MAYOR & CITY COUNCIL OF BALTIMORE, **Plaintiff,** **v.** **PURDUE PHARMA, L.P., *et al.*,** **Defendants.**	**IN THE** **CIRCUIT COURT** **FOR BALTIMORE CITY** **Case No. 24-C-18-000515**

MEMORANDUM OPINION

Baltimore has a severe opioid addiction problem. Hundreds of people die in Baltimore every year from opioid overdoses. Thousands of Baltimoreans and their families endure the daily debilitating effects of coping with opioid use disorder ("OUD"). The community suffers many effects, including increased crime, decreased productivity, and increased trash and sanitation problems. The City and its taxpayers bear many costs of responding to these intractable problems. The difficult question in this action is the extent to which two distributors of prescription opioid medications can be held liable for this complex problem.

Plaintiff Mayor and City Council of Baltimore (the "City") sued numerous manufacturers and distributors of prescription opioids in this action alleging that the Defendants are legally responsible for the City's opioid problems. The action came to trial before a jury in September, October, and November 2024 against two of the distributor Defendants: McKesson Corporation ("McKesson") and AmerisourceBergen Drug Corporation ("AmerisourceBergen" or "ABDC"). Based on the Court's pretrial rulings, the sole claim against these two Defendants is for public nuisance under the common law of Maryland. The other Defendants either settled with the City before trial or were excluded from trial because the claims against them have been stayed by bankruptcy proceedings or, in the case of a single Defendant, because the Court severed the claims against that Defendant for separate trial.

The jury found both Defendants liable and awarded a total of $266,310,333 in damages allocated between them. The Court previously determined that the issue of what equitable abatement remedy to grant, if any, would be tried separately to the Court. The Court conducted the abatement phase of the trial in December 2024. The Court also determined that all post-trial motions potentially affecting the jury verdict should be presented together with arguments on the abatement remedy. The Court set a briefing schedule for those motions culminating in a hearing on March 6, 2025.

Defendants McKesson and AmerisourceBergen filed a joint Defendants' Motion for Judgment Notwithstanding the Verdict, Remittitur, and/or for a New Trial (filed January 16, 2025). Defendant AmerisourceBergen filed its own Supplemental Motion for Judgment Notwithstanding the Verdict, Remittitur, and/or a New Trial (filed January 16, 2025). Plaintiff City filed separate oppositions to the Defendants' joint motion and to Defendant ABDC's individual supplemental motion (both filed February 6, 2025). Defendants filed separate reply memoranda, one by both Defendants jointly and one by Defendant ABDC only (both filed February 18, 2025).

Overlapping with this briefing, Plaintiff City and both Defendants jointly filed Abatement Briefs (both filed January 26, 2025). All parties then filed responses to these initial Abatement Briefs (both filed February 21, 2025).

To produce this coordinated consideration of all the issues, the Court declined to enter judgment on the jury's verdict until now. Despite discussing this procedural plan with the parties, Plaintiff City filed a Motion for Entry of Judgment (filed January 6, 2025) before the post-trial briefing began. Defendants opposed that motion (filed January 8, 2025), and the Court denied the City's motion by Order Deferring Entry of Judgment (issued February 3, 2025). By design, the Court has directed Defendants to file post-trial motions that are technically premature. The Maryland Rules permit this process without prejudice to any party's rights

because the post-trial motions are deemed to have been timely filed immediately after the Court enters judgment. Md. Rules 2-532(b), 2-533(a). To ensure this procedural sequence, the Court directed the Clerk to enter the separate judgments against Defendants McKesson and AmerisourceBergen on June 11, 2025, and the Court then immediately stayed those judgments. On entry of those judgments, Defendants' post-trial motions were deemed to be filed, and the Court is now deciding those motions based on the briefing already accomplished.

Before considering any of the issues, the Court thanks and recognizes the jurors for their extraordinary service in this action. Twelve individuals – six jurors and six alternate jurors – set aside their personal schedules to devote twenty-six trial days spread out over three months to this effort. Their attention and diligence to their duty was apparent and impressive. Although the Court concludes that their verdict must be set aside in part, that decision does not detract from their exemplary service to the Court and to the parties. It is always heartening to see ordinary citizens embrace this important duty even though it is imposed on them.

The jury concluded that a public nuisance exists in the City and that the unreasonable conduct of these two Defendants caused the public nuisance in part. The Court concludes that the jury's core lability finding is supported by the evidence. The jury's award of damages reflects a conclusion that the unreasonable conduct of these two distributor Defendants creates legal responsibility for 97% of the entirety of the harm experienced by the City for the public nuisance from 2011 through 2029 in the future. The Court concludes that the extent of the liability imposed cannot be justified by the evidence presented at trial. The appropriate remedy in these complicated circumstances is not judgment notwithstanding the verdict but the grant of a new trial limited to issues determining the amount of damages. The Court issues a remittitur in two parts which, if accepted by Plaintiff, will avoid the need for a new trial on damages.

The Court's conclusions concerning the extent of liability that is supported by the evidence also influence the abatement remedy to be granted as a matter of equity. Although the

Court will comment here on some of the abatement issues, the Court defers ruling on any abatement remedy until it becomes clear whether a new trial on the extent of liability and damages will be necessary.

Procedural History

A. Pre-Trial Proceedings

The Court will provide a basic history to understand the scope of the issues that ultimately went to trial. The City filed this action in 2018, and the operative complaint is the Second Amended Complaint filed on October 9, 2018. The City named thirty-seven defendants in three categories: manufacturers, distributors, and prescribers of prescription opioid medications. The Manufacturer Defendants include eighteen corporations or other business entities, some of them related, and nine individuals associated with them. The City sued Purdue Pharma L.P. and three affiliated entities as well as eight members of the Sackler family alleged to be owners and directors of Purdue entities. The other individual Defendant associated with a manufacturer is John D. Kapoor, alleged to be the founder of Defendant Insys Therapeutics, Inc. The Distributor Defendants include seven corporations or other business entities, some of them also related. The City did not sue any individuals affiliated with Distributor Defendants. The City sued CVS Health Corporation, Walgreens Boots Alliance, Inc. a/k/a Walgreen Co.,[1] Rite Aid Corporation, and Rite Aid of Maryland, Inc., all or some of which operate retail pharmacies, but it sued those Defendants only as wholesale distributors of opioid medications. The City did not sue any retail pharmacies as such. Finally, the City sued two individual prescribers, Norman B. Rosen and Howard J. Hoffberg, both medical doctors, and their practice, Rosen-Hoffberg Rehabilitation and Pain Management Associates, P.A.

[1] By consent motion, the City later dismissed this Defendant and added as Defendants Walgreen Co. and Walgreen Eastern Co., Inc.

Several of the Manufacturer Defendants have filed bankruptcy petitions, and the claims against them were stayed. Most notable among these are the Purdue Pharma entities. In that bankruptcy case, the court issued an injunction also staying actions against the individual Sackler Defendants.[2] Insys Therapeutics, Inc. also entered bankruptcy protection, but the Bankruptcy Court in that case did not also protect Defendant Kapoor.

Actions like this one but brought in federal courts have been transferred for coordinated treatment under the multi-district litigation procedure in the United States District Court for the Northern District of Ohio. *In Re: National Prescription Opiate Litigation,* MDL No. 17-cv-2804. That action will be referred to here as the MDL case or the MDL litigation.

This action was specially assigned to this Court.

All of the Defendants who remain as active Defendants filed motions to dismiss the claims against them. The Court initially limited discovery. The motions to dismiss were heard on January 3, 2019. After that hearing, the Court reserved ruling on the motions to dismiss and allowed discovery to proceed, mostly under the auspices of the federal MDL case, with certain limitations.

The MDL litigation and bankruptcy proceedings produced different proposals for settlement among plaintiffs nationwide and defendants. On February 11, 2022, the City advised the Court that it had declined to join in certain national settlements that had been reached through the MDL litigation. After consulting with the parties, the Court issued a Scheduling Order on March 31, 2023 that set the September 16, 2024 trial date and established deadlines to complete discovery and for briefing and hearing on dispositive motions and motions to exclude or limit

[2] The Purdue Pharma bankruptcy action reached the United States Supreme Court, which reversed approval of a plan of reorganization. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024). The action is back in the Bankruptcy Court for further proceedings.

expert testimony. To their credit, counsel adhered to that demanding schedule, and the trial started on the scheduled trial date.

In discovery, certain Defendants sought to compel the City to identify specific individuals whose use of opioids the City attributed to Defendants' conduct. The City responded that it intended to prove its claims by aggregate proof. The City stated it had "no intention . . . at this time" "to present testimony or evidence regarding specific individual's use of opioids, rather than the cumulative effect of numerous individuals' use of opioids." *See* Mem. and Order on Distrib. Defs.' Mots. to Compel Disc. (7/25/23) (quoting City's discovery responses). The Court accepted the City's disclaimer of proof of this sort and denied the motion to compel more specific answers to certain interrogatories. The Court also warned the City: "Unless the City timely supplements its answers to change that position, the City will be barred from presenting this type of evidence." *Id.* For the most part, the City remained true to its plan. At trial, it relied heavily on more generalized expert testimony than on fact witnesses describing their experiences and observations. The Court now must decide whether that approach provided a legally sufficient basis for the jury's findings of liability and award of damages.

At the end of discovery, the parties filed various pretrial motions. All Defendants filed dispositive motions, and all parties moved to exclude the testimony of some or all of the expert witnesses identified by the opposing parties. With briefing underway on the dispositive motions, the Court issued orders denying the long-pending motions to dismiss. The Court stated its belief that it was preferable that the difficult issues be decided in the context of a developed factual record. The denial of the motions to dismiss without any definitive ruling on the issues raised was necessary procedurally to trigger Defendants' obligations to file answers.

The Court's rulings on the summary judgment and other pretrial motions shaped the trial. Among other points, the Court held:

1. That Plaintiff City could seek a monetary abatement remedy even though the City had waived any injunctive relief directly against any Defendant;

2. That any abatement remedy, even if it consisted only of money, is an equitable remedy and therefore would be decided by the Court rather than a jury;

3. That the trial would be bifurcated into two phases – a liability and damages trial to a jury and then an abatement trial to the Court;

4. That Defendants were not entitled to summary judgment on the City's claim for public nuisance; and

5. That the public nuisance injury claimed by the City is divisible, meaning that any liability or damages proved by the City could be apportioned both among any liable Defendants and to other actors.

Early in the trial, the Court ruled further that the Defendants had the burden of proof on issues of apportionment.

In denying summary judgment on the City's claim for common law public nuisance, the Court expressed its serious reservations about applying public nuisance to a societal problem of the nature and complexity of the opioid problem. The Court continues to have those reservations. The jury's difficulty in grappling with the complex issues only highlights the problems with submitting a problem of this nature to adjudication by a jury. The Supreme Court of Maryland clearly has recognized the tort of public nuisance, as explicated in the Restatement Second of Torts, in simpler situations. *See Tadjer v. Montgomery County*, 300 Md. 539, 551–54 (1984) (adopting structure of Restatement (Second) of Torts, § 821B for public nuisance, but holding that allegations involving County's alleged negligence in operation of landfill that allegedly caused methane gas explosion on property adjoining landfill site did not state a claim

for public nuisance). This Court has applied those principles here, leaving for the Maryland appellate courts ultimately to assess whether the tort is properly applicable under Maryland law.

As the trial date approached, the City reached resolutions with all but three Defendants, excluding those Defendants that are the subject of bankruptcy stays or injunctions. The City voluntarily dismissed its claims against the only prescriber defendants – Defendants Norman B. Rosen, Howard J. Hoffberg, and Rosen-Hoffberg Rehabilitation and Pain Management Associates, P.A. This resolution apparently did not involve any payment to the City by those Defendants. The City reached a series of monetary settlements with other Defendants. Shortly before trial, the Court granted a motion by Defendant John D. Kapoor to sever the claims against him from this trial. As noted above, the manufacturer Defendant Kapoor is associated with, Defendant Insys Therapeutics, Inc., is the subject of a bankruptcy stay. As a result, the trial was limited to the claims against two distributor Defendants – McKesson and AmerisourceBergen.

B. Jury Trial

The jury trial began with jury selection on September 16, 2024. The jury – six jurors and six alternate jurors – was seated on September 17, 2024, and opening statements began on September 18, 2024. Because of the unavailability of the Court and individual jurors, the trial proceeded with gaps, including two five-day periods in which the jury did not sit. In all, the jurors served for two days of jury selection, eighteen days with either argument or the presentation of evidence, and two days of deliberations. The Court also convened on two days with counsel and without the jury for arguments on motions or consideration of the verdict sheet and jury instructions. The jury returned its verdict on November 12, 2024.

The Court will discuss the specific evidence admitted at trial in connection with the particular issues raised by the parties. The Court here describes the way the Court structured the jury's consideration of the issues, after consultation with the parties, with a multi-step verdict

sheet and corresponding instructions. The Court will then follow the same sequence to discuss the Defendants' challenges to the jury's conclusions.

On the elements of public nuisance, the Court instructed the jury that the City must prove:

> (1) That a public nuisance existed or exists in the City of Baltimore based on a population of people in the City who have opioid use disorder arising from misuse of prescription opioids;
>
> (2) That one or both of the defendants acted unreasonably;
>
> (3) That the defendant's unreasonable conduct was a substantial factor in causing the public nuisance; and
>
> (4) That Plaintiff City incurred costs or damages in responding to the public nuisance that was caused by the defendant's conduct.

