerous independent actions of multiple actors over whom

Defendants had no control defeat proximate causation as a matter of law because these actions render Defendants' conduct too remote from Plaintiffs' alleged injuries." *Id*. Although in some circumstances proximate causation may involve questions of fact, here Plaintiffs' own allegations—accepted as true—establish that the claimed injuries are remote from Defendants' conduct and therefore that proximate causation cannot be established.[6]

Three closely analogous federal court decisions, applying West Virginia law, demonstrate that the MLP applied the correct legal framework and reached the correct conclusion on proximate causation.

First, in *City of Huntington*, plaintiff municipalities alleged that distributors of prescription opioids had created a public nuisance in their communities through the distribution of an allegedly excessive volume of those medicines. The court held that the alleged harms (including "drug overdose deaths," "addict[ion] to opioids," babies "born with neonatal abstinence syndrome" and "sharply increased rates of infectious disease") were too remote from the distributors' conduct to establish proximate causation. *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 419-21, 482 (S.D.W. Va. 2022). The court found that prescribing by doctors, dispensing by pharmacists, diversion by patients, and thefts and sales by criminal actors all stood between the distributors' conduct and the plaintiffs' alleged harms, precluding a finding of proximate causation. *Id.* Here, where the birth mothers' decisions to ingest opioids add yet another layer to

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[6] Plaintiffs suggest (Br. 50–51) that the MLP's decision is inconsistent with its prior rulings denying summary judgment on proximate causation grounds in opioid litigation brought against various Defendants by West Virginia political subdivisions. But those prior rulings found a genuine issue of material fact for trial based on different theories of causation and harm asserted by different kinds of plaintiffs, and based on a different record. The key point here is that Plaintiffs' own allegations demonstrate that, as a matter of law, they cannot establish proximate causation.

the causation analysis, the alleged connection between Defendants' conduct and Plaintiffs' alleged injuries is even more remote.

Second, in *City of Charleston, W. Va. v. Joint Commission*, 473 F. Supp. 3d 596 (S.D.W. Va. 2020), plaintiff municipalities sued the body that accredits hospitals nationwide, alleging that its requirement that hospitals treat pain as "The Fifth Vital Sign" and its issuance of permissive "Pain Management Standards" led to "inappropriate provision of opioids," which in turn caused the municipalities to incur increased health care costs and other injuries. *Id.* at 606–07, 615–16. The court dismissed the municipalities' claims on proximate causation grounds, holding that "defendants' actions are too attenuated and influenced by too many intervening causes," and that "no injury would occur unless the physician proceeded to unnecessarily prescribe opioid treatments or if patients obtained the drugs through some other illegal means." *Id.* at 630–31. Reflecting the well-established distinction between "foreseeability" and "remoteness," the court found no proximate causation because the injury was remote from the defendant's conduct—even as it discussed foreseeability in determining the separate issue of whether the defendant owed plaintiffs a duty of care. *Id.* at 619–22.

Lastly, in *Employer Teamsters-Local Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co.*, 969 F. Supp. 2d 463 (S.D.W. Va. 2013), plaintiffs alleged that manufacturers' marketing of a prescription medicine led to higher reimbursement costs for health insurers. The court stressed that proximate causation analysis requires "carefully drawing a line so as to distinguish the direct consequences in a close causal chain from ***more attenuated effects***," and held that plaintiffs could not establish proximate causation because "[b]etween Defendants' alleged misleading marketing and Plaintiffs' prescription reimbursements lies a vast array of intervening events, including the independent medical judgment of doctors." *Id.* at 475 (quotation

omitted) (emphasis added). Importantly, the decision did not turn on whether increased prescribing was "foreseeable," or whether the manufacturer was a "concurrent cause." *See id*. Rather, proximate causation was lacking because as a matter of law the manufacturer's conduct was too remote and "attenuated" from the alleged harms to establish proximate causation.[7]

Plaintiffs raise several arguments in response. But Plaintiffs' arguments have no basis in West Virginia law.

First, Plaintiffs assert that (Br. 47, 52) the question of proximate causation in this case turns on the foreseeability of intervening acts, arguing that the MLP's decision is inconsistent with decisions of the West Virginia Supreme Court of Appeals holding that a tortfeasor is "not relieved from liability" by "reasonably foreseeable" acts of third parties. *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 450, 854 S.E.2d 257, 270 (2020); *Anderson v. Moulder*, 183 W. Va. 77, 89, 394 S.E.2d 61, 73 (1990). But *Wal-Mart* and *Anderson* address a different issue from the MLP's remoteness ruling—namely, that unforeseen acts of third parties (even if they are ***not*** remote) break the chain of causation and "relieve[] [the tortfeasor] from liability," whereas "reasonably foreseeable" acts do not break the chain of causation.

That foreseeability principle was not the basis of the MLP's ruling on proximate causation. While the MLP explicitly referred to the *Wal-Mart* decision, *see* JA 00117, it correctly recognized

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[7] Plaintiffs note (Br. 50) that *City of Huntington*, *City of Charleston* and *Employer Teamsters* included a discussion of the "directness" test set forth in *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268-69 (1992), and argue this standard applies only to pure economic loss. But those decisions applied West Virginia law and were based on principles of remoteness that are well-established in West Virginia law, including for allegations of harm comparable to those here. *See City of Huntington*, 609 F. Supp. 3d at 481 (applying West Virginia state law remoteness principles); *City of Charleston*, 473 F. Supp. 3d at 628 (applying "the principles of remoteness to state law tort claims" under West Virginia law); *Employer Teamsters*, 969 F. Supp. 2d at 473-75 (applying remoteness standard to West Virginia state law claims). Plaintiffs offer no basis for their suggestion that remoteness principles should apply only to certain tort claims and not others.

that, "if a defendant's alleged conduct is too remote from the alleged harm, it cannot be a ***proximate*** cause of that harm as a matter of law, ***regardless of whether the harm was foreseeable***." JA 00118 (emphases added). This reflects the settled principle of West Virginia law that foreseeability and remoteness are separate, distinct analyses in determining proximate causation. *See Aikens*, 208 W. Va. at 492, 541 S.E.2d at 582; *Metro*, 146 W. Va. at 990, 124 S.E.2d at 464; *Webb*, 135 W. Va. at 349, 63 S.E.2d at 69.

Applying that principle, the MLP did not find that the conduct of third parties—such as "physicians [who] prescribed opioids to birth mothers," "third parties [who] provided illegally obtained opioids to those birth mothers," and "birth mothers [who] ingested . . . opioids during their pregnancies," JA 00119—were unforeseeable "intervening acts" that broke the chain of causation between Defendants' alleged conduct and Plaintiffs' alleged injuries. Instead, the MLP held that the conduct of these other actors meant that Defendants' conduct was "too attenuated and remote from the alleged injuries to establish proximate causation." JA 00119. In other words, the MLP's holding on remoteness was not based on the conclusion that these other actors were unforeseeable intervening causes that broke the chain of causation, but instead was based on the MLP's distinct finding that these multiple steps in the causal chain rendered Defendants' conduct too remote and attenuated from the alleged injuries to establish ***proximate*** causation. JA 00117–120.

That holding is supported by decades of decisions from the West Virginia Supreme Court of Appeals. The Supreme Court of Appeals has made clear that "remoteness is a component of proximate cause," *Aikens*, 208 W. Va. at 492, 541 S.E.2d at 582, that "a remote . . . cause of injury" cannot establish proximate causation, *Metro*, 146 W. Va. at 990, 124 S.E.2d at 464, and that "remote causes of the injury" are not "actionable," *Webb*, 135 W. Va. at 349, 63 S.E.2d at 69. *See*

also City of Huntington, 609 F. Supp. 3d at 481 (under West Virginia law "[a] remote cause of injury," whether or not foreseeable, "is insufficient to support a finding of proximate cause"). West Virginia law on this point is entirely consistent with the "well established principle of the common law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 201 (2017) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014)). "[F]oreseeability alone does not ensure the close connection that proximate cause requires." *Id*. at 202, 1306.[8]

Next, Plaintiffs assert that the remoteness standard for proximate causation has been applied only in so-called "non-traditional" tort cases involving economic harms rather than "traditional" cases involving alleged personal injuries. Br. 50. Contrary to Plaintiffs' assertion—which is unsupported by citations to case law—the settled standards of proximate causation under West Virginia law apply to any tort claims, as a matter of conventional tort principles. *See Strahin*, 216 W. Va. at 183, 603 S.E.2d at 205; *Webb*, 135 W. Va. at 348-49, 63 S.E.2d at 68–69; *City of Huntington*, 609 F. Supp. 3d at 475–76.

In *Webb*, for instance, the West Virginia Supreme Court of Appeals applied the remoteness standard to find a lack of proximate causation in a "traditional" tort case alleging negligence by multiple parties in a wrongful death claim. 135 W. Va. at 348-49, 63 S.E.2d at 68–69*; see also Metro*, 146 W. Va. at 990, 124 S.E.2d at 464 (applying remoteness standard in a "traditional" tort case alleging negligence in the operation of an automobile). Similarly, the recent decision in *City of Huntington* involved claims under West Virginia law arising out of alleged bodily harm from

[8] Although the specific issue in *Bank of America Corp.* involved proximate causation under a federal statute, the Supreme Court's analysis was based on "principle[s] of the common law." 581 U.S. at 201.

exposure to opioids that are materially identical to Plaintiffs' claims here. *See, e.g.*, 609 F. Supp. 3d at 420 (identifying the "rate of babies being born with NAS at Cabell and Huntington Hospital" as among the harms from opioid exposure established in the record, but which the Court held were not proximately caused by defendants).

Finally, Plaintiffs argue that the determination of proximate causation must be reserved for the jury. Br. 46. But questions of negligence, proximate cause, and intervening cause are questions of fact for a jury ***only*** "where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusion from them." *Evans v. Farmer*, 148 W. Va. 142, 143, 133 S.E.2d 710, 711 (1963). Where, as here, Plaintiffs' own allegations demonstrate that they cannot show proximate causation as a matter of law, courts regularly grant motions to dismiss for lack of proximate causation. *See City of Charleston*, 473 F. Supp. 3d at 628; *Employer Teamsters*, 969 F. Supp. 2d at 475; *Webb*, 135 W. Va. at 349, 63 S.E.2d at 69.

In sum, the MLP correctly held—based on Plaintiffs' own allegations—that Defendants' conduct is too remote from Plaintiffs' alleged injuries to establish proximate causation.

B. Under Plaintiff's Own Allegations, The Birth Mothers' Ingestion of Opioids Is the Sole Proximate Cause of the Alleged Injuries.

In addition to remoteness, the MLP held that Plaintiffs cannot establish proximate causation as a matter of law for a second reason: the birth mothers "were the sole proximate cause of the Minors' alleged injuries." JA 00008. This holding applies a distinct legal doctrine, appears under a separate heading of the MLP's analysis, and is a dispositive, independent reason that Plaintiffs cannot establish proximate causation.

As the MLP concluded, Plaintiffs' own allegations, accepted as true, establish that the alleged injuries "necessarily occurred because the Minors' birth mothers ingested opioids during their pregnancies, and they would not have occurred otherwise." JA 00120. Accordingly, "[u]nder

the *Webb* standard, the birth mother's ingestion of opioids—which, by Plaintiffs' own allegations, was the necessary factor causing each of the Minors' alleged NAS, independent of any alleged conduct by Defendants—'produced the wrong complained of,' which wrong 'would not have occurred' without that conduct, and which wrong resulted from the birth mothers' conduct 'unbroken by any independent cause.'" JA 00120 (quoting *Webb*, 135 W. Va. at 341, 63 S.E.2d at 65).

In other words, Plaintiffs' own allegations establish that the birth mothers were the sole proximate cause of Plaintiffs' alleged injuries. The birth mothers' actions "constitute[] a new effective cause and operate[] independently of any other act, making [them] and [them] only, the proximate cause of the injury." Syl. Pt. 12, *Marcus v. Staubs*, 230 W. Va. 127, 139, 736 S.E.2d 360, 372 (2012) (quotation omitted). Plaintiffs do not dispute or even discuss this aspect of the MLP's proximate causation analysis—which is fully correct under the West Virginia Supreme Court of Appeals' decisions in *Webb* and *Marcus*.

While Plaintiffs assert (Br. 46) that the MLP's holding on sole proximate cause would provide "blanket immunity" against "all product liability claims premised on birth defects," that is incorrect. Proximate causation is a required element of any product liability claim. *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 888, 253 S.E.2d 666, 682 (1979). And proximate causation requires a "case-by-case analysis" of the causation theories and facts alleged. *Gott v. Raymond Corp.*, No. 3:07-CV-145, 2009 WL 10710125, at *2 (N.D.W. Va. Jan. 20, 2009). Here, Plaintiffs' particular theories and facts alleged are a far cry from the traditional theories of causation at issue in conventional products liability cases. Unlike those product liability cases, Plaintiffs' own allegations establish that the alleged harms are based on the birth mothers' consumption of opioids—including through criminal conduct—and involve multi-link causation

theories. Plaintiffs also allege injuries ***not*** to the direct user of a product, but to someone allegedly harmed by a third party's willful (or even criminal) use of a product—which involves a different proximate causation analysis than would apply if a consumer-plaintiff alleged that he or she was injured by a product directly.

In short, because the MLP correctly held that the birth mothers were the sole proximate cause of the Minor's alleged injuries, Plaintiffs' claims were properly dismissed on this basis alone—separate and apart from the MLP's holding on remoteness.