The first six questions on the verdict sheet tracked these elements.[3] The jury first considered:

> 1. Do you find that a public nuisance relating to the misuse of prescription opioids exists or existed in the City of Baltimore as alleged by Plaintiff Mayor and City Council of Baltimore?

Among the instructions related to this first question, the Court told the jury:[4]

> . . . [A] public nuisance is an unreasonable and substantial interference with a right common to the general public. The interference must affect the community generally or broadly. It is not enough that the interference affects a large number of individuals. An interference with a public right includes interferences with public health, public safety, or public convenience.
>
> * * *

[3] The Court will preserve the numbering from the verdict sheet in quoting the questions posed.

[4] These instructions did not occur in this sequence as given by the Court. The first paragraph quoted came after the other paragraphs quoted.

> . . . The public nuisance the City alleges in this case is creation of a population of people in the City who have opioid use disorder arising from the misuse of prescription opioids. . . .
>
> . . . [T]he City claims that the public nuisance it alleges has existed in Baltimore since at least 2006 and exists today and will continue to exist in the future. That is a long period of time, and you must consider the evidence over that period. You could find that the alleged public nuisance never existed, that it existed during the entire period alleged, or that it existed during only part of that period. You could also conclude that it has changed during that period and that the variations are significant for this case.
>
> . . . [R]elated to the long time period of the allegations in this case, you must consider the conduct of each defendant over that period of time. You may not judge the defendants' conduct using hindsight. You must consider what each defendant knew or reasonably should have known at the time it acted or did not act, and you must judge each defendant's conduct according to those changing circumstances.
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> * * *
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> . . . [Y]ou have heard evidence concerning Baltimore City, Baltimore County, and parts of Anne Arundel County. The claim in this case is limited to the alleged existence of a public nuisance in the City of Baltimore. You may consider evidence of events or activity outside of Baltimore only as it bears on the situation alleged to exist or to have existed in the City of Baltimore.

The Court told the jury it was answering this first question "without regard to a specific defendant." The jury answered Question 1, "Yes," that the City proved the existence of a public nuisance arising from opioid misuse in the City.

Questions 2 and 3 and Questions 4 and 5 were paired questions relating to each of the Defendants:[5]

> 2. Do you find that Defendant AmerisourceBergen Drug Corporation acted unreasonably in its distribution of prescription opioids affecting the City of Baltimore?

[5] The Court told the jury the Defendants were listed in this order based on alphabetical order.

3. Do you find that the unreasonable conduct of Defendant AmerisourceBergen Drug Corporation was a substantial factor in causing the public nuisance in the City of Baltimore?

Questions 4 and 5 were the same two questions applicable to Defendant McKesson Corporation.

On the issue of unreasonable conduct interfering with a public right for Questions 2 and 4, the Court instructed the jury in part:

> A defendant may be found liable for public nuisance only if the plaintiff proves that the defendant interfered with a public right and did so unreasonably. In deciding whether a specific defendant's conduct was unreasonable, you should consider all the circumstances surrounding the defendant's conduct.
>
> Circumstances that may support a finding of unreasonable conduct include:
>
> (a) Whether the conduct involves a significant interference with public health, public safety, or public convenience;
>
> (b) Whether the defendant's conduct violated a statute or regulation; or
>
> (c) Whether the defendant's conduct is of a continuing nature or has produced a permanent or long-lasting effect on a public right and the defendant knows or has reason to know its conduct has or will have a significant effect on a public right.
>
> The second of these considerations is conduct that violated a statute or regulation. A violation of a statute or regulation is evidence of unreasonable conduct but does not automatically establish unreasonable conduct. You should consider the nature and extent of any violations alleged.
>
> Because of the amount of evidence you have seen and heard about the federal regulatory requirements, I am going to go into more detail about them, but they remain one part of the overall circumstances you should consider in deciding whether either defendant acted unreasonably. . . .
>
> Plaintiff City alleges that both defendants violated the federal Controlled Substances Act and an associated federal regulation that

requires distributors of controlled substances to maintain a suspicious order monitoring system. Both statutes and regulations are binding provisions of federal law.

The Controlled Substances Act establishes the overall system of regulating controlled substances, including the requirement that every participant in the manufacture and delivery of controlled substances must be registered. You have heard about the four basic types of registrants and the process of delivery from registered manufacturers to registered wholesale distributors to registered retail pharmacies to patients based on prescriptions written for those patients by registered physicians.

Under the Controlled Substances Act, a registered distributor must maintain "effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels." 21 U.S.C. § 823(b)(1). The federal regulations repeat the requirement to seek to prevent diversion: "All applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances." 21 C.F.R. § 1301.71(a). The regulations then include the provision you have seen in this trial:

> The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Field Division Office of the Administration in his area of suspicious orders when discovered by the registrant. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.

21 C.F.R. § 1301.74(b).

There are different types of possible diversion of prescription opioids from legitimate channels into illegal distribution or use. You should consider the role of a wholesale distributor in the delivery system and the information available or not available to a wholesale distributor in considering what types of possible diversion a wholesale distributor reasonably can be expected to detect.

What is a suspicious order? Neither the statute nor the regulations give a comprehensive definition, but the regulation provides that "[s]uspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." That use of "include" means these are

> examples of orders that should be considered suspicious, but there may be other orders that can be considered suspicious based on other circumstances. Suspicious must be understood in the context of the purpose of avoiding diversion. Suspicion does not mean certainty or even likelihood of diversion. It is enough that the circumstances create a reasonable basis to believe diversion may be occurring in connection with the order.
>
> The statute and the regulations require a distributor (and other registrants) to have a system for identifying suspicious orders, and the distributor then must report the suspicious orders to the DEA [Drug Enforcement Administration]. There is no explicit requirement in the statute or regulations that a distributor conduct its own investigation or due diligence concerning suspicious orders. But if a distributor identifies information that raises suspicion about an order or orders, then it cannot decide that the order or orders are not suspicious, and therefore do not need to be reported, unless it develops enough information reasonably to resolve the suspicion.
>
> The statute and regulations also do not provide explicitly that a distributor must stop or block a suspicious order or orders. The DEA has taken the position since at least 2007 that suspicious orders must be blocked and reported. On this point and on other aspects of the federal regulatory requirements, you may consider how clear or unclear the requirements were and what guidance the DEA did or did not give in deciding whether either defendant acted unreasonably.
>
> Even though I have spent extra time addressing the federal statute and regulations, the decision for you to make is whether each defendant's conduct was reasonable or unreasonable. In deciding whether a defendant's conduct was unreasonable, you must consider all the circumstances at the time the defendant did or did not act. Because this case involves the distribution of a lawful product, the circumstances include consideration of the usefulness, social value, and potential for harm of the product and of defendants' conduct in distributing the product.

On the issue of causation for Questions 3 and 5, the Court instructed the jury in part:

> . . . For Plaintiff City to recover, the public nuisance must result from and be a reasonably foreseeable consequence of the particular defendant's unreasonable conduct. There may be more than one cause of the public nuisance, that is, the conduct of multiple actors may work together to cause the harm. Each person whose conduct

> is a substantial factor in causing the public nuisance is responsible. In the context of this case, to prove causation Plaintiff City must prove not only that a defendant's unreasonable conduct created a possibility or risk of diversion of prescription opioids, but also that the defendant's conduct resulted in the actual diversion of prescription opioids that contributed to the alleged public nuisance. Plaintiff City does not have to match specific allegedly suspicious orders of either defendant to specific instances of diversion, but it must prove by a preponderance of the evidence that the conduct of the specific defendant for which you are answering the question resulted in the actual diversion of prescription opioids that contributed to the alleged public nuisance.
>
> There can be additional causes for the injury that occur after the defendant's conduct. If a later event or act could have been reasonably foreseen, the defendant is not excused from responsibility for any harm caused by the defendant's unreasonable conduct. But if an event or act is so extraordinary that it was not reasonably foreseeable, the defendant's conduct is not a legal cause of the harm.

The jury answered, "Yes," to each of Questions 2 through 5, thus concluding that both Defendants acted unreasonably and that their unreasonable conduct was a substantial factor in causing the public nuisance in Baltimore.

Question 6 then turned back to a broader question that the jury was instructed to answer without reference to a specific Defendant:

> 6. Considering the public nuisance alleged by Plaintiff Mayor and City Council of Baltimore as a whole, what amount of damages, if any, do you find was experienced or will be experienced by Plaintiff Mayor and City Council of Baltimore as a result of the public nuisance?

The jury was given separate lines to specify any amount of "Past damages," "Future damages," and "TOTAL DAMAGES." The Court provided the following instructions on damages:

> If you find for the plaintiff on the issue of liability against either defendant, then you must consider the question of damages. It will be your duty to determine what, if any, award will fairly compensate the plaintiff. The plaintiff has the burden to prove by a preponderance of the evidence each item of damages claimed to

> be caused by the defendant. For the plaintiff to recover damages, the plaintiff's expenses must result from and be a reasonably foreseeable consequence of the particular defendant's conduct. In considering the items of damages, you must keep in mind that your award must adequately and fairly compensate the plaintiff. However, an award should not be based on guesswork.
>
> In a public nuisance case brought by a governmental entity, the plaintiff may recover the reasonable expenses or costs it has incurred in responding directly to the public nuisance. The plaintiff may recover the actual amount of expenses it has incurred for this purpose in the past and the amount it is reasonably likely to incur in the future for five years.
>
> In deciding upon the damages to be awarded for any future expenses, you shall consider the present cash value of the expenses. Present cash value means that amount of money needed now which, when added to what that amount may reasonably be expected to earn in the future by prudent investment, will equal the amount of the plaintiff's future expenses. In other words, the total anticipated future loss must be reduced to an amount which, if prudently invested at an appropriate rate of interest over the applicable number of years, will return an amount equal to the total anticipated future expenses.
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> * * *
>
> . . . The public nuisance alleged by the City is the existence of a population of people in the City who have opioid use disorder arising from the misuse of prescription opioids.
>
> It is very important that you recognize in answering this question that you are considering the alleged public nuisance **as a whole**. I am asking you here to state the full amount, if any, the City has proved that it experienced or will experience because of the public nuisance. For this question, you do not consider the extent of liability of either specific defendant. You will consider that issue in the subsequent questions.

(Emphasis in original written instructions.) The jury answered Question 6 by finding "Past damages" of $193,808,635, "Future damages" of $80,738,100, and "TOTAL DAMAGES" of $274,546,735. As will be discussed below, the jury awarded $600 more in past damages and $14,302,548 more in future damages than the amounts put forward in evidence by the City.

Questions 7 and 8 then turned to the questions of apportionment:

> 7. Do you find that the conduct of actors other than the Defendants also contributed to cause the public nuisance in the City of Baltimore?
>
> 8. Considering the public nuisance in Baltimore as a whole, what portion of the public nuisance do you find was caused by each of the following actors or group of actors?
>
> a. Defendant AmerisourceBergen Drug Corporation _____%
>
> b. Defendant McKesson Corporation _____%
>
> c. All other actors combined _____%
>
> TOTAL 100 %

The Court instructed the jury as follows for these questions:

> . . . [Question 7] is asked generally and relates to both defendants. This is also the first question on which the defendants have the burden of proof.
>
> You should consider the conduct of any other actor, with one exception. Other actors could include other distributors of prescription opioids, other types of registrants in the system of prescription opioid delivery, and other individuals or entities outside that system who might be involved in creating or contributing to the public nuisance alleged by Plaintiff City. Answer "Yes" to Question 7 if you find that either defendant has proved by a preponderance of the evidence that there is at least one other actor whose conduct was a substantial factor in creating the public nuisance.
>
> As I said a moment ago, there is one exception under Question 7. Neither Defendant may be relieved of liability because the City, the DEA, or another actor failed to correct that defendant's unreasonable conduct. For example, if you find that a defendant acted unreasonably in not reporting certain suspicious orders, but that the DEA or the City could have discovered the same suspicious conduct, the DEA's or the City's failure to act does not relieve that defendant of liability for that unreasonable conduct. However, you may consider the conduct of the City or the DEA in assessing the reasonableness of either defendant's conduct.

. . . The shorthand term for th[e] issue [asked in Question 8] is the apportionment of fault. . . . First, if you have found either defendant not liable, then that conclusion dictates the percentage you apply to that defendant. Thus, if you found Defendant AmerisourceBergen Drug Corporation not liable because you answered "No" to either Question 2 or 3, you must put 0% for Defendant AmerisourceBergen Drug Corporation on line 8a. Similarly, if you found Defendant McKesson Corporation not liable because you answered "No" to either Question 4 or 5, you must put 0% for Defendant McKesson Corporation on line 8b. Finally, if you answered "No" to Question 7 – concluding that neither defendant proved that any other actor contributed to the public nuisance – then you must put 0% for "all other actors combined" on line 8c.

If you have found one or both of the defendants liable, consider the entire fault for creating the public nuisance. That entire fault of all actors totals 100%. You will divide fault among any category for which you have not already placed 0% based on answers to earlier questions. For example, if you find that fault is shared by both defendants and by at least one other actor, then you will divide or apportion fault three ways. The three percentages you assign must total 100%. As another example, if you find both defendants liable and answered "No" to Question 7, you will divide or apportion 100% fault between the two defendants only. As yet another example, if you find only one defendant liable and answered "Yes" to Question 7, you will divide or apportion 100% fault only between the liable defendant as one part and all other actors combined as the other part.

The third category under Question 8 is stated on the verdict sheet as "All other actors combined." If you find that other actors caused part of the harm of the alleged public nuisance, you should attribute to those other actors only that portion for which neither defendant played any substantial causative role.

In making this apportionment decision, you should consider all the evidence. You may consider such factors as the period of time this case covers and the role of the defendants and other actors over that span of time. You may consider the volume of prescription opioids sold by either defendant and by other distributors. You may consider the relative or comparative roles in the prescription opioid delivery system of different types of registrants. You also may consider the relative or comparative roles of actors outside the regulated prescription opioid delivery system. Finally, although your answers to Question 8 are quantified as percentages, you may

> consider the quality or seriousness of the conduct of both the defendants and other actors. These are only suggestions for the types of factors you may consider, and I do not mean to suggest that all these factors are important. You must decide this issue as a matter of fact based on all the evidence presented.
>
> If you find liability and damages and apportionment, the amount that one defendant will be required to pay will be separate from the amount the other defendant will be required to pay. Those amounts will be calculated by me by multiplying the total amount, if any, that you state in your answer to Question 6 times the percentage for each defendant that you find in your answer to Question 8.

The jury answered, "Yes," to Question 7, thus concluding that at least some of the public nuisance in Baltimore was caused by actors other than the two Defendants. In their answer to Question 8, the jury assigned 27% of the total liability and damages to Defendant AmerisourceBergen, 70% of the total liability and damages to Defendant McKesson, and 3% of the total liability and damages to all other actors combined. Applying these percentages to the total amount of damages found by the jury in response to Question 6, the judgments against Defendant AmerisourceBergen would be for $74,127,618 and against Defendant McKesson would be for $192,182,715. The Court has now entered judgments in those amounts.

C. Abatement Phase of Trial

The abatement phase of the trial before the Court, without a jury, began on December 11, 2024 and concluded on December 17, 2024.

The Court has described above the process the Court established so it could consider at the same time both the Defendants' post-trial motions challenging the jury's verdict and the appropriate abatement remedy based on the abatement phase of the trial. As noted, the parties briefed those motions, and the Court conducted a single hearing on all the motions on March 6, 2025.

Discussion

A. Defendants' Post-Trial Motions

1. Legal Standards

Both Defendants have filed combined, alternative motions for judgment notwithstanding the verdict ("JNOV"),[6] for a new trial, and for remittitur. The standards for these post-trial motions are similar, but there are critical differences.

"[A] party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion." Md. Rule 2-532(a). If the jury has returned a verdict, the court may "set aside any judgment entered on the verdict, and direct the entry of a new judgment." Md. Rule 2-532(d). The Court evaluates the evidence, including all fair inferences that may be drawn from it, in the light most favorable to Plaintiff as the non-moving party. *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 328 (1978). A motion for JNOV must be denied "[i]f there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact in issue." *Id.* "Only where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury." *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 91 (2014) (citing *Pickett v. Haislip*, 73 Md. App. 89, 98 (1987)). "[I]f the record presents any evidence, however slight, from which the jury could have reached its verdict, then [the movant] is not entitled to a JNOV." *Id.* (citing *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 190–91 (1997)); *see also Town of Riverdale Park v. Ashkar*, 474 Md. 581, 607–08 (2021) (citing *Hoffman v. Stamper*, 385 Md. 1,

[6] JNOV refers to the Latin version of judgment notwithstanding the verdict: judgment "non obstante veredicto." *Judgment*, *Black's Law Dictionary* (12th ed. 2024).

16 (2005)). When a party moving for JNOV bears the burden of proof on an issue, the Court may grant the motion only when "the facts are *uncontroverted* (as opposed to merely *uncontradicted*)." *Smith v. Miller*, 71 Md. App. 273, 278–79 (1987) (quoting *C.S. Bowen Co. v. Maryland Nat'l Bank*, 36 Md. App. 26, 33–34 (1977), and citing *Alexander v. Tingle*, 181 Md. 464 (1943), and *Pennsylvania R. Co. v. Stallings*, 165 Md. 615 (1934)) (emphasis in original).

A motion for JNOV and a motion for new trial may be joined together. Md. Rule 2-532(c). On a motion for new trial, "[t]he court may set aside all or part of any judgment entered and grant a new trial to all or any of the parties and on all of the issues, or some of the issues if the issues are fairly severable." Md. Rule 2-533(c). A motion for new trial is addressed to the discretion of the trial judge and may be granted when the verdict is against the weight of the evidence. *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 58–59 (1992). The motion is addressed to the trial court's "opportunity . . . to feel the pulse of the trial and to rely on his [or her] own impressions in determining questions of fairness and justice." *Id.* at 59.

A motion for remittitur is a form of a motion for new trial. The trial court grants the new trial requested by the defendant, but it gives the plaintiff the option of avoiding a re-trial by remitting the portion of the judgment deemed to be excessive and accepting a judgment at the reduced amount set by the trial court. *Turner v. Washington Suburban Sanitary Comm'n*, 221 Md. 494, 501–02 (1960). "The standard to be applied by a trial judge in determining whether a new trial should be granted on the ground of excessiveness of the verdict has been variously stated as whether the verdict is 'grossly excessive,' or 'shocks the conscience of the court,' or is 'inordinate' or 'outrageously excessive,' or even simply 'excessive.'" *Banegura v. Taylor*, 312 Md. 609, 624 (1988), *quoted in Hebron Volunteer Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 628 (2006). "[T]he trial court, in making its determination, must make a fair and reasonable

assessment of the evidence it has seen and heard during the trial and determine the highest amount that a reasonable jury would award to fairly compensate a plaintiff for his or her loss based on that evidence." *Hebron Volunteer Fire Dep't, Inc.*, 166 Md. App. at 642–43.

The different standards applicable to motions for JNOV and to motions for a new trial reflect the different consequences of the motions:

> The effect of the grant of judgment notwithstanding the verdict is similar to a Rule 2-535 action because it operates to supplant the jury's verdict, unlike the grant of a motion for new trial, in which the movant gets a second chance to present his/her case before a new jury, with the prospect of securing a jury verdict, unaffected by judicial alteration. For that reason, the guideposts are more definitive, delimiting the circumstances in which we will uphold a court's revision of the jury verdict. The bedrock principle justifying the grant of a judgment n.o.v. is when the evidence, at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense.

Kleban v. Eghrari-Sabet, 174 Md. App. 60, 85 (2007) (citations omitted). The distinction is between determination of the legal sufficiency of the evidence, which can produce a new and final outcome as a matter of law, and an assessment of the weight of the evidence, which produces at most a full or partial repeat of the trial:

> That a jury verdict is against the weight of the evidence is historically a proper ground for the grant of a new trial. Unlike a complaint that the verdict is against the evidence, which engages a clinical analysis of the legal sufficiency of the evidence – a task which an appellate court as well as a trial court may accomplish – a claim that the verdict is against the weight of the evidence requires assessment of credibility and assignment of weight to evidence – a task for the trial judge.

Buck, 328 Md. at 60.

"A motion for judgment n.o.v. is not the way to get at excessive damages; that is the office of a motion for a new trial which can be denied conditioned on the plaintiff's acceptance

of a remittitur." *Battista v. Sav. Bank of Baltimore*, 67 Md. App. 257, 273 (1986) (citing *Cheek v. J.B.G. Properties, Inc.*, 28 Md. App. 29, 43 (1975)).[7] Thus, "a motion for Judgment NOV, standing alone, cannot be the basis for either increasing or decreasing the verdict." *Board of Trustees of Baltimore Community Colleges v. RTKL Associates, Inc.*, 80 Md. App. 45, 59 (1989) (citing *Millison v. Clarke*, 32 Md. App. 140, 143 (1976)), *cert. granted*, 317 Md. 609, *and cert. dismissed*, 319 Md. 274 (1990).

2. The City's Procedural Arguments

The City makes several procedural arguments to limit the scope of Defendants' motions. The Court discusses the procedural arguments first to set the proper scope for consideration of the trial evidence.

First, the City argues that Defendants waived any right to seek JNOV with respect to the apportionment issues – characterizing essentially all of Defendants' arguments as apportionment arguments – because Defendants failed to move for judgment on those particular issues at the close of all the evidence during the trial. The City is correct that a motion for judgment at the close of all the evidence is a required predicate for a post-trial motion for JNOV. Md. Rule 2-532(a); *General Motors Corp. v. Seay*, 388 Md. 341, 344 (2005). Even when a motion for judgment is made at the close of all the evidence, an issue is not preserved for a subsequent JNOV motion unless the specific issue is presented in the motion for judgment. *Leake v. Johnson*, 204 Md. App. 387, 405 (2012). In the analogous situation of a criminal defendant preserving for appeal issues of the sufficiency of the evidence, "a motion for judgment of acquittal may be sufficient to preserve an issue where the acquittal argument generally includes the issue raised on appeal." *Redkovsky v. State*, 240 Md. App. 252, 261 (2019).

[7] The court recognized in *Battista* that a JNOV would be appropriate if a plaintiff presented no evidence of damages at all. 67 Md. App. at 273.

Here, Defendants explicitly moved for judgment at the close of all the evidence on multiple aspects of causation. Because of the very close relationship between the causation and apportionment issues in this action, Defendants' motions for judgment on causation were sufficient to bring before the Court the issues they now raise concerning causation and apportionment. For example, in arguing that the evidence was insufficient to prove causation, counsel for Defendant McKesson argued specifically that opioid use disorder in Baltimore results primarily from overprescribing and medicine cabinet diversion, facts that are at the heart of Defendants' apportionment arguments. Tr. (11/6/24) at 203–04. In the course of Defendant McKesson's motion for judgment, the Court had this specific exchange with counsel about the apportionment issues in connection with causation of damages:

> MS. RODGERS [for McKesson]: I think there is an element of – a burden of proof that carries through, as in all courts, from causation of the actual tort.
>
> So here, the nuisance, to damages. And the City is required to show what damages are attributable to defendants' conduct.
>
> THE COURT: Well, I view that more as an apportionment issue, which would be the obligation of the defendant to prove it, but . . .
>
> MS. RODGERS: I want to talk about that for a minute, though.
>
> Because I think the first step in this analysis, of course, is the City's burden. And it's their burden, of course, to show that there was – that our conduct caused the public nuisance.
>
> It's also their burden, and it's contained here right in the jury instructions, that they show damages that were caused by defendants' conduct.
>
> Once they've established that bucket of harm, whatever it is, that dollar amount, then we can – it's our burden, under the court's ruling, to apportion within that. To say, well, some of this was caused by good-faith prescribing, or some of this was caused by drug cartels.

> THE COURT: I agree with you, except that the defendants also supported the approach of the verdict sheet, which is to state a damages amount undifferentiated by defendant. Total, you know, damages resulting from the total public nuisance.
>
> There is a – you know, there we get into the definition of whether it's a portion of opioid use disorder related to the misuse of – of prescription opioids or whether it's all opioid use disorder.
>
> But it's an aggregate amount, and then the apportionment occurs against that amount.
>
> MS. RODGERS: Well, I think – I want to be clear as to what our objections were. I think we submitted the paper most recently on that question, 8C, that goes to this question.
>
> I think the defendants' position has always been that the amount of damages must be linked to our conduct. That's – that's the City's burden. And from that point, then, we can apportion further.

Id. at 212–16. As will be seen in the discussion below, the Court agrees with important parts of what Ms. Rodgers argued here. For waiver purposes, it is clear that the Court had before it – front and center – the intertwined issues of causation and apportionment. Moreover, the City itself moved for judgment on the issue of apportionment, *id.* at 264–69, so the City itself ensured that those issues were before the Court procedurally at the close of the evidence. The Court concludes that the requirement of Maryland Rule 2-532(a) has been satisfied and Defendants have not waived any issues presented in their motions for JNOV.

Second, the City argues that Defendants' JNOV motions are procedurally improper on these issues because Defendants cannot support a "take-nothing" theory of relief. The Court agrees in part. Like a motion for judgment at the close of all the evidence, a JNOV motion tests the legal sufficiency of the evidence. The motion must be granted if the evidence, viewed most favorably to the non-moving party, is insufficient to support the claim. The implication is that JNOV applies only to arguments that undermine a necessary element of a claim and therefore is available only if the argument would result in reversal of the judgment found by the jury. The

restriction does not go quite as far as the City argues. It is not the case that a JNOV motion could only be granted if it takes away the entire judgment. Thus, for example, in certain circumstances a JNOV motion might be granted to negate one cause of action but not another cause of action or a JNOV motion might be granted to remove a separate category of damages that has no evidentiary support.

In Maryland cases, cited above, this restriction on JNOV is captured in the statement that "[a] motion for judgment n.o.v. is not the way to get at excessive damages; that is the office of a motion for a new trial which can be denied conditioned on the plaintiff's acceptance of a remittitur." *Battista*, 67 Md. App. at 273. The Court of Special Appeals, now the Appellate Court of Maryland, applied this restriction in complicated circumstances in *Board of Trustees of Baltimore Community Colleges v. RTKL Associates, Inc.*, 80 Md. App. 45 (1989).[8] The roof of the new physical education building at what was then called Dundalk Community College partially collapsed. *Id.* at 48. The College sued the architect (RTKL), the general contractor (Gonnsen), and the subcontractor (Carr) responsible for the roof trusses. *Id.* RTKL cross-claimed for contribution and indemnity against both Gonnsen and Carr. *Id.* Before trial, the College settled with Gonnsen and Carr. *Id.* The settlement agreements included joint tortfeasor provisions by which the College promised to protect Gonnsen and Carr against contribution and indemnification claims by RTKL. *Id.* at 48–49.