II. THE MLP CORRECTLY DISMISSED PLAINTIFFS' PUBLIC NUISANCE CLAIMS FOR LACK OF STANDING.

A. As a Matter of Law, Plaintiffs Cannot Meet the Standing Requirement to Establish an Injury Different "In Character."

Under West Virginia law, "[o]rdinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public." *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 620 (1985) (quoting *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595–96, 34 S.E.2d 348, 354 (1945)). For this reason, private parties—such as Plaintiffs here—lack standing to assert a public nuisance claim unless they can establish "an injury different from that inflicted upon the public in general, ***not only in degree, but in character***." *Callihan*, 2018 WL 6313012, at *5 (quotation omitted) (emphasis added).

The MLP emphasized that this special injury requirement serves an important policy purpose of "prevent[ing] duplicative, repeated public nuisance claims asserted by private claimants who cannot establish an injury different in degree and character from other members of the public." JA 00110. As the West Virginia Supreme Court of Appeals explained over 100 years ago, "[t]he general rule of law is well settled that individuals cannot enforce a public right, or redress a public

injury, by suits in their own names. Endless would be the litigation, were every individual allowed to do so upon his own impulse or for private ends." *Talbott v. King*, 32 W. Va. 6, 6, 5 S.E. 48, 50 (1889). Thus, the "special injury" requirement "recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292, 750 N.E.2d 1097, 1104 (N.Y. 2001) (citing Restatement (Second) of Torts §821C, comment *a*).

Applying these settled principles, the MLP correctly held that Plaintiffs lacked standing to assert public nuisance claims and therefore dismissed the claims as a matter of law. JA 00109–110. The MLP concluded that, because the Minors' claimed injuries "necessarily arise from exposure to opioids," those injuries were not different "in character" from injuries "that might be suffered by 'the public in general' from exposure to opioids, or that might be suffered by other infants exposed *in utero* to opioids." JA 00109.

While Plaintiffs suggest (Br. 17–18) that this conclusion is inconsistent with prior decisions by the MLP in other opioid litigation finding that the government plaintiffs in those cases had adequately alleged an interference with "public rights," those cases did not involve the issue of standing for private parties asserting public nuisance claims. The MLP's holding here addressed a distinct issue not presented in the cases brought by government plaintiffs—namely, whether the Minors' alleged injuries as private parties qualify as "special injuries" for purposes of public-nuisance standing, and whether the Minors' alleged injuries are different "in character" from injuries suffered by others exposed to opioids *in utero* or others harmed by exposure to opioids.

The MLP's holding was correct. Other West Virginia infants born with exposure to opioids *in utero* have the same "character" of potential injuries as those alleged here by Plaintiffs. In other

words, the Minors' alleged injuries here—based on their purported exposure to opioids *in utero*—are ***identical*** to the harms that could be claimed by other West Virginia minors who were also exposed to opioids *in utero*. For that fundamental reason, the alleged injuries of these three individual plaintiffs are not different "in character" from the same alleged harms suffered by others born with NAS.

On appeal, Plaintiffs do not dispute the MLP's finding that their alleged injuries from opioid exposure *in utero* are ***not*** different "in character" from other West Virginia minors who likewise were exposed to opioids *in utero*. *See* Br. 22; JA 00109. Nor could they. Thus, as the MLP recognized, allowing Plaintiffs here to advance individual claims for public nuisance would open the floodgates to "duplicative, repeated" NAS-related public nuisance claims advanced by other minors who likewise were exposed to opioids *in utero*. JA 00110.

Plaintiffs also cannot dispute that other West Virginia citizens allegedly harmed by opioid exposure would have the same "character" of injuries as those based on the Minors' exposure to opioids *in utero*. While the alleged injuries from opioid exposure *in utero* might be different "in degree" from injuries caused to others in the community from opioid exposure, the "character" of the alleged injury remains the same—namely, harms caused by exposure to opioids. *See* Compl. ¶¶ 79, 88 (alleging that the public's exposure to opioids has created "high rates of NAS, addiction, overdoses, dysfunction, and despair"); *see also City of Huntington*, 609 F. Supp. 3d at 419–21 (summarizing harms suffered by West Virginia residents from exposure to opioids, including "drug overdose deaths," "addict[ion] to opioids," babies "born with neonatal abstinence syndrome" and "sharply increased rates of infectious disease"). While Plaintiffs argue (Br. 22) that the Minors' alleged injuries are different "in kind" from those exposed "willfully" to opioids, that misstates the standards for determining a "special injury," which addresses the nature of the

alleged injury—*i.e.*, whether it is different not only "in degree, but in character," *Callihan*, 2018 WL 6313012, at *5—and not the reasons why the injury occurred.

For these precise reasons, a federal district court recently held that the plaintiffs in a similar case did not have standing under West Virginia law to assert public nuisance claims on behalf of minors born with NAS, ruling that "the injuries are similar among the NAS minors and others exposed to opioids" and that "the personal injuries from opioid exposure are not suffered by a few but rather by millions of adults and minors alike." *In re: McKinsey & Co., Inc. Nat'l Prescription Opiate Consultant Litig.*, No. 21-md-02996-CRB, 2023 WL 4670291, *8–9 (N.D. Cal. July 20, 2023). While Plaintiffs (Br. 15) try to discount the *McKinsey* decision by suggesting that the court misunderstood the Dobbs treatise it quoted and that the treatise is based on discredited precedent, the general principle stated in that treatise—that a special injury could be established if "a few people suffer personal injury" but not if injuries are caused "for everyone in town," 2023 WL 4670291, *8–9—is fully consistent with West Virginia's requirement that the injury must be different "not only in degree, but in character" from "that inflicted upon the public in general," *Callihan*, 2018 WL 6313012, at *5 (quotation omitted).

B. The Restatement of Torts Does Not Support Standing for Plaintiffs' Public Nuisance Claims.

Plaintiffs rely on the Restatement (Second) of Torts § 821-C comment *d* to argue that a claim of physical injury always suffices as a "special injury" establishing a private plaintiff's standing to assert a public nuisance claim. Br. 11–15. They are incorrect. Comment *d* does not say anything that relieves Plaintiffs of their burden—under established West Virginia law—to show that the claimed injury is different in "character" and "degree" from injuries that could be claimed by the public in general. *Callihan*, 2018 WL 6313012, at *5. Instead, comment *d* says only that a claim of "personal injury to the plaintiff or physical harm to his land or chattels" is

"***normally*** different in kind from that suffered by others." Restatement (Second) of Torts § 821-C comment *d* (emphasis added). This reflects the uncontroversial proposition that the existence of a special injury must be determined based on the specific allegations and facts of the case presented—precisely what the MLP did here. *See also McKinsey*, 2023 WL 4670291, at *8 (the Restatement "does not provide for . . . a 'presumption'" that the "special injury" requirement is "satisfied by a plaintiff seeking to recover damages for physical harm.").