The case went to jury trial on the College's claim against defendant RTKL only and on RTKL's cross-claims against Gonnsen and Carr. *Id.* at 49. On the verdict sheet, the jury found RTKL negligent and in breach of contract and awarded the College $557,296 in damages. *Id.* On RTKL's cross-claims, the jury found both Gonnsen and Carr negligent and awarded RTKL

[8] The Court of Appeals, now the Supreme Court of Maryland, first granted *certiorari* in this case, 317 Md. 609, and then dismissed the writ as improvidently granted after hearing argument, 319 Md. 274.

damages of $111,459 from Gonnsen and $167,189 from Carr. *Id.* at 49–50. The appellate court observed that the combined amounts awarded to RTKL on the cross-claims was exactly 50% of the amount awarded to the College on the primary claim and that the split in the amounts between Gonnsen and Carr was a 60%/40% apportionment of liability between them for one-half the amount awarded against RTKL. *Id.* at 50 n.1 and 53. On a variety of post-trial motions, including a motion for JNOV, the trial court adjusted the awards. *Id.* at 50, 58. The trial court reduced the judgment for the College against RTKL to $185,765.33, exactly one-third of the amount awarded by the jury, and it increased both cross-claim judgments to the same amount, $185,765.33. *Id.* at 50.

The appellate court began its discussion with consideration of a trial court's very limited authority to revise or correct a jury verdict to conform to the jury's intentions when those intentions are "manifest and beyond doubt." *Id.* at 52–53 (quoting *Sun Cab Co. v. Walston,* 15 Md. App. 113, 161 (1972), *affirmed in part and reversed in part,* 267 Md. 559 (1973)). The trial court's action was not justified on this basis because its adjustments were inconsistent with the apparent intention of the jury: "What the jury apparently intended was to apportion the negligence between the defendants – RTKL responsible for 50 percent, Carr for 30 percent and Gonnsen for 20 percent." *Id.* at 54.[9] After a discussion of the features of contribution and indemnification, *id.* at 54–57, and after concluding that the jury failed to follow instructions on indemnification, *id.* at 57–58, the court concluded that the trial court's adjustments would result in the perverse outcome that the College's recovery against RTKL would be erased and the College would actually have to pay sums to parties the jury found negligent based on the

[9] The Court then immediately observed: "The doctrine of comparative or relative negligence has never been adopted in Maryland, either as to contributory negligence of a plaintiff as opposed to negligence of the defendant or as to the degree of negligence among two or more defendants." *Id.* at 54 (citation omitted). Unlike in this action, the harm in that case was indivisible.

College's obligations under the settlement agreements with two of the parties, *id.* at 58–59. This produced the court's conclusion that "a motion for Judgment NOV, standing alone, cannot be the basis for either increasing or decreasing the verdict." *Id.* at 59 (citing *Millison v. Clarke*, 32 Md. App. 140, 143 (1976)). Because of the fundamental inconsistencies between the jury's verdict and the law of contribution and indemnification and the jury instructions, the court concluded the only available course was a new trial. *Id.* at 60.

The situation in this action is obviously different – including most notably the fact that the Court has determined that the divisible injury involved in this action permits apportionment of liability – but the Court is convinced that Defendants' motions for JNOV may be entertained only to the extent they involve issues that would result in judgment for either Defendant. On issues that would result in a reduction of damages or a different apportionment of damages, the only available remedy is a new trial, including the feature of a remittitur. The Court thus must sort Defendants' arguments to determine whether they are or are not so dispositive that they can be the subject of a motion for JNOV. Before doing that, the Court considers one further procedural argument by the City.

Third, the City argues that remittitur is not available to address any apportionment issue. In support, the City cites *Cunningham v. Baltimore Cnty.*, 246 Md. App. 630 (2020), *Akermanis v. Sea-Land Services, Inc.*, 688 F.2d 898 (2d Cir. 1983), and *Keith v. Russell T. Bundy & Assoc.*, 495 So. 2d 1223 (Fla. Dist. Ct. App. 1986). The Court rejects this argument. *Cunningham* provides a useful summary of the concept and development of remittitur, 246 Md. App. at 702–04, but the trial court in that case did not even grant a remittitur, and the appellate discussion does not bear on this particular issue. The City is correct that the appellate court in *Keith* held that remittitur could not be used in Florida to adjust the percentage of contributory fault assessed against a plaintiff. 495 So. 2d at 1225. But the court also affirmed the trial court's grant of a

new trial on liability on the ground that the finding of no contributory negligence on the part of the plaintiff was against the weight of the evidence. *Id.* at 1226.

In *Akermanis*, the Second Circuit held that remittitur could not be used to increase the contributory liability share of a plaintiff in a Jones Act case. 688 F.2d at 902. As in *Keith*, however, the Second Circuit also allowed that there might be circumstances, to be considered on remand, in which the grant of a new trial was warranted based on the jury's finding of minimal negligence on the part of the plaintiff being against the weight of the evidence. *Id.* at 904–06. More fundamentally, however, as Defendants point out, *Akermanis* represents a minority view among federal courts. In an asbestos case governed by Kentucky law, the Sixth Circuit concluded that the jury's apportionment of fault between the defendant distributor and the manufacturer of the asbestos-containing product could not be supported by the evidence.[10] *Strickland v. Owens Corning*, 142 F.3d 353, 356–57 (6th Cir. 1998). The Sixth Circuit held the trial court erred in not granting a new trial and that ordering a remittitur was a useful tool in this context:

> Where "[t]he defects in the award are readily identified and measured," remittitur is more appropriate than a new trial. *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982) (ordering a new trial on the question of damages unless plaintiff consents to a remittitur); *accord Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 178 (5th Cir. 1992). Similarly, remittitur would seem an appropriate remedy where a defect in the allocation of fault can be readily identified.

Id. at 359. The Sixth Circuit declined to follow *Akermanis* and instead quoted the Seventh Circuit's approach as "the more sensible one":

> "[There is] a technical question whether remittitur is proper in a case of malapportionment of damages, as distinct from excessive damages. Strictly speaking it is not, for . . . the decision on apportionment is a decision on liability, and not on the amount of

[10] Apportionment in this context would not be proper under Maryland law. *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333 (2014).

> damages. But we think logic ought to give way to practical convenience and to the policy behind the device of remittitur, which is that if the plaintiff is willing to accept a lower amount of damages rather than incur the risks and expense of a new trial, and the defendant cannot complain because that lower amount would have been within the jury's power to award, it is a just economy to terminate the suit without a retrial. The policy is fully applicable to a case such as this where the defendants are complaining that the jury placed too large a share of the blame on them."

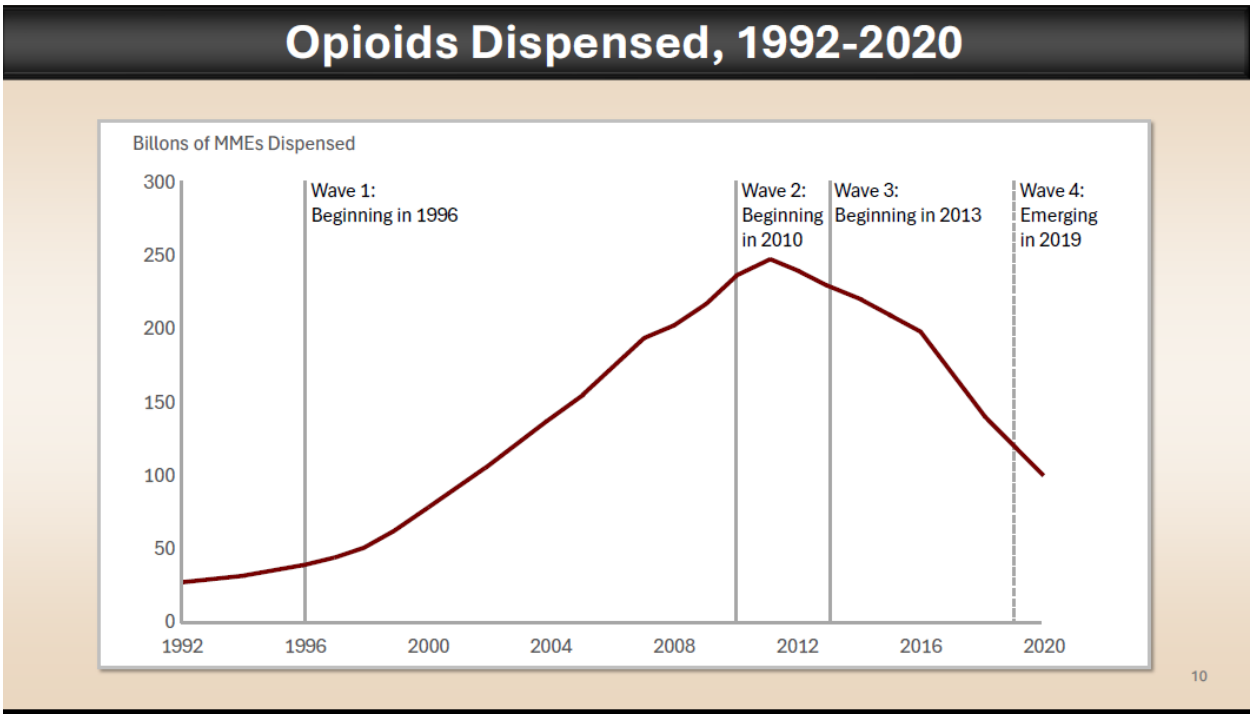
Id. at 360 (quoting *Davis v. Consolidated Rail Corp.*, 788 F.2d 1260, 1267 (7th Cir. 1986)). *See also Marcano Rivera v. Turabo Med. Ctr. P'ship*, 415 F.3d 162 (1st Cir. 2005) (reviewing apportionment verdict using remittitur principles and concluding verdict was not grossly excessive); *Atlantic Coast Line R. Co. v. Anderson*, 267 F.2d 329, 333 (5th Cir. 1959) (commenting in *dictum* that remittitur could be available on apportionment issues).

The Court is convinced that the technique of remittitur is available under Maryland law to address causation and apportionment issues if those issues resulted in an excessive verdict.

3. The Public Nuisance in Baltimore

Neither Defendant has challenged the sufficiency of the evidence to support the jury's conclusion that a public nuisance exists in Baltimore related to misuse of prescription opioids and opioid use disorder. To understand the context of the subsequent contested issues, it is important to examine the evidence on that topic and the way the public nuisance was defined for purposes of this action and the jury's consideration.

The City presented expert testimony that the public health community characterizes the current national opioid epidemic as having begun in 1996 and as developing or progressing in four waves or phases. Through the testimony of Dr. Michael Barnett, a medical doctor and professor at Harvard Medical School, the City presented the demonstrative exhibit shown below marking the waves in relation to the volume of prescription opioids sold in the United States.



Exh. P02359, Slide 10 (identification only).

Wave 1 of the epidemic, from 1996 to 2010, was marked by a rapid increase in the prescribing of opioid medications. There was "an over fivefold increase in just a raw amount of opioids that were dispensed in the country and also a huge rise in opioid use disorder and prescription opioid deaths at the same time." Tr. (10/17/24) at 89. Dr. Barnett stated this as a causal relationship: "[A] huge increase in opioids and the opioid oversupply resulted in more cases of addiction and more people getting sick and dying." *Id.* at 89. "[T]he best-quality evidence [in the literature] is extremely consistent and unanimous that opioid oversupply is associated with increased opioid use disorder and addiction, problems with addiction." *Id.* at 90. "[O]versupply causes addiction and causes overdose deaths directly." *Id.* at 91.

The starting year, 1996, "is when Purdue Pharmaceuticals started to aggressively push marketing of their opioid products." *Id.* at 84. The evidence at this trial on responsibility for the surge in opioid prescribing in Wave 1 of the epidemic was minimal. No party presented any factual evidence of the conduct of any of the Purdue entities or any other opioid manufacturer.

Defendants presented expert evidence showing a fundamental change in the medical community around the appropriate use of opioid medications. Both scholars and regulators, including the Maryland Board of Physician Quality Assurance (now the Maryland Board of Physicians), adopted the view that physicians were not treating pain sufficiently. The City's expert witness, Dr. Barnett, testified generally that "drug manufacturers were very successful, in the beginning of the first wave, at convincing many doctors and professional societies that opioids were less dangerous than they had believed in the past." *Id.* at 85. The City presented nothing to suggest that either Defendant distributor bore any responsibility for this increase in prescribing.

Not specifically limited to Wave 1 conduct, Dr. Barnett opined "that one characteristic of opioid prescribing is that doctors are extremely variable. So some doctors are very cautious with opioids, where some dispense it quite frequently." *Id.* at 86. "[O]verprescribing . . . is very much concentrated in a smaller group of doctors who write lots of prescriptions." *Id.* at 87. "So many opioids got out because there were lots of prescribers with very low standards who were prescribing enormous number of pills and pharmacies that were dispensing them and distributors giving pills to those pharmacies." *Id.* at 99.

Wave 2 of the epidemic began in 2010 with greater recognition of the risks associated with prescription opioids and with changes to the medications to make them more difficult to abuse. Again, the evidence at this trial concerning these changes was scant. Dr. Barnett referred to Purdue Pharma changing the formulation of OxyContin to make it very difficult to inject. Dr. Barnett described this phase as featuring a shift in use by individuals who had developed dependence or opioid use disorder during Wave 1: "[B]ecause all of these people were caught in that . . . loop, opioid addiction that we talked about, and they were highly dependent on opioids, they had to find something else. . . . Heroin was the cheapest, most widely available source that was potent enough." *Id.* at 94. As prescription opioids became less accessible, some of these users switched to heroin because of its greater availability and its greater potency.