Comment *d* itself confirms this. The illustration to comment *d* describes a scenario where a "trench across the public highway" is left "unguarded at night," and a motorist "drives into the trench and breaks his leg." Restatement (Second) of Torts § 821-C comment *d*. In that scenario, the Restatement is describing an injury to the motorist that is different "not only in degree, but in character" from "that inflicted upon the public in general" from the public nuisance created by the unguarded trench, *Callihan*, 2018 WL 6313012, *5 (quotation omitted).

That is different from the situation here, where the harms allegedly suffered by these three Minors from opioid exposure *in utero* are not different "in character" from the harms that would be suffered by other infants exposed to opioids *in utero*. Nor are the harms different "in character" from harms suffered by others in the community who were exposed to opioids and developed addiction and other health problems comparable to those alleged here by Plaintiffs. The MLP was therefore correct to hold that the Plaintiffs' alleged injuries "necessarily arise from exposure to opioids and thus are not 'different in character' from injuries suffered by 'the public in general' from exposure to opioids, or that might be suffered by other infants exposed *in utero* to opioids." JA 00109.

If, as Plaintiffs argue, the Restatement is construed (contrary to what it says) to suggest that ***any*** allegation of "personal injury" ***always*** suffices to satisfy the "special injury" requirement, this would be contrary to decades of West Virginia cases.

In *Callihan*, for instance, the plaintiffs alleged "that they sustained personal injuries . . . by inhaling toxic fumes" caused by a fire. 2018 WL 6313012, at *5. But that personal injury claim—identical in material respects to Plaintiffs' theory of personal injury from exposure to opioids—was found insufficient to establish standing because there was no showing that the plaintiffs were "***uniquely*** affected by the fire." *Id*. (emphasis added). While Plaintiffs erroneously assert (Br. 12–13) that *Callihan* did not involve allegations of bodily injury, the court expressly stated that the plaintiffs alleged "bodily injury" as a result of their "ingestion" of fumes and "significant exposure to" the fire, and that these allegations were "sufficient to establish injury at this stage," *Id.* at *2.

Likewise, in *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 769–70 (S.D.W. Va. 2009), *aff'd in part, dismissed in part*, 636 F.3d 88 (4th Cir. 2011), the plaintiffs alleged "contamination of their . . . bodies" and "increased risk of disease" from exposure to chemicals in the water of the Parkersburg Water District (or "PWD"). In affirming the district court's dismissal of these claims, the Fourth Circuit explained that, "because the plaintiffs allege that all the water customers exposed to PFOA since 2005 have suffered the same personal injury, the plaintiffs' own pleadings refute their contention of 'special injury.'" 636 F.3d at 98. The Fourth Circuit also rejected the same argument that Plaintiffs make here—that a physical injury is by itself sufficient to establish public-nuisance standing—holding that "it is not supported either by the facts alleged in the plaintiffs' complaint or by West Virginia law." *Id.* In doing so, the Fourth Circuit affirmed the district court's finding that the allegations of personal harm were "not

special injuries with which the plaintiffs have standing to bring a public nuisance claim" because "all individuals who have consumed PWD water"—and not just the individual plaintiffs bringing suit—were alleged to "have suffered a significantly increased risk of disease." 657 F. Supp. 2d at 769–70. Accordingly, "[t]he plaintiffs ha[d] not suffered a special injury different in degree and kind from the other PWD customers." *Id*. at 769.

Plaintiffs mistakenly assert (Br. 13) that *Rhodes* supports their position, but the district court in *Rhodes* held that plaintiffs did ***not*** have standing to assert a public nuisance claim because they had not shown that their exposure to PWD's water gave rise to a "special injury different in degree and kind" from others exposed to that water. *Id*.; *see also id*. at 769 n.17 ("without a special injury, the plaintiffs lack . . . standing to bring the public nuisance cause of action"). The footnote that Plaintiffs quote (Br. 13) was addressed to "alleged PFOA contamination" that the court found was "not an injury at all." *Id*.

Similarly, in the *McKinsey* decision, the court applied West Virginia law to reject standing for private parties asserting "bodily injur[y]" claims based on exposure to opioids *in utero*, reasoning that "the personal injuries from opioid exposure are not suffered by a few but rather by millions of adults and minors alike." 2023 WL 4670291, at *8–9. As the *McKinsey* decision demonstrates, Plaintiffs are plainly wrong in stating (Br. 12) that no "decision from any jurisdiction" holds that a "personal, bodily injury is insufficient to satisfy the standing requirement."

C. Plaintiffs Cannot Establish a "Special Injury" by Comparison Against Those Not Exposed to Opioids.

Plaintiffs assert (Br. 18, 21) that the MLP's standing analysis was flawed because it failed to consider that Plaintiffs' alleged harms were different from those allegedly suffered by "employers, teachers, and families" that have "not been exposed to opioids," and because the MLP

improperly compared Plaintiffs' alleged injuries against those of others "exposed to opioids." Plaintiffs' apparent position is that they have standing to bring public nuisance claims so long as their alleged injuries are different from those suffered by ***some*** other members of the public—even if, as the MLP concluded, Plaintiffs' alleged injuries are the same in character as the injuries allegedly suffered by many others.

Plaintiffs' argument contradicts West Virginia law. In *Rhodes*, the court evaluated whether the plaintiffs could establish a "special injury" by comparing their alleged injuries against others who had been exposed to the same allegedly contaminated water. *See* 657 F. Supp. 2d at 769 ("the relevant comparative population for determining whether the plaintiffs have suffered a special injury is the population of PWD customers" who drank the same water). Likewise, in *Callihan*, the court held that the plaintiffs could not establish a "special injury" from a fire because they were not "uniquely affected" compared to others exposed to the same fire. *See* 2018 WL 6313012, at *5. The same is true in *McKinsey*, where the court held that the plaintiffs did not have "special injuries" from opioid exposure compared to the injuries "suffered by millions of adults and minors alike" who had also been exposed to opioids. 2023 WL 4670291, at *9. In none of these cases did the courts broaden the inquiry by comparing the plaintiffs' alleged harms against others who had not been exposed to the same alleged nuisance or had not suffered comparable harms to those alleged by the plaintiffs. *See Rhodes*, 657 F. Supp. 2d at 769 (evaluating "the population of PWD customers" who drank the same water); *Callihan*, 2018 WL 6313012, at *5 (evaluating plaintiffs' injuries against others exposed to the same fire); *McKinsey*, 2023 WL 4670291, at *9 (evaluating harms from opioid exposure against others also exposed to opioids).

Unable to overcome these West Virginia authorities, Plaintiffs instead rely (Br. 19–21) on the Ninth Circuit's decision in *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003), which applied

nuisance law governed by a California statute and ***did not*** address the standing requirements of common law public nuisance claims under West Virginia law. To the extent that Plaintiffs read this case to suggest that standing can be established whenever a given plaintiff has injuries different from any others affected by the same public nuisance, that is clearly not the law of West Virginia.

Further, *Ileto* is distinguishable on its facts. There, the court held that four shooting victims and an eyewitness to a shooting had standing under California law to assert a public nuisance claim against gun manufacturers because their alleged harms were "different in kind" from members of the public who had not been shot. The district court concluded, and the Ninth Circuit agreed, that the plaintiffs suffered "trauma resulting from an assault with a gun and gun shot wounds," which was different from the "danger, fear, inconvenience and interference with the use and enjoyment of public spaces" suffered by the general public. *Id*. at 1212. That case, in other words, involved five plaintiffs who alleged injuries "different in kind" from the general public. Here, in contrast, Plaintiffs' alleged injuries are not "different in character" from other West Virginia minors exposed to opioids *in utero* or from the "millions of adults and minors alike" exposed to opioids, *McKinsey*, 2023 WL 4670291, at *9. West Virginia does not allow a finding of special injury under such facts. *See Hark*, 127 W. Va. at 596, 34 S.E.2d at 354 ("special injury" exception applies only to injuries "to one or a limited number of persons").

More fundamentally, if Plaintiffs' argument were accepted, it would eviscerate West Virginia's "special injury" requirement. Almost any alleged public nuisance might have indirect effects on some members of the public that would differ from injuries suffered by those directly exposed to the nuisance. Here, for instance, Plaintiffs argue (Br. 18) that their alleged injuries from opioid exposure are different from injuries allegedly suffered by "employers, teachers, and families" who were ***not*** exposed to opioids. If a "special injury" can be established whenever an

alleged public nuisance has such indirect or disparate impacts, a private plaintiff would always have standing to sue—even if the plaintiff has suffered an injury that is otherwise identical in character to injuries suffered by thousands of others. That is not West Virginia law, and such a conclusion would be directly contrary to the purpose of the special injury requirement. *See, e.g.*, *Davis v. Spragg*, 72 W. Va. 672, 672, 79 S.E. 652, 653 (W. Va. 1913) ("[T]o avoid multiplicity of suits to accomplish one purpose, public wrongs are redressed at the suit of proper officials, and individuals are not permitted to maintain separate actions or suits to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong."); *see also* Restatement (Second) of Torts § 821C (1979) ("it is essential to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong").

D. Plaintiffs Mischaracterize the MLP's Reference to Prior Settlements of Claims Asserted by the State and Political Subdivisions.

Lastly, Plaintiffs suggest (Br. 23, 27–29) that the MLP found that their claims "have already been resolved" by the prior settlement of public nuisance actions filed by the State of West Virginia and various West Virginia cities and counties. Alternatively, Plaintiffs say it is "not clear" whether the MLP so ruled. Br. 23.

Plaintiffs mischaracterize the MLP's decision. The MLP's dismissal of Plaintiffs' public nuisance claims was not based on these prior settlements. The MLP did not hold that Plaintiffs were barred as a matter of *res judicata* or under the doctrine of release from advancing their claims following the prior government settlements. Nor did it hold that the prior settlements otherwise "resolved" Plaintiffs' claims. Instead, the MLP simply observed that those prior settlements reinforced the importance of the "special injury" requirement—"to prevent duplicative, repeated

public nuisance claims asserted by private claimants who cannot establish an injury different in degree and character from other members of the public." JA 00110.

The MLP's observation reflects the well-established principle that "ordinarily" public nuisance claims cannot "be maintained by an individual in his private capacity" because "it is the duty of the proper public officials to vindicate the rights of the public." *Sharon Steel*, 175 W. Va. at 483, 334 S.E.2d at 620 (quoting *Hark*, 127 W. Va. at 595–96, 34 S.E. 2d at 354).

It is not surprising that the MLP referred to these earlier opioid cases because Plaintiffs argued below that the public nuisance claim they were asserting was "identical in every respect" to the prior public nuisance claims asserted by the State of West Virginia and its subdivisions. JA 00300. Plaintiffs stressed this point in oral argument before the MLP: "It is the same public nuisance. It is the same issue." JA 000301. Given Plaintiffs' own argument, the MLP rightly recognized that Plaintiffs were seeking to assert the "identical" public nuisance claim on behalf of individual NAS plaintiffs, raising the obvious specter of duplicative, repeated litigation over the "same public nuisance" that had already been alleged by and resolved through settlements with public officials—the State of West Virginia and its subdivisions. In that context, the MLP had every reason to emphasize that standing limitations for private parties asserting public nuisance claims play an important role in preventing virtually endless, repetitive litigation over the "identical" alleged public nuisance.

III. THE MLP CORRECTLY DISMISSED PLAINTIFFS' NEGLIGENCE CLAIM FOR FAILURE TO ESTABLISH THAT DEFENDANTS OWED A DUTY OF CARE TO PLAINTIFFS.

The MLP also correctly dismissed Plaintiffs' negligence claims because, as a matter of law, Defendants owed no duty of care running to Plaintiffs.

"[T]he threshold question in all actions in negligence is whether a duty was owed." *Strahin*, 216 W. Va. at 183, 603 S.E.2d at 205. Further, "the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581; *accord Bradley v. Dye*, 247 W. Va. 100, 108, 875 S.E.2d 238, 246 (2022).

In determining whether a duty is owed, foreseeability is a relevant factor. *See Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988). But West Virginia law is clear that foreseeability alone does not give rise to a duty: "***Beyond the question of foreseeability***, the existence of duty ***also involves policy considerations*** underlying the core issue of the scope of the legal system's protection." *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983) (emphases added). These "considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Id*. *Accord Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 535, 788 S.E.2d 59, 63 (2016) ("policy aims and goals must also be accounted for in the legal duty calculus").

Applying these general principles, the MLP held that these policy considerations were dispositive, notwithstanding Plaintiffs' arguments of foreseeability. The MLP concluded that it would "stretch[] the concept of due care too far" to hold that Defendants—manufacturers, distributors, pharmacies, the West Virginia Board of Pharmacy and McKinsey, a consulting firm—owed a common law duty of care to private plaintiffs asserting that they were injured by the conduct of third parties. JA 00115.

This holding was correct. The injuries claimed here by Plaintiffs are far down the causal chain, and not proximately caused by Defendants' conduct. The MLP's holding recognizes that Plaintiffs' allegations would create unbounded and limitless theories of liability that could be

invoked by "any private party in this State" against any entity "associated with the supply of prescription opioids." JA 00115. The West Virginia Supreme Court of Appeals has acknowledged the fundamental importance of avoiding such "limitless liability." *See McNair*, 241 W. Va. at 39, 818 S.E.2d at 865 (quoting *Aikens*, 208 W. Va. at 502, 541 S.E.2d at 592). "This Court's obligation is to draw a line beyond which the law will not extend its protection in tort, and to declare, as a matter of law, that no duty exists beyond that court-created line." *Id*. "Each segment of society will suffer injustice, whether situated as plaintiff or defendant, if there are no finite boundaries to liability and no confines within which the rights of plaintiffs and defendants can be determined." *Id.*; *see also Stevens*, 237 W. Va. at 535, 788 S.E.2d at 63.