The third wave, beginning in 2013, "marks the start of when the opioid fentanyl started to become adulterated into the heroin supply." *Id.* at 94. Fentanyl is both cheaper and far more potent than heroin. It was first introduced as a secret addition to heroin and later became marketed on the streets as its own product. The most striking feature of Wave 3 is a rapid increase in opioid mortality – overdose deaths – even as the volume of the prescription opioid supply dropped. This introduction of fentanyl produced a significant increase in overdoses and overdose deaths because individuals using heroin had little ability to know whether or how much fentanyl was present in the drugs they were purchasing. According to Dr. Barnett, Wave 3 also featured "a frantic reexamination of [prescribing] guidelines," and "many professional societies updated their prior prescription guidance . . . to opioids are a last resort and should only be used if you have to." *Id.* at 92.

Dr. Barnett marked Wave 4 of the opioid epidemic on his demonstrative exhibit as "Emerging in 2019," but no party elicited testimony from him on the characteristics of Wave 4. Although it is not a matter of evidence before the jury, at least one researcher has described Wave 4 as marked by an increased role of stimulants in drug overdose deaths related to opioid overdose deaths:

> A 'fourth wave' of high mortality involving methamphetamine and cocaine use has been gathering force in the US. Availability and use of illicit fentanyls are still the major drivers of overdose deaths and the current rise in stimulant-related deaths appears entwined with the ongoing opioid epidemic.

Daniel Ciccarrone, *The Rise of Illicit Fentanyls, Stimulants and the Fourth Wave of the Opioid Overdose Crisis* (Jul. 1, 2021) (unpublished manuscript on file with National Library of Medicine), https://pmc.ncbi.nlm.nih.gov/articles/PMC8154745.

Dr. Barnett also described the process by which opioid use may lead to addiction or opioid use disorder. The human body produces natural opioids that act in certain situations on

opioid receptors to block pain. For example, in reaction to a traumatic injury, the body may suppress pain long enough to permit a saving response like flight. External opioids – both naturally derived and synthetic – operate on the body's opioid receptors in a similar way, except they are indiscriminate rather than targeted like the body's natural reactions. Opioids may be used effectively to block pain, but the misuse of opioids can lead progressively to tolerance or dependence and then to opioid use disorder. Dr. Barnett presented a stylized progression from initial use to misuse to dependence and then to addiction. Tolerance or dependence is a physiological change in the body when misuse of opioids leads to the body requiring more opioids to produce a desired reaction. Dependence is marked by a cycle in which the individual craves the euphoric sensation produced by the opioid, but the end of the intoxication produces the intensely negative effects of withdrawal symptoms. The individual craves the drug to stave off those adverse symptoms, and that craving results in seeking behavior as the individual is compelled to get more of the drug. Dr. Barnett emphasized that this cycle of dependency is physiological and not only behavioral. When the dependence becomes sufficiently severe, it may progress to opioid use disorder, a classification characterized by interference with the individual's normal functioning in life. The urgency of the craving resulting from the physical symptoms leads to problems in relationships, interference with employment, or interference with the ability to provide care to self and others as the need to obtain the drug overwhelms normal functioning. Dr. Barnett described opioid use disorder as "a lifelong, relapsing illness." Tr. (10/17/24) at 75. Individuals can achieve sustained remission, but they remain "vulnerable to relapse." *Id.*

All of the expert witnesses agreed that the progression from initial opioid use to misuse to dependence to opioid use disorder is relatively rare. Fewer than one percent of individuals who have used opioids appropriately progress to misuse of the drugs and ultimately to opioid use

disorder.[11] Of course, for the small percentage who develop opioid use disorder, the impact is profound. Dr. Barnett testified that "in most cases, [it takes] probably at least months" to progress from initial use to opioid use disorder. *Id.* at 70. Dr. Barnett opined that it is unlikely that a person misusing opioids to the point of dependence could get enough opioids "from a typical doctor." *Id.* "At some point they will have to go to other places, either the illicit drug market or doctors with much lower standards, to continue to get the prescription opioids that they need." *Id.*

It is striking to the Court that no party presented the testimony of any person who has actually experienced the progression from opioid use to opioid use disorder. Thus, the evidence before the jury on this subject remained abstract and generalized.

4. Defendants' Unreasonable Conduct

Both Defendants challenge the sufficiency of the evidence to support the jury's conclusion that they acted unreasonably in a way that interfered with a public right. They embed these arguments within other arguments relating to causation and apportionment, but it is useful to separate them as relating to this element of the City's claim. Because these arguments would negate the jury's finding of an essential element of the City's claim, these arguments could provide the basis for a JNOV. Before considering Defendants' specific arguments, the Court will examine the City's theory and evidence of unreasonable conduct.

[11] An expert witness presented by Defendants, Dr. Christopher Gilligan, came closest to giving these statistics. He testified that only about 1% of patients who are prescribed opioids for pain go on to misuse them. Tr. (10/21/24) at 277–78. Of that group, about 3.6% go on to take heroin or fentanyl. *Id.*; Tr. (10/24/24) at 142–43. These sequential risks mean that only four of 10,000 patients who take prescription opioids for pain will eventually take heroin or fentanyl. Tr. (10/24/24) at 120–21. Dr. Gilligan did not give a specific statistic for the percentage of people who misuse prescription opioids who develop full opioid use disorder. He described that occurrence as "[l]ess than 1 percent." *Id.* at 138.

a. Distributors' Regulatory Duties

The City premised its claim of unreasonable conduct on the Defendants' failure to identify and to stop suspicious orders of opioids by pharmacies, as required by federal law. Although public nuisance law allows unreasonable conduct to be shown in multiple ways, the City focused exclusively, or almost exclusively, on alleged violations of Defendants' federal regulatory obligations.

The federal Controlled Substances Act ("CSA"), codified in part at 21 U.S.C. § 801 *et seq.*, regulates various drugs on different schedules. An "opioid" or "opiate" is defined as "any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine . . . ." 21 U.S.C. § 802(18). Most opioid medications are classified as Schedule II substances based on "a high potential for abuse" but also the existence of "a currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(2). The CSA requires that all participants in the supply chain for opioid medications – manufacturers, distributors, and pharmacies or "dispensers" – be registered with the United States Attorney General through the Drug Enforcement Administration ("DEA"). 21 U.S.C. § 822. In addition, physicians and other health care professionals who prescribe opioids must register with the DEA as "dispensers." *Id.* In Maryland, pharmacies and physicians also must be licensed under State law.

With some exceptions, Schedule II substances, including opioids, may not be "dispensed," which includes sales by pharmacies, except pursuant to a prescription written by a registered physician or other health care practitioner. 21 U.S.C. § 829(a). Thus, for the most part, the prescribing of opioid medications by physicians and other health care professionals drives the permissible production and distribution of opioid medications. Each year, the DEA sets "production quotas" for opioids based on "the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment

and maintenance of reserve stocks." 21 U.S.C. § 826(a)(1). The production quotas include overall production and production for each registered manufacturer. 21 U.S.C. § 826.

Every registrant must report detailed information to the DEA on its inventory of opioids and on all opioid transactions of the registrant. 21 U.S.C. § 827. The DEA maintains an Automated Reports and Consolidated Orders System ("ARCOS") to collect that and other information. 21 U.S.C. § 827(f)(1). The Defendant distributors reported every individual transaction in which they engaged to the DEA through the ARCOS.

The City's claims against the Defendant distributors focused almost entirely on Defendants' obligation under federal law to maintain "effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels." 21 U.S.C. § 823(b)(1). A part of that broader requirement is the obligation of a distributor to maintain a suspicious order monitoring system. Before 2018, the suspicious order monitoring requirement existed in a federal regulation that provided:

> The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Field Division Office of the Administration in his area of suspicious orders when discovered by the registrant. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.

21 C.F.R. § 1301.74(b). In 2018, Congress added a specific provision to the CSA requiring registrants to "design and operate a system to identify suspicious orders for the registrant." 21 U.S.C. § 832(a)(1).

The City anchored its claims against Defendants in letters sent by the DEA to all registrants in 2006 and 2007. In the first of those letters, dated September 27, 2006, Deputy Assistant Administrator Joseph T. Rannazzisi emphasized that "distributors must be vigilant in deciding whether a prospective customer can be trusted to deliver controlled substances only for

lawful purposes" as part of the effort to address "the abuse (nonmedical use) of controlled prescription drugs," which he described as "a serious and growing health problem in this country." Exh. P00025 at 1. He cited the suspicious order regulation and stated DEA's view that distributors must both report and "avoid filling suspicious orders that might be diverted." *Id.* at 2. DEA included a list of characteristics "often display[ed]" by pharmacies engaged in illegitimate dispensing and a list of inquiries that a distributor "may wish" to make of its pharmacy customers to identify potential diversion. *Id.* at 3. On December 27, 2007, DEA sent another letter to all registrants "to reiterate the responsibilities of controlled substance manufacturers and distributors to inform DEA of suspicious orders in accordance with 21 CFR 1301.74(b)." Exh. P00039 at 1. The DEA disavowed any prior approval of a registrant's suspicious order monitoring system:

> DEA does not approve or otherwise endorse any specific system for reporting suspicious orders. Past communications with DEA, whether implicit or explicit, that could be construed as approval of a particular system for reporting suspicious orders, should no longer be taken to mean that DEA approves a specific system.

Id. The DEA stated that reporting alone was not enough: "Registrants must conduct an independent analysis of suspicious orders prior to completing a sale to determine whether the controlled substances are likely to be diverted from legitimate channels." *Id.*

b. Types of Diversion

Diversion of controlled substances from the lawful distribution system comes in many forms. A manufacturer or distributor could be directly responsible, either intentionally or negligently, for the diversion of controlled substances while they are in the registrant's control. For example, a manufacturer or distributor could enter into a corrupt agreement to supply controlled substances directly to an unlicensed person. Such corruption might occur at a high level in the registrant's organization, or it could consist of a failure to detect wrongful conduct by

a lower-level employee. Direct, negligent diversion by a manufacturer or distributor could occur if the registrant fails to maintain adequate security of controlled substances in the registrant's possession and theft by a third party results. The City presented no evidence of any diversion of these types occurring while controlled substances were in the control of either Defendant.

Diversion also can occur downstream from a registered distributor. Such diversion focuses on the conduct of other registrants – pharmacies or prescribers – or of third parties. For a registered pharmacy, the diversion may occur through intentional or negligent conduct. A pharmacy may have a corrupt employee who supplies controlled substances improperly to others. A pharmacy also might fail to secure its stocks of controlled substances, resulting in theft. A pharmacy also may dispense controlled substances pursuant to prescriptions without taking sufficient care to ensure those prescriptions are legitimate. That form of diversion could involve a failure to detect fraudulent prescriptions or the more complicated scenario of filling prescriptions from licensed prescribers where the prescription is not based on a valid medical need.

Diversion resulting from the conduct of licensed prescribers also comes in many variations, also involving both intentional and negligent conduct by the prescriber. At this level, the issue is complicated by the applicable standards of medical practice. Outright corruption by prescribers is possible. Prescribers may sell or give prescriptions in situations in which the "patient" has no medical need for the prescription at all or in which the lack of medical need is obvious. Much more difficult are situations in which the need for the prescription is medically debatable. As already discussed, the beginning of the opioid epidemic is generally attributed to a broad expansion of prescribing practices by physicians. The City alleged that some or all of that expansion was caused by opioid manufacturers promoting their products improperly, but that evidence was not presented with any depth or specificity in this trial because no manufacturer defendants remained in the case for trial. The City made no claim that either of the distributor

Defendants bore any responsibility for that allegedly wrongful or unreasonable conduct by any manufacturer. Thus, for purposes of the liability of these two Defendants, the good faith but medically mistaken prescription of opioid medications by physicians must be viewed as legitimate prescribing conduct.

Defendants McKesson and AmerisourceBergen placed great emphasis on so-called "medicine cabinet" diversion. This type of diversion involves opioid medications that are properly prescribed – for example, a thirty-pill prescription given to a patient who has had minor surgery. The patient uses only part of the prescription, perhaps only five of the thirty pills. The remaining twenty-five pills might be "diverted" by various means. The patient could consume the pills herself – illegitimately in the sense that she no longer has sufficient pain to warrant use of the medication. More obviously, the patient or a family member of the patient might give or sell the excess pills to another person who has no legitimate need for them. That other person might be a friend or family member or it could be a stranger. The excess pills might be misused within a private sphere close to the legitimate patient or they might enter the illegal market and be supplied to unrelated persons. In one sense, this is not "diversion" at all because the pills all left the legal supply system legitimately by a lawful prescription, but the distinction is semantic. This is a source of opioid medications that are misused and therefore "diverted" from appropriate medical use.

c. The City's Theories of Unreasonable Conduct

The City advanced two theories of unreasonable conduct. One expert witness, Ruth Carter, focused on specific pharmacies and red flags that she opined should have led to the identification of suspicious orders or conduct by those pharmacies. Two other expert witnesses, Dr. Leslie Schafer and Gary Tuggle, engaged in a more abstract statistical approach to identifying what might be suspicious orders. The Court concludes that Ms. Carter's testimony adequately supported a jury finding of unreasonable conduct. The testimony of Dr. Schafer and

Mr. Tuggle, in retrospect, should have been excluded and cannot support any conclusion of unreasonable conduct.

i. Ruth Carter's Opinions

Ruth Carter is a former diversion investigator with the DEA. As an expert witness retained by the City, she examined specific evidence about Defendants' sales to specific pharmacies located in Baltimore City and Baltimore County. She identified what she deemed to be red flags about those pharmacies and opined that each Defendant conducted insufficient investigations into those red flags, with the result that the Defendant continued to sell opioids to those pharmacies when, in her opinion, the Defendant should have reported suspicious orders and stopped its sales to those pharmacies. In many of these instances, the Defendant involved eventually stopped selling to the pharmacy in question. Thus, the City's ultimate theory was that there was a period of time during which the Defendant unreasonably continued sales to that pharmacy. The Court permitted Ms. Carter to testify about sales to pharmacies located in Baltimore County, but the Court instructed the jury that it had to determine what effect, if any, sales to those pharmacies had on the existence of the alleged public nuisance in Baltimore City.

Ms. Carter testified concerning Defendant McKesson's sales to nine specific pharmacies. All of them are or were independent, as opposed to chain, pharmacies. Five are or were located in Baltimore City; four are or were located in Baltimore County. She testified as follows:

1. McKesson sold opioids, primarily hydrocodone, to **NewCare Pharmacy** in Baltimore City from 2005 to October 2006. NewCare was an internet pharmacy; it did not have a public, storefront location. McKesson received an inquiry about NewCare from a DEA agent in October 2005. McKesson cut its sales to NewCare in February 2006, but it did not terminate NewCare as a customer until October 2006. The City alleged an eleven-month period from October 2005 to October 2006 when McKesson should not have been selling any opioids to NewCare Pharmacy.

2. McKesson sold opioids to **Drug City Pharmacy** in Dundalk, in Baltimore County, from 2006 to March 2012. Drug City was a

very large store. It was the highest volume purchaser of oxycodone from McKesson in the country. Ms. Carter identified as red flags for this customer: the volume of oxycodone purchased; a high percentage of controlled substance prescriptions in relation to all prescriptions; filling prescriptions for patients of the Rosen-Hoffberg clinic; and the fact that the pharmacy hired armed guards to try to prevent drug transactions occurring in its parking lot. McKesson terminated Drug City as a customer in March 2012. Ms. Carter faulted McKesson for continuing sales from March 2009, when it learned about the armed guards needed in the parking lot, until March 2012, and from October 2011, when the DEA requested information about Drug City, until March 2012.

3. McKesson sold opioids to **Bayview Pharmacy** in Baltimore City from 2006 to July 2013. The same individual owned Bayview and **White Marsh Pharmacy** in Baltimore County, which also was a McKesson customer. Ms. Carter identified as red flags the fact that Bayview filled prescriptions from pain clinics, including the Rosen-Hoffberg clinic; a high percentage of controlled substance prescriptions in relation to all prescriptions; a high percentage of oxycodone prescriptions in relation to all controlled substance prescriptions; and the fact that a manufacturer, Mallinckrodt, informed McKesson that Bayview was not eligible for Mallinckrodt's charge-back discounts. McKesson terminated both Bayview and White Marsh Pharmacies as customers in July 2013. Ms. Carter testified that McKesson should have terminated sales to them at least as of November 2012, when it learned that Mallinckrodt had some concerns about this pharmacy.

4. McKesson sold opioids to **Joppa Road Pharmacy** in Baltimore County from 2006 to October 2013. The same individual owned Joppa Road Pharmacy and **Harford Road Pharmacy**, also in Baltimore County. Ms. Carter identified as red flags the fact that Joppa Road filled prescriptions from pain clinics, including the Rosen-Hoffberg clinic, and a high percentage of controlled substance prescriptions in relation to all prescriptions. McKesson also learned of a DEA raid of a Timonium pain clinic in 2012 for which Joppa Road filled prescriptions. Ms. Carter also noted observations by McKesson during a visit to Joppa Road in October 2013 that there were customers waiting in the parking lot in cars with out-of-state plates who entered the pharmacy after a FedEx delivery from another distributor arrived. McKesson terminated both Joppa Road and Harford Road Pharmacies as customers in October 2013. Ms. Carter testified that McKesson should have terminated sales to them earlier, in May 2012, when it learned of the raid on the Timonium pain clinic.

5. McKesson sold opioids to **Northern Pharmacy** in Baltimore City from 2010 to 2014. Ms. Carter identified as red flags the fact that McKesson was aware that Northern Parkway had gained business from Drug City after Drug City was investigated by the DEA in 2012 and that, during a site visit, a pharmacist at Northern Pharmacy stated her opinion that half of the patients with oxycodone prescriptions did not really need oxycodone, suggesting that physicians were responsible for overprescribing the drug. McKesson terminated Northern Parkway in September 2014. Ms. Carter testified that McKesson should have terminated sales to Northern Pharmacy in May 2012, when McKesson learned that business had shifted from Drug City to Northern Pharmacy.

6. McKesson sold opioids to **Keystone Pharmacy** in Baltimore City from 2006 until at least 2019. Ms. Carter identified as red flags a high percentage of controlled substance prescriptions in relation to all prescriptions; the pharmacy filling prescriptions from pain clinics; and a significant percentage of cash transactions for prescriptions. In March 2014, McKesson had an internal recommendation to terminate Keystone as a customer or at least to reduce controlled substance sales to it, but McKesson did not terminate the customer. Ms. Carter testified that McKesson should have terminated sales to Keystone Pharmacy in March 2014 based on the internal recommendation.

7. McKesson sold opioids to **Poplar Grove Pharmacy** in Baltimore City until 2018. Ms. Carter identified as a red flag McKesson's discovery in March 2017, during a license verification of the pharmacy, that the pharmacy had been disciplined by State authorities in 2016 for filling fraudulent prescriptions from 2012 to 2015. McKesson terminated Poplar Grove Pharmacy as a customer in 2018. Ms. Carter testified that McKesson should have terminated sales to Poplar Grove Pharmacy in March 2017, when McKesson learned of the prior discipline of the pharmacy.

Ms. Carter testified concerning Defendant AmerisourceBergen's sales to seven specific pharmacies. Four of those pharmacies are or were independent pharmacies, and three of those four independent pharmacies were owned by the same person. Three of the four independent pharmacies are or were in Baltimore City; one of them was in Baltimore County. Three of the pharmacies Ms. Carter testified about are or were chain Walgreen pharmacies. All three of those Walgreen pharmacies are or were in Baltimore County. Ms. Carter testified:

1. Defendant ABDC sold opioids to **Orchard Pharmacy** in Baltimore City from 2008 to 2011 and then again from 2014 to at least 2020. During the hiatus, Orchard purchased opioids from a different distributor. Ms. Carter identified as red flags related to this customer that two of the largest sources of prescriptions filled by this pharmacy were pain clinics; a high percentage of controlled substance prescriptions in relation to all prescriptions; and that a high percentage of the pharmacy's controlled substance purchases were for oxycodone and alprazolam, which are often abused in combination. Ms. Carter testified that ABDC developed this information about Orchard Pharmacy in 2017 and considered terminating Orchard as a customer in January 2020 but did not terminate the customer. She testified that she believed based on the material she reviewed that Orchard was still an ABDC customer.

2. **Belvedere, Campus, and Hillendale Pharmacies** were all owned by the same person. Belvedere and Campus Pharmacies are in Baltimore City; Hillendale Pharmacy was in Baltimore County. Ms. Carter identified as red flags related to Belvedere Pharmacy that it filled prescriptions of the Rosen-Hoffberg clinic; that it filled prescriptions of Dr. Okoli, a physician in Greenbelt, which is a substantial distance from Baltimore City; that it was ABDC's largest customer in Maryland for oxycodone; and that it had a substantial number of cash transactions for prescriptions. In October 2017, ABDC terminated sales of controlled substances to Belvedere Pharmacy, but ABDC then reconsidered that termination for ninety days. Ms. Carter's testimony was not clear on whether ABDC then terminated sales of controlled substances to Belvedere in January 2018 at the end of the ninety-day period.

3. For **Campus Pharmacy**, Ms. Carter identified as red flags a high percentage of cash transactions for prescriptions and a high percentage of oxycodone 30 mg. prescriptions in relation to all controlled substance prescriptions. In September 2016, Defendant ABDC requested dispensing data from Campus Pharmacy. That data showed Dr. Kofi Shaw-Taylor as the source of a significant number of the prescriptions filled at this pharmacy, and Ms. Carter testified that the information obtained amounted to a red flag. Her testimony was not clear on whether or when ABDC terminated sales of controlled substances to Campus Pharmacy.

4. For **Hillendale Pharmacy**, Ms. Carter identified as a red flag the fact that the pharmacy filled prescriptions written by Drs. Shaw-Taylor, Okoli, and Babaturk. Ms. Carter testified that Defendant ABDC was aware in 2016 that Dr. Babaturk's medical license was

suspended for writing improper prescriptions. Defendant ABDC did not terminate sales to Hillendale Pharmacy before the pharmacy closed in 2018. Ms. Carter testified that the pharmacy closed because one of its pharmacists was arrested for supplying controlled substances to a woman in exchange for sex. Ms. Carter faulted Defendant ABDC for continuing sales to the co-owned Belvedere and Campus Pharmacies after learning of this misconduct at Hillendale Pharmacy.

5. In 2013, Defendant ABDC became the controlled substances distributor for Walgreen pharmacies, including **Walgreen #5686**, **Walgreen #6779**, and **Walgreen #7574**, all located in Baltimore County. Walgreen previously had served as its own distributor to its own pharmacies. Ms. Carter testified that ABDC's due diligence for these pharmacies was deficient because ABDC conducted all of its monitoring for Walgreen pharmacies through central corporate offices and not with the individual Walgreen pharmacy locations. As a red flag, Ms. Carter noted that all three of these Walgreen pharmacies filled prescriptions written by the Rosen-Hoffberg clinic. Separately, the City introduced evidence that individual pharmacists at some Walgreen pharmacies were uncomfortable with prescriptions written by physicians and others at the Rosen-Hoffberg clinic.

Defendants make two arguments that the evidence at trial was legally insufficient to support the jury's conclusion that both Defendants acted unreasonably. First, and most broadly, Defendants argue they cannot be liable for any diversion of opioids that occurred as a result of improper prescriptions written in pill mills because distributors have no authority to second-guess the medical decisions of prescribers. Defendants are correct that distributors generally cannot be expected to examine the medical validity of a prescription, but the argument fails because there are circumstances in which a distributor may be expected to know that prescriptions are improper. The City presented evidence that the problem of pill mills was known in the opioid industry. Indeed, there was very specific evidence of Defendant ABDC's knowledge of the problem as part of its own understanding of its regulatory obligations. A pharmacist has a duty not to fill prescriptions if the pharmacist has reason to know that the prescriptions are fraudulent or written without any medical basis. A distributor who knows or

has reason to know a pharmacy is violating this duty must avoid selling controlled substances to that pharmacy. The issue will always be fact-specific, but the Defendant distributors cannot escape all potential liability by saying they can never question the validity of a prescription written by a licensed physician.

Second, Defendants argue that the jury's conclusion that they acted unreasonably can be justified only by an improper application of hindsight. Defendant McKesson urges in particular that it had no basis to suspect the legitimacy of prescribing activity by any "pill mill" – particularly the Rosen-Hoffberg clinic – at the time of its sales to these pharmacies. McKesson notes that it ended its sales to the Drug City, Bayview, White Marsh, Joppa Road, Harford Road, and Northern Pharmacies in 2014 at the latest and that the investigation and exposure of alleged wrongdoing at the Rosen-Hoffberg clinic did not become public until 2018 at the earliest. Defendant AmerisourceBergen similarly argues that the City relied on suspicions about the prescribing conduct of several doctors, in addition to those at the Rosen-Hoffberg clinic, and that there was no evidence of its ability to know that information when it made sales to the identified pharmacies. With respect to Hillendale Pharmacy in particular, Defendant ABDC argues that it had no basis to know of the very specific and individual wrongdoing of a pharmacist at that location.

Defendants are correct that their conduct cannot be judged by hindsight, and the Court instructed the jury on that principle. The Court recognizes substantial risk that the jury applied hindsight, but the jury is presumed to have followed the Court's instruction. There was sufficient evidence before the jury concerning knowledge of the general risks of pain clinics operating as illegitimate pill mills. Relating more specifically to Defendant ABDC, there also was evidence of pharmacists having concerns about the Rosen-Hoffberg clinic before public disclosures of an investigation in 2018, and there also was evidence of some grounds for suspicion of other prescribers at earlier dates. In addition, the City identified other factors that

the jury could have determined to be red flags concerning the operation of these pharmacies. Taken as a whole and in the light most favorable to the City as Plaintiff, the evidence was sufficient for a reasonable juror to find that both Defendants acted unreasonably with respect to these particular pharmacies during these particular time periods. The Court agrees with Defendant ABDC that the City did not offer any basis on which it could have anticipated the specific wrongdoing of the pharmacist at the Hillendale Pharmacy, but the City presented evidence of other problems at that pharmacy and it also offered the evidence concerning the pharmacist's illicit supplying of opioids for sex as a reason why ABDC should have then terminated sales to the co-owned Belvedere and Campus Pharmacies. If that fact stood alone as the only basis for terminating sales to the Belvedere and Campus Pharmacies, it might be insufficient because the owner closed the Hillendale Pharmacy where the offending pharmacist worked. But the City presented other evidence of red flags associated with operations at the Belvedere and Campus Pharmacies.