These policy factors are dispositive, whether or not Plaintiffs' alleged injuries were foreseeable. Under Plaintiffs' allegations, the Minors were harmed by their mothers' use of opioids during their pregnancies. That includes both opioids that may have been prescribed to birth mothers by their treating physicians during pregnancy, but also prescription opioids that were illegally diverted or stolen and then illicitly used by birth mothers during pregnancy without a prescription. Imposing a duty of care in these circumstances would threaten Defendants with "limitless liability," *McNair*, 241 W. Va. at 39, 818 S.E.2d at 865, not only for harms caused to the users of prescription opioids but also to third parties (here, Minors) allegedly injured by their birth mothers' use of prescription opioids. *See Aikens*, 208 W. Va. at 492, 541 S.E.2d at 582 ("Legal liability does not always extend to all of the foreseeable consequences of an accident.") (quoting *In re Exxon Valdez*, No. A89–0095–CV, 1994 WL 182856 (D. Alaska March 23, 1994)); *see also, e.g., Labzda v. Purdue Pharma, L.P.*, 292 F. Supp. 2d 1346, 1355 (S.D. Fla. 2003) (holding that defendant opioid manufacturer had no duty to control physician's prescribing practices in wrongful death suit); *D.C. v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 645 (D.C. 2005)

(holding that firearm manufacturer did not owe duty of care to persons injured by firearms); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 234, 750 N.E.2d 1055 (N.Y. 2001) (same).

Plaintiffs do not dispute the tremendous "magnitude" and "consequences" associated with imposing such a burden on Defendants. Instead, Plaintiffs challenge the MLP's analysis on other grounds. All of Plaintiff's arguments fail.

First, Plaintiffs argue (Br. 35, 41–42) that whether Defendants owed a duty of care to Plaintiffs is a jury question. That is incorrect. The MLP's holding rejecting a duty of care was a pure legal conclusion based not on any factual disputes surrounding foreseeability of harm, but rather on the policy considerations addressed above. *See Aikens*, 208 W. Va. at 488, 541 S.E.2d at 578 ("the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law"). While the Supreme Court of Appeals has recognized that it can be appropriate in some circumstances for the court to "identif[y] the existence of the duty conditioned upon the jury's possible evidentiary finding," *Marcus*, 230 W. Va. at 138, 736 S.E.2d at 371, that principle does not apply here, where the MLP rejected a duty of care on legal grounds that do not turn on disputed issues of fact.

Next, Plaintiffs assert (Br. 43) that the MLP's distinction between duties owed to governmental entities and duties owed to private individuals like Plaintiffs is "inexplicable." But the MLP specifically explained the distinction. It noted that it previously had found that various manufacturers and distributors of prescription opioids, and pharmacies that self-distribute and dispense prescription opioids, owed a duty of care ***to government entities*** in the State of West Virginia. *Id*. But the MLP also clearly explained that the "question presented here"—*i.e.*, whether Defendants owed a duty of care to private parties— "is different," a distinction that goes directly to the public policy question of imposing limits on the scope of tort law protections. Imposing a

duty of care here running ***to private parties*** "would allow any private party in this State . . . to claim that entities associated with the supply of prescription opioids (or active pharmaceutical ingredients) owed that party a duty of care in their activities." *Id*. "Even assuming that any Defendant in these cases owed a duty of care to ***some*** entity, Plaintiffs have not properly alleged that such a duty ran ***from*** Defendants ***to*** these private Plaintiffs." *Id.* (emphases added).

Lastly, Plaintiffs make various policy-facing arguments (Br. 35–39). But all these policy arguments fail because they never address the fundamental, dispositive point recognized by the MLP: in making the policy determination of whether a legal duty exists, a court is obligated "to draw a line beyond which the law will not extend its protection in tort" and to impose "finite boundaries to liability," *McNair*, 241 W. Va. at 39, 818 S.E.2d at 865.

For example, Plaintiffs argue that a duty of care is supported by one factor discussed in *Robertson*, 176 W. Va. at 612, 301 S.E.2d at 568—the likelihood of injury. Br. 35–38. But *Robertson* makes clear that the "policy considerations underlying" the duty of care are not confined to a single factor and "include" likelihood of injury among a list of considerations that must be evaluated in determining "the core issue of the scope of the legal system's protection." 171 W. Va. at 612, 301 S.E.2d at 568. In any event, this factor does not support Plaintiffs' claims. To the contrary, imposing a duty on Defendants simply because there was some likelihood of injury to Plaintiffs would threaten unbounded and limitless liability that could be invoked by "any private party in this State" against any entity "associated with the supply of prescription opioids"—precisely the result that the duty element is meant to avoid.

Plaintiffs also argue (Br. 30–34) that the duty of care owed to them by Defendants is established merely by the foreseeability of harm. But as already explained, West Virginia law is clear that foreseeability alone does not establish a duty of care. *See Stevens*, 237 W. Va. at 535,

788 S.E.2d at 63; *Robertson*, 171 W. Va. at 612, 301 S.E.2d at 568; *see also Miller v. Whitworth*, 193 W. Va. 262, 267, 455 S.E.2d 821, 826 (1995) (while "foreseeability of risk is an important consideration when defining the scope of duty . . . it would be absurd to expect landlords to protect tenants against all crime since it is foreseeable anywhere in the United States").

Plaintiffs' own allegations confirm that a duty cannot be based on foreseeability alone. As the MLP recognized, Plaintiffs allege two principal ways by which the Minors suffered injuries from their birth mothers' ingestion of opioids during pregnancy—neither of which Defendants were under a duty of care to prevent, regardless of whether these mechanisms of injury were foreseeable.

First, Defendants had no duty to prevent the exercise of independent medical judgment that the birth mothers' doctors engaged in when prescribing them opioids. As to that source of injury, the MLP held that the duty of care was owed to the Minors either by the prescribing doctors, or by their birth mothers taking prescription opioids in accordance with medical direction while pregnant. JA 00115–116. The MLP held that Defendants did not owe a duty of care to prevent any alleged injuries to the Minors arising from such medical care. JA 00116–117. That holding was fully supported by considerations of public policy, since Defendants are not engaged in prescribing decisions and do not have the ability or authority to second-guess doctors' independent medical judgments about whether to prescribe opioids to birth mothers during their pregnancies. *See City of Huntington*, 609 F. Supp. 3d at 475.

Second, Defendants had no duty to prevent the birth mothers' illicit ingestion of opioids during pregnancy, which involved "illicitly obtaining opioids through those individuals' own illegal conduct or through illegal conduct by third parties." *See* JA 00115–16. As the MLP noted, "a person usually has no duty to protect others from the criminal activity of a third party because

the foreseeability of risk is slight, and because of the social and economic consequences of placing such a duty on a person." JA 00116 (quoting *Miller*, 193 W. Va. at 266, 455 S.E.2d at 826). This reflects "the general proposition that there is no duty to protect against deliberate criminal conduct of third parties." *Strahin*, 216 W. Va. at 183–84, 603 S.E.2d at 205–06.