In its Supplemental Motion, Defendant AmerisourceBergen argues that the Court erred in admitting the testimony of a Walgreen employee, Erin Meisel, and exhibits containing purely internal communications among Walgreen employees about concerns about prescriptions from the Rosen-Hoffberg clinic. The communications occurred during the time that ABDC was distributing opioids to those Walgreen pharmacies. The Court admitted the exhibits on the basis that they showed the knowledge and reservations of those pharmacy employees about Rosen-Hoffberg prescriptions and that ABDC could have learned of those concerns if it had made inquiries to those pharmacies. The Court instructed the jurors that they could consider that information only if they found that the information was known or should have been known by ABDC. Defendant ABDC argues that this "should have known" standard unfairly expanded the scope of its duty. The Court disagrees. A distributor's regulatory duty under federal law extends to making reasonable inquiries about the activities of its pharmacy customers. The City offered

sufficient evidence to trigger ABDC's obligation to inquire of Walgreen pharmacies. Whether those pharmacy employees would have shared their concerns if asked about them is a fact question the jury was empowered to resolve.

Defendant ABDC also argues that the Court improperly allowed certain "impeachment" exhibits admitted in response to the deposition testimony of Ed Hazewski to be considered for more than an impeachment purpose. Plaintiff City was permitted to introduce the testimony of Mr. Hazewski, a former ABDC employee, as the statement of a party-opponent, Md. Rule 5-803(a)(4), and also as former testimony of an unavailable declarant, Md. Rule 5-804(b)(1). Once that testimony was introduced, it was subject to impeachment. Md. Rule 5-806(a). The City was also permitted to impeach its own witness. Md. Rule 5-607. Once admitted on this basis, the evidence could be considered for any purpose. Defendant ABDC has not convinced the Court that its ruling during trial was incorrect and a JNOV or a new trial on this basis therefore is not appropriate.

ii. Schafer/Tuggle Opinions

The City does not rely on the combined opinions of Dr. Leslie Schafer and Gary Tuggle to support the jury's conclusion that Defendants acted unreasonably, and Defendants pay scant attention to those opinions in their motions. The Schafer/Tuggle opinions warrant discussion because they may have misled the jurors to believe Defendants' conduct was more extensive than was proved by the City through Ms. Carter's testimony.

Dr. Schafer is an "applied empirical economist" with experience working with large datasets. Tr. (10/17/24) at 272. She did not claim any expertise or experience relating to suspicious order monitoring systems of opioid distributors. Mr. Tuggle has extensive law enforcement experience. He started his law enforcement career as a Baltimore Police officer, served briefly with the federal Bureau of Alcohol, Tobacco and Firearms, and then served for twenty-seven years with the DEA. In the DEA he held positions both as executive assistant to

the DEA Administrator and as Special Agent-in-Charge of the Philadelphia field office. After retiring from the DEA, he served for about two years as Deputy and then Interim Police Commissioner in Baltimore. He was offered and qualified, over objection, as an "expert on suspicious order monitoring." Tr. (10/18/24) at 136.

Together, Dr. Schafer and Mr. Tuggle presented a statistical analysis of the ARCOS data for all sales by Defendants McKesson and AmerisourceBergen to pharmacies – excluding hospital pharmacies – in Baltimore City, Baltimore County, and the Brooklyn area of northern Anne Arundel County from 2006 to 2017. The analysis was performed by the firm of Greylock McKinnon and Associates with Mr. Tuggle's input. It aimed to identify "outlier" orders using two similar methodologies applied with two different variables to produce four sets of results. Dr. Schafer endorsed the methodologies, after-the-fact, as consistent with established analytical methods for identifying outliers in a large dataset.

The first method was "median times three." All orders placed by a pharmacy with one of the Defendants were analyzed over a 180-day period to determine the median order by number of orders. In other words, over that period the pharmacy placed the same number of orders below the median as were placed above the median. The volume of opioids ordered at that median was then multiplied by three to establish the cutoff level. If the next order at the end of that 180-day period was for a volume of opioids greater than the cutoff, the order was flagged as an outlier. This method was applied once using dosage units as the measure of each order and once using morphine milligram equivalents ("MMEs") as the unit of measure. MME is a conversion that expresses the strength or potency of an opioid based on its effect compared to the effect of milligrams of morphine.

The second method used the interquartile range or IQR. This method similarly analyzed 180-day periods of orders placed by a pharmacy with one of the Defendants. Instead of using the median, this method identified the orders lying at the 25th and 75th percentiles of all orders in

that 180-day period. Again, these points were based on the number of orders. In other words, one quarter of the orders placed by that pharmacy during that period lay below the 25th percentile, and one quarter of the orders lay above the 75th percentile. One half the pharmacy's orders were within the IQR. The analysis then set the upper cutoff by taking the difference between the volumes of the orders marking the 25th and 75th percentiles of all orders, multiplying that difference by 1.5, and adding that amount to the volume of the order at the 75th percentile. In the illustration presented by Dr. Schafer, the volume of the order at the 25th percentile was 100 dosage units, and the volume of the order at the 75th percentile was 600 dosage units. Tr. (10/17/24), Exh. P2361, Slide 15.[12] The IQR difference in that example therefore was 500 dosage units, and 1.5 times that difference is 750 dosage units. *Id.* The cutoff or "IQR Threshold" as shown was 1,350 dosage units – the 75th percentile value of 600 dosage units plus the added factor of 750 dosage units. As with the first method, if the next order placed after the 180-day period was for a volume greater than the cutoff, it was flagged as an outlier. This second method also was applied once using dosage units and once using MMEs.

Dr. Schafer was careful not to ascribe any significance to orders identified as "outliers" beyond the fact that these methodologies classified them that way. Any further significance for this action required a "contextual review" or "Step 2" analysis beyond her expertise. Tr. (10/17/24) at 343 (adopting terms used by counsel in cross-examination). In contrast, Mr. Tuggle simply equated "outliers" with "suspicious orders": "[W]hen you hear me refer to

[12] Dr. Schafer did not give the actual values, so the values stated here are the Court's estimates based on the graphs shown with the testimony. The Court uses Slide 15 rather than Slide 14 because the placement of the quartiles on Slide 14 does not appear to be accurate. On Slide 14, the horizontal scale for number of orders runs to 388, and that appears to correspond with the total number of orders. For 388 orders, each quartile would contain 97 orders. Quartile 1 (25%) would be at 97 orders, Quartile 2 (50%) would be at 194 orders, and Quartile 3 (75%) would be at 291 orders. Slide 14, however, appears to show these breaks respectively at about 81, 207, and 318. There is no value for total orders that would harmonize those three quartile dividing points. In contrast, Slide 15 shows Q1 and Q3 values that are consistent with 388 total orders.

outlier, I'm referring to suspicious activity." Tr. (10/18/24) at 161. In his opinion, the classification of an order as an outlier by any of these methods automatically meant that the distributor would have to stop the shipment and report the order to the DEA unless and until the distributor investigated the order and dispelled any suspicion associated with it.

Mr. Tuggle then arbitrarily magnified the effect of the analysis by opining that, because an investigation would take some period of time, *every* order placed by that pharmacy for the rest of the month in which a *single* outlier order occurred should be classified as an outlier. Thus, for example, if an "outlier" order occurred on the fifth day of a month, Mr. Tuggle treated every order by that pharmacy for the next twenty-five days as an "outlier," whether the order did or did not fall above the analytical cutoff. Moreover, Mr. Tuggle did not differentiate between orders that actually were "outliers" according to one of the statistical methods and those orders that were considered perfectly ordinary under the statistical analysis but became "outliers" solely based on his thirty-day rule.[13] One of Defendants' expert witnesses, Peter Boberg, made that distinction and demonstrated the profound effect of Mr. Tuggle's thirty-day rule. Exh. MCK50051, Slide 13 (identification only). With that assumption, Mr. Tuggle flagged between 258,466 and 380,010 orders as outliers, depending on which of the four methods was used. *Id.* Without that assumption, only 46,402 to 72,504 orders were flagged. *Id.* Between 80.6% and 82.4% of all flagged "outliers" actually were not outliers at all. They were below that statistical cutoff for outliers and were flagged solely because of Mr. Tuggle's thirty-day rule.

The illustrations given by Dr. Schafer show the flaws in applying these statistical methods indiscriminately in this context. Setting either the median or the IQR for either of the methods depends on the distribution of all orders during whatever analytical time period is used.

[13] For simplicity, the Court calls this Mr. Tuggle's "thirty-day" rule, but it is really a "rest-of-the-month" rule.

To illustrate the median times three method, Dr. Schafer showed a scatter diagram of all of Drug City's orders placed with Defendant McKesson during the first six months of 2010. Tr. (10/17/24) Exh. P2361, Slide 6 (identification only). In the diagram with the orders arranged in chronological order, one can see plainly that there are regular orders across every month at various volume levels. When the orders are arranged in sequence based on order size (Slide 7), one can see that there are a significant number of small orders. The number of small orders relative to the total number of orders brings the median down to a lower volume level. That keeps the median relatively low and results in a lower cutoff value at three times the median. Once Dr. Schafer showed the outlier orders in red for the full year of 2010, one can see that the methodology captures as "outliers" not only every large order but also a whole series of orders at the volume of about 2,400 dosage units each. *Id.* Exh. P2361, Slide 11. Those orders occur with monotonous regularity across almost every month in 2010. They may qualify technically as "outliers" under this statistical method, but they are obviously not unusual for this pharmacy.

Dr. Schafer's illustration of the IQR method involved Defendant ABDC's sales to Walgreens Pharmacy #5686.[14] *Id.* Exh. P2361, Slide 12. As with the first illustration, this pharmacy has a pattern of regular orders at various volume levels, and there are a significant number of low-volume orders. The number of low-volume orders keeps the 25th and 75th percentile points lower in volume, which in turn keeps the cutoff level lower. The result is that the method classifies as "outliers" even a series of regularly recurring orders in the volume range

[14] In addition to the issue identified above about placement of the quartile lines on one graph, there appear to be inconsistencies in some of the diagrams Dr. Schafer presented as part of this illustration. Comparing her presentation of all orders in chronological order (Slide 12) with her presentation of all orders with the outliers in red (Slide 17), it appears that the outlier orders were omitted from Slide 12. The same discrepancy can be seen in comparing Slide 12 with Slide 13. Slide 13 is supposed to show the same orders as are shown on Slide 12, but arranged in size order instead of chronological order. On Slide 12, however, the largest orders are for about 1,300 dosage units. Slide 13 clearly shows a series of orders larger than that going up almost to 3,000 dosage units.

of 1,500 to 2,000 dosage units each. *Id.* Exh. P2361, Slide 17. Even among the largest orders, in the range of 2,500 dosage units to 3,000 dosage units, there is a distinctive pattern from about June 1, 2019 to the end of the year with three orders of descending size repeated four or five times at regular intervals. *Id.*

Consider a very simplified example. Suppose a pharmacy anticipated prescription demand for opioids of 10,000 dosage units each month, and it placed an initial order at the beginning of the month for 75% of that demand and then placed small orders of 5% of the demand each as the month progressed and it monitored actual prescriptions being presented. Within one month, the pharmacy would have six successive orders of 7,500, 500, 500, 500, 500, and 500 dosage units, totaling 10,000 dosage units. If the pharmacy repeated this exact pattern for six months, it would have thirty-six total orders – six of them at 7,500 dosage units each and thirty of them at 500 dosage units each. The median order for the 180-day period would be 500 dosage units, and, at three times that level, the cutoff using that statistical method would be 1,500 dosage units. Using the IQR method, there would be no IQR difference because both the 25th percentile and the 75th percentile would be 500 dosage unit orders. The cutoff by that method therefore would be only 500 dosage units. Under both methods, every single 7,500 dosage unit order would be labelled as an "outlier," despite the fact that those orders fit a perfectly regular pattern. The real world is more complicated, including different products that are ordered in different standard bulk amounts. But for any pharmacy that has a significant number of small-volume orders in relation to the total number of orders and some number of large-volume orders, *all* of the pharmacy's largest orders by definition will be "outliers" according to these statistical methods, even if that is the pharmacy's pattern of ordering month after month. More starkly, if such a pharmacy placed a large order as its first order in the month, then Mr. Tuggle's thirty-day rule, which is not a feature of any statistically approved method, would result in every single order of that pharmacy being classified as an "outlier."

Dr. Schafer sought to protect herself from these criticisms by disclaiming any real-world significance to the "outlier" designations without a "contextual review" or some further analysis, which she expected Mr. Tuggle to provide. But Mr. Tuggle did no such analysis. Instead, he assigned that task to Defendants without recognizing that the most cursory examination of this data would show that most of the orders being flagged as outliers were well within recurring patterns of ordering. Instead of applying even the most rudimentary check on the analysis, Mr. Tuggle artificially amplified the results by applying his thirty-day rule, which has no statistical justification. Indeed, a distributor with experience with a pharmacy customer's ordering history would be able to resolve almost all "outlier" tags immediately based on knowledge of the customer's ordering patterns.

The Court regrets allowing the jury to hear the testimony of Dr. Schafer and Mr. Tuggle. Having seen this analysis in the full context of the trial, the Court recognizes that their opinions are insufficient to prove that either Defendant failed to detect suspicious orders of the magnitude labelled by their methodologies. Moreover, Mr. Tuggle's amplification of this effect by applying his thirty-day rule has no justification. The introduction of this evidence posed a very significant risk of confusing and misleading the jury because it allowed the City to put before the jury the unjustified implication of widespread wrongdoing beyond the more specific conduct identified by Ms. Carter in her opinions. This mistake by the Court in admitting this evidence warrants a new trial.