While Plaintiffs argue that intervening criminal conduct does not negate duty in certain exceptional situations—for example, "where (1) there is a special relationship which gives rise to a duty or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct," *Marcus*, 230 W. Va. at 136-37, 736 S.E.2d at 370–71, the MLP rightly found that neither of those exceptions applies here, JA 00116. Plaintiffs do not even attempt to argue they have a "special relationship" with any Defendant. And Plaintiffs' own allegations confirm that the alleged harm was caused by the "affirmative acts and omissions" of third parties—including the criminal conduct of third parties diverting opioids for illicit uses—and not the actions of Defendants.

Finally, Plaintiffs argue (Br. 38) that unbounded and limitless liability is nonetheless justified because Defendants occupy a position of authority as entities authorized to do business involving controlled substances. But Defendants' status as heavily regulated entities supports the opposite conclusion. The point is demonstrated by *Stevens*, a case relied on by the MLP, where the Supreme Court of Appeals held that manufacturers of video lottery terminals and the casinos that used them did not have a duty of care to prevent compulsive gambling. The Court explained that imposing such a common law duty would unduly interrupt and interfere with the detailed regulatory scheme governing casino gambling. 237 W. Va. at 538, 788 S.E.2d at 66.

The same reasoning applies here. The development, distribution, prescribing and sale of controlled substances are subject to comprehensive regulation by federal, state and local public-

health and law-enforcement officials—all designed to balance the public interests involved. This includes balancing the public's interest in access to necessary medications, on the one hand, against the need on the other hand to avoid prescription drug misuse and abuse.

While Plaintiffs suggest (Br. 39) that *Stevens* is distinguishable because gambling was "specifically approved by the legislature and regulatory bodies" despite its "inherent risks and dangers," precisely the same point applies to prescription opioids, which are controlled substances with recognized and warned-of risks of harm and abuse. *See* 21 U.S.C. §812(b)(2) (controlled substances such as prescription opioids have "a high potential for abuse" along with a "currently accepted medical use"). Plaintiffs ask the Court to disrupt that balance between "accepted medical use" and "potential for abuse" by creating a cause of action for all private parties affected by opioid harms and abuse in West Virginia. But Plaintiffs do not identify any policy reason justifying that disruption. Nor do Plaintiffs address the concomitant burden that this duty—and the endless litigation that would follow—would impose on the courts.

Accordingly, the MLP correctly held that Plaintiffs' negligence claims should be dismissed for lack of a duty owed. *See Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 869, 280 S.E.2d 703, 706 (1981) ("No action for negligence will lie without a duty broken.").

IV. THE MLP CORRECTLY DISMISSED PLAINTIFFS' CONSPIRACY CLAIMS.

Plaintiffs effectively concede (Br. 53) that a conspiracy claim must be dismissed where the plaintiff cannot establish any predicate underlying tort. *See*, *e.g.*, *O'Dell v. Stegall*, 226 W. Va. 590, 625, 703 S.E.2d 561, 596 (W. Va. 2010) ("a civil conspiracy must be based on some underlying tort or wrong"); *see also Hammer v. Hammer*, No. 14-0995, 2016 WL 765839, at *4 (W. Va. Feb. 26, 2016) ("if the [underlying] claim fails, the civil conspiracy claim cannot

survive"). Because the MLP correctly dismissed Plaintiffs' underlying tort claims, the MLP likewise correctly dismissed Plaintiffs' conspiracy claims.

V. THE MLP CORRECTLY DISMISSED PLAINTIFFS' FRAUD CLAIMS.

The MLP dismissed Plaintiffs' fraud claims for lack of proximate causation. As with any tort, a showing of proximate causation is required to sustain a fraud claim—a point that Plaintiffs do not contest. *See White*, 227 W. Va. at 140, 705 S.E.2d at 837. For the reasons discussed above, Plaintiffs cannot establish proximate causation as a matter of law. The MLP therefore correctly held that Plaintiffs' fraud claims were also barred as a matter of law.

VI. THE MLP CORRECTLY DISMISSED PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES.

Plaintiffs concede (Br. 63–64) that their punitive damages claims are predicated on their underlying tort claims. Because those tort claims fail, the MLP correctly held that Plaintiffs' punitive damages claims must also be dismissed. *See, e.g.*, *Roche v. Lincoln Prop. Co.*, 175 F. App'x 597, 606 (4th Cir. 2006) (dismissing punitive damages claim because plaintiff's "underlying" common law claims were barred).

VII. THE MLP CORRECTLY DISMISSED PLAINTIFFS' CLAIMS WITH PREJUDICE.

The MLP dismissed Plaintiffs' Complaints with prejudice and without leave to amend. JA 00128. Under West Virginia law, "[w]hether to permit an amendment is left to the presiding court's discretion." Although "'[l]eave to amend should be freely given when justice so requires, . . . the action of a trial court in refusing to grant leave to amend a pleading will not be regarded as reversible error in the absence of a showing of an abuse of the trial court's discretion in ruling upon a motion for leave to amend.'" *Bowyer v. Wyckoff*, 238 W. Va. 446, 453, 796 S.E.2d 233, 240 (2017) (quoting *Perdue v. S.J. Groves & Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250

(1968)). Plaintiffs cannot show that the MLP abused its discretion in dismissing Plaintiffs' Complaints without leave to amend.

First of all, Plaintiffs failed to preserve a claim of error in the MLP's dismissal of the Complaints with prejudice. Plaintiffs ***never moved for leave to amend*** their Complaints and never raised this issue in any briefing before the MLP. On this basis alone, they cannot raise this issue for the first time on appeal. *See In re E.B.*, 229 W. Va. 435, 467, 729 S.E.2d 270, 302 (2012) ("[T]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.") (quoting *Sands v. Sec. Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)); *see also ACA Fin. Guar. Corp v. City of Buena Vista*, 917 F.3d 206, 218 (4th Cir. 2019) ("a district court does not abuse its discretion by declining to grant a request to amend when it is not properly made as a motion"). In fact, during oral argument before the MLP, Plaintiffs' counsel specifically disavowed amendment of the Complaints, stating that "moving forward, we are going to look at whether or not a motion to amend is necessary; but ***that's not even necessary at this point***." JA 00353 (emphasis added).

The MLP initially dismissed the Complaints of Plaintiffs *A.D.A.* and *A.N.C.* on April 17, 2023—and it did not issue its Final Order dismissing those Complaints with prejudice until May 31, 2023. But in that six-week window between April 17 and May 31, Plaintiffs never moved for leave to amend, nor did they even raise the issue of amending their Complaints. Although Plaintiffs filed objections to the MLP's order before it issued on May 31, 2023, even then Plaintiffs did not request leave to amend as part of their objections. Further, the MLP issued a substantively identical Final Order dismissing the *Sparks* Complaint on June 27. And during that additional 27-day period, Plaintiffs again never raised the issue of seeking leave to amend. Having failed to seek

leave to amend before the MLP, Plaintiffs cannot now raise the issue for the first time on appeal. *In re E.B.*, 229 W. Va. at 467, 729 S.E.2d at 302.

Aside from Plaintiffs' failure to preserve the issue, Plaintiffs also fail to establish what amendment would accomplish. Plaintiffs do not proffer (*see* Br. 64–66) any further facts they would seek to allege if amendment were granted, nor do they make any showing that amendment would alter the MLP's dismissal of their claims. *See ACA Fin.*, 917 F.3d at 218 (upholding denial of leave to amend complaint where plaintiffs "never indicated what amendments they were seeking," "never identified any facts they sought to include in an amendment," and "never identified any cause of action they sought to add").

In any event, amendment here is futile because the MLP dismissed Plaintiffs' claims based on deficiencies that could not cured by amendment. *See Vogt v. Am. Arb. Ass'n*, No. 19-0676, 2020 WL 3469214, at *3 (W. Va. June 25, 2020) (upholding denial of leave to amend on the basis that amendment would have been futile). Plaintiffs cannot plead around the controlling, purely legal principles that defeat their claims as a matter of law. Plaintiffs in fact do not argue that they could avoid the MLP's dispositive legal rulings through amendment. *See* Br. 64–66. Instead, Plaintiffs recite only general standards for amending complaints (Br. 64–65), without any explanation of how any amendments (whatever they may be) would cure the defects on which the MLP based its dismissal of their Complaints.

In short, Plaintiffs have failed to preserve any right to seek amendment of their Complaints because they never sought that relief from the MLP and in fact disavowed that relief during argument before the MLP. Even now, Plaintiffs make no showing that amendment would alter the MLP's dismissal of their claims.

CONCLUSION

The Court should affirm the MLP's order dismissing Plaintiffs' claims with prejudice.

Jeffrey M. Wakefield (WVSB #3894)
Amy Rothman Malone (WVSB #10266)
FLAHERTY SENSABAUGH BONASSO PLLC
200 Capitol Street
Charleston, WV 25301
(304) 345-0200
jwakefield@flahertylegal.com

/s/ Timothy C. Hester
Timothy C. Hester (*pro hac vice*)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
thester@cov.com

Counsel for McKesson Corporation

Gretchen M. Callas (WVSB #7136)
Candice M. Harlow (WVSB #12496)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000
gcallas@jacksonkelly.com
charlow@jacksonkelly.com

John H. Tinney, Jr., Esquire (WVSB# 6970)
Keith A. Jones, Of Counsel (WVSB# 1923)
HENDRICKSON & LONG, PLLC
214 Capitol Street
Charleston, WV 25339
Tel.: (304) 346-5500
jtinney@handl.com
kjones@handl.com

Robert A. Nicholas (admitted *pro hac vice*)
Joseph J. Mahady (admitted *pro hac vice*)
Anne R. Bohnet (admitted *pro hac vice)*
REED SMITH LLP
1717 Arch Street, Suite 3100
Philadelphia, PA 19130
(215) 851-8100
rnicholas@reedsmith.com
jmahady@reedsmith.com
abohnet@reedsmith.com

Lauren E. O'Donnell, Esquire *(pro hac vice)*
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
Phone: (215) 569-5735
lauren.odonnell@blankrome.com

Counsel for Anda, Inc.

Kim M. Watterson (admitted *pro hac vice*)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
kwatterson@reedsmith.com

Counsel for AmerisourceBergen Drug Corp. and AmerisourceBergen Corporation (n/k/a Cencora, Inc.)

Todd A. Mount (WVSB #6939)
Shaffer & Shaffer, PLLC
330 State Street
Madison, WV 25130
(304) 369-0511
tmount@shafferlaw.net

Brian T. Himmel (admitted *pro hac vice*)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
bhimmel@reedsmith.com

Counsel for H. D. Smith LLC, H. D. Smith Holdings, LLC, and H. D. Smith Holding Company

Marc E. Williams (WVSB #4062)
Robert L. Massie (WVSB #5743)
Shaina D. Massie (WVSB # 13018)
Alexander C. Frampton (WVSB # 13398)
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Telephone: (304) 526-3500
marc.williams@nelsonmullins.com
bob.massie@nelsonmullins.com
shaina.massie@nelsonmullins.com
alex.frampton@nelsonmullins.com

Counsel for Johnson & Johnson and Janssen Pharmaceuticals, Inc.

Jon B. Orndorff (WVSB 7763)
Kelly Calder Mowen (WVSB 12220)
Gordon L. Mowen, II (WVSB 12277)
ORNDORFF MOWEN PLLC
135 Corporate Centre Drive, Suite 524
Scott Depot, WV 25560
Jon.Orndorff@om-pllc.com
Kelly.Mowen@om-pllc.com
Gordon.Mowen@om-pllc.com
(866) 481-2765 (t)

Jenny A. Hergenrother (pro hac vice)
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street, Suite 4900
Atlanta, GA 30309
Jenny.Hergenrother@alston.com
(404) 881-4977 (t)

Counsel for NORAMCO

Tim J. Yianne (WV State Bar #8623)
Patricia M. Bello (WV State Bar #11500)
LEWIS BRISBOIS BISGAARD & SMITH, LLP
707 Virginia Street E., Ste. 1400
Charleston, West Virginia 25301
Tel. 304.553.0166
Tim.yianne@lewisbrisbois.com
Patricia.Bello@lewisbrisbois.com

Counsel for Allergan Finance, LLC, Allergan USA, Inc., Allergan Sales, LLC, and AbbVie Inc.

John H. Tinney, Jr. (WVSB# 6970)
Keith A. Jones (WVSB# 1923)
HENDRICKSON & LONG, PLLC
214 Capitol Street
Charleston, WV 25339
Tel.: (304) 346-5500
jtinney@handl.com
kjones@handl.com

Terry M. Henry *(pro hac vice)*
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
Phone: (215) 569-5644
terry.henry@blankrome.com

Counsel for Teva Pharmaceuticals USA, Inc.

CERTIFICATE OF SERVICE

Pursuant to W. Va. Rule 38A(q), I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Intermediate Court of Appeals for West Virginia via the Court's e-filing system on January 19, 2024.

I certify that all participants in the case are registered with the Court's e-filing system and that service will be accomplished by the Court's e-filing system.

Dated: January 19, 2024

/s/ Marc E. Williams

Marc E. Williams (WV Bar No. 4062)
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
(304) 526-3500
(304) 526-3599 – facsimile
marc.williams@nelsonmullins.com