5. Causation and Apportionment

Most of Defendants' arguments are directed to the evidence concerning causation and apportionment. Because of the close relationship between those issues, the Court considers them together. The Court must separate the issues that potentially could defeat the City's claim altogether, and therefore could be a basis for granting a JNOV, from the issues that relate only to

the quantum of damages, and therefore could lead to granting a new trial but not to a JNOV. The Court will list all of the arguments made and then will discuss them with this distinction in mind.

Defendants argue that "the jury rendered an obviously unsupportable verdict when it found that ***97%*** of Baltimore's opioid epidemic was caused by two wholesale distributors, while 'all other actors combined' – including all prescribers, manufacturers, other distributors, pharmacies, and illegal actors – caused just ***3%***." Defs.' Mot. J. Notw. Verdict, Remittitur, New Trial at 3 (emphasis in original). More specifically, Defendants argue:

1. The primary source of misused opioid medications was overprescribing by physicians, most of which was done in good faith and for none of which they can be held responsible.

2. As already addressed above, as distributors they cannot be responsible for bad-faith overprescribing done by physicians and others in "pill mills."

3. They cannot be liable for opioid medications that are misused as a result of "medicine cabinet" diversion.

4. The City's own evidence did not support the extent of diversion to misuse the City sought to attribute to "pill mills."

5. The City's evidence was insufficient to prove that any actual diversion of opioid medications occurred as a result of Defendants' actions with respect to specifically identified pharmacies during specific time periods.

6. The jury failed to assign a sufficient degree of liability to the following actors, all of which "are more directly responsible for the alleged nuisance than these two Defendants":

    a. Good-faith prescribers;

    b. Bad-faith prescribers;

    c. Manufacturers;

    d. Other distributors;

    e. Pharmacies and pharmacists;

f. Medicine cabinet and other diverters; and

g. Illegal cartels and gangs.

7. The Court erred in instructing the jury it could attribute a share of liability to another actor only to the extent that "neither defendant played any substantial causative role" in the portion of liability linked to that other actor.

In its Supplemental Motion, Defendant AmerisourceBergen makes two additional arguments relating to causation and apportionment:

8. The City could not satisfy substantial factor causation against Defendant ABDC because all the evidence against it related to a time period "*after* the prescription opioid epidemic already started and peaked" and because the opioids implicated in that evidence amounted to only 1.1% of the opioids distributed to all pharmacies in Baltimore City.

9. The evidence also was insufficient to justify the jury's decision to apportion 27% of liability for the opioid epidemic in Baltimore to Defendant ABDC.

In response, the City presented its case as predicated almost entirely on pill mill diversion. The City argues its case was not premised on "the gross volume of opioids that Defendants distributed to Baltimore" but on "evidence that Defendants violated their legal obligations while distributing hundreds of millions of highly addictive prescription opioids, causing diversion through criminal pill mill doctors. That unreasonable conduct drove the massive increase in opioid addiction arising from the misuse of prescription opioids." Pl.'s Opp'n at 1–2. The City argues that it presented sufficient evidence to establish causation and that doing so triggered joint and several liability of Defendants for all damages associated with the opioid epidemic in Baltimore. According to the City, because the burden of proof then shifted to Defendants on the issue of apportionment, Defendants failed to carry that burden except to the extent of 3% of liability assigned by the jury to other actors. The City argues that the jury's 3% allocation to other actors was consistent with the instruction that excluded

apportionment of any liability or harm for which either Defendant shared any substantial causative role. The City argues further that the instruction was legally correct and that Defendants waived any right to challenge it when they did not object to it specifically after the Court instructed the jury.

a. Divisible Harm and Causation

A basic premise of the City's arguments on the causation and apportionment issues is the City's contention that proof sufficient to satisfy substantial factor causation against either Defendant necessarily produces liability by that Defendant for the entire injury claimed by the City, at least as long as the Defendant does not satisfy its affirmative burden to prove allocation of some part of that total liability to another party or actor. Under the City's argument, if it can prove that the unreasonable conduct of either Defendant played a substantial part in causing the diversion of *any* quantity of opioids at *any* time during the period of damages claimed – the City perhaps would concede that the quantity diverted and the time period of the diversion themselves need to be substantial – then that Defendant becomes liable for *all* opioids diverted over the *entire* period of harm claimed, both past and future. If this were the law, then this Court would reject as absurd any possible application of public nuisance law to a situation of this nature and complexity. The City's premise is flawed because it relies on causation principles drawn from cases involving indivisible injuries. The Court ruled before trial that the harm claimed in this action – the existence of a sustained and multivarious public nuisance – is divisible. That fact carries with it important implications for the concepts of causation and apportionment in this action.

i. Divisible and Indivisible Injury

The leading case on divisibility or indivisibility of harm in Maryland – indeed, almost the only case in Maryland on the subject – is *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333 (2014). *See also Mayer v. North Arundel Hosp. Ass'n, Inc.*, 145 Md. App. 235

(2002).[15] *Carter* involved appeals of four asbestos exposure cases that were tried together. 439 Md. at 336–37. One of the wrongful death plaintiffs' decedents, Roger C. Hewitt, Sr., died of lung cancer at age 81. *Id.* at 339. He was exposed to asbestos installed by the defendant while employed at Bethlehem Steel for thirty-two years, and he also was a daily smoker for sixty-five years. *Id.* at 338–39. An expert called by plaintiffs testified that both asbestos exposure and smoking were substantial contributing factors in Mr. Hewitt's development of lung cancer and that the expert "could not differentiate between the two causes because the two exposures are 'not just additive, they are synergistic which means they multiply exposures.'" *Id.* at 340 (footnote omitted). The defendant sought apportionment of damages and proffered expert testimony "that the relative contribution of Hewitt's tobacco use and of Hewitt's exposure to asbestos to the development of his lung cancer was 75% and 25% respectively." *Id.* at 341. The trial court excluded the proffered testimony and declined to instruct the jury on apportionment of damages. *Id.* at 341–42. The Court of Appeals, now the Supreme Court of Maryland, affirmed the trial court's conclusion that the harm in that case was indivisible.

Apportionment of damages is appropriate where "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A, *quoted in Carter*, 439 Md. at 351. The issue turns on "the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes." *Carter*, 439 Md. at 351 (citing W. Page Keeton *et al., Prosser and Keeton on Torts* § 52, at 345 (5th ed. 1984)). The Court cited illustrations of the principle of divisibility given by Prosser and Keeton, including:

[15] The court in *Mayer* applied these principles in a much more complicated procedural context arising from a trial ruling that the plaintiff's claims of medical negligence could be based only on treatment in a hospital emergency department before a certain time. 145 Md. App. at 241. The court's discussion is instructive, but it is bound to the unusual facts and procedural situation of the case.

> Upon the same basis, if two defendants each pollute a stream with oil, in some instances it may be possible to say that each has interfered to a separate extent with the plaintiff's rights in the water, and to make some division of the damages. It is not possible if the oil is ignited, and burns the plaintiff's barn.

Id. at 352 (quoting *Prosser and Keeton on Torts* § 52). The Court concluded that Hewitt's ultimate injury – his death – was indivisible and therefore not subject to apportionment. *Id.* at 355–57.

There is a close link between indivisibility of the injury and joint and several liability. In *Consumer Protection Division v. Morgan*, 387 Md. 125 (2005), the Court considered and contrasted joint and several liability based on the concerted action of multiple tortfeasors and such liability based on the conduct of concurrent joint tortfeasors.[16] *Id.* at 177–83. Concerted action involves some common design or coordination among the separate tortfeasors. *Id.* at 178. "The rationale for joint and several liability for this category is that tortfeasors who joined together should be liable for the entire damage, independent of whether any one of them directly caused more or less of the damage." *Id.* "In contrast, the predicate for concurrent tortfeasors' joint and several liability is the indivisibility of the injury. . . . [T]he necessary condition for concurrent tortfeasors to be held jointly and severally liable is that they caused a single injury *incapable of apportionment*." *Id.* at 178–79 (emphasis added). The Court adopted the reasoning of the Illinois Supreme Court:

> [A] tortfeasor who acts independently and concurrently with other individuals to produce an indivisible injury to a plaintiff may be held jointly and severally liable for that injury, even though the tortfeasor does not act in concert with the other individuals, and shares no common purpose or duty with them. Such an

[16] The Court looked "for guidance from the law of joint and several liability developed in the tort context," but its ultimate decision involved a statutory claim under the Maryland Consumer Protection Act. *Id.* at 177. The Court concluded that joint and several liability is available under the Act but only for concerted action. *Id.* at 178.

> "independent, concurring tortfeasor" is held jointly and severally liable because the plaintiff's injury cannot be divided into separate portions, and because the tortfeasor fulfills the standard elements of tort liability, *i.e.*, his or her tortious conduct was an actual and proximate cause of the plaintiff's injury. The fact that another individual also tortiously contributes to the plaintiff's injury does not alter the independent, concurring tortfeasor's responsibility for the entirety of the injury which he or she actually and proximately caused.

Woods v. Cole, 693 N.E.2d 333, 336 (Ill. 1998) (citations omitted), *quoted in Consumer Protection Division v. Morgan*, 387 Md. at 181–82.

Thus, as the Court concluded in *Carter*, "if an injury is indivisible, any tortfeasor joined in the litigation whose conduct was a substantial factor in causing the plaintiff's injury would be legally responsible for the entirety of the plaintiff's damages." 439 Md. at 354. The contrary is also true: "Only if the harm is reasonably divisible is the issue of apportionment a question of fact for the jury or a basis for a *Frye-Reed* hearing. In that instance, where an injury is reasonably – or theoretically – divisible, the burden of proof would shift to the defendant to prove that apportionment of damages is appropriate." *Id.* at 354–55.

Here, the injury alleged – a public nuisance spanning more than twenty years – is so clearly divisible that the Court decided the issue before trial. Early in the trial, the Court decided further that Defendants had the burden of proof on issues of apportionment.[17] Divisibility of harm is present here in at least four different dimensions. First, the City claims damages for the

[17] Defendants argue they were prejudiced and a new trial is warranted because the Court did not make this ruling until the trial was in progress. The Court rejects this argument because Defendants were not prejudiced by the timing of the ruling. The Court made the ruling early in the trial, during the City's case-in-chief. Defendants had a full opportunity to organize their cases to satisfy this burden, and they have not identified any specific way in which they proceeded differently based on an expectation that they did not have the burden of proof on the apportionment issues. For example, they do not argue that they missed an opportunity to cross-examine a City witness in some way before the Court ruled on this issue.

existence of the opioid epidemic in Baltimore over a span of fourteen years in the past, 2011 to 2024, and five years into the future. It is plain that conduct and causative factors change over such a long span of time. Second, the epidemic is defined primarily by its impact on thousands of individuals who have developed opioid use disorder and secondarily by the effects from those individuals to the larger community. There may be some commonality among those many individuals, but there certainly also is extensive variability. Third, misuse of prescription opioids is central to the City's allegations, and misuse occurs in different ways with opioids from differing sources. Fourth, the City focused in this trial on diversion of opioids to misuse at one particular point in the lawful distribution system. Diversion occurs in several different ways, and there are many different actors, both lawful and unlawful, who play a part in diversion. Given the breadth and complexity of public nuisance claimed by the City, joint and several liability cannot and does not apply, at least not at the level of simplicity argued by the City.

ii. Specific Causation for Indivisible Injury

It is notable that the City has been relieved of the much more demanding requirements for proof of causation that an individual plaintiff would face in an individual tort action seeking recovery for an indivisible injury. A plaintiff alleging injury caused by exposure to a harmful substance must prove the defendant was the actual source of the substance to which the plaintiff was exposed. Thus, for example, the judgment of an asbestos plaintiff, Knuckles, against a supplier and installer, Porter, was reversed "because of missing links in the chain of causation running from Porter to Knuckles." *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 214 (1992). "Knuckles must do something more than show that Porter sold Manville products and that Key Highway[, the shipyard where Knuckles worked,] purchased Manville products." *Id.* at 215. The evidence may be circumstantial, but it must put the individual plaintiff in the vicinity

of the specific product. *Id.* at 210 (with respect to manufacturer liability, factors include "the nature of the product, the frequency of its use, the proximity, in distance and in time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product"). Similarly, a plaintiff claiming injury from exposure to lead-based paint must prove a specific causal chain from a lead hazard at the defendant's property to the plaintiff's exposure and ingestion of lead. *Hamilton v. Kirson*, 439 Md. 501, 529–30 (2014) ("To connect the dots between a defendant's property and a plaintiff's exposure to lead, the plaintiff must tender facts admissible in evidence that, if believed, establish two separate inferences: (1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the victim's exposure to lead."). The proof may be circumstantial and may come in different forms, but it must link the claimed injury to a specific source. *Rowhouses, Inc. v. Smith*, 446 Md. 611, 631–63 (2016) (reviewing cases and focusing particularly on evaluation of causation evidence on summary judgment motions).

Suppose a hypothetical plaintiff alleged he (or she) first took an opioid that was prescribed following surgery. He then progressed to misuse of prescription opioids that he acquired without any medical need for them. He offers expert testimony that his misuse of prescription opioids progressed to the point that it would be classified as both dependence and opioid use disorder. He testifies that the drugs became difficult to buy in sufficient quantities, and he turned to use of heroin. Putting aside many other issues that might doom such a claim, this individual plaintiff would have to prove specific causation, including product identification and source. If this plaintiff sued a distributor, alleging that the distributor negligently sold opioids to a pharmacy in circumstances that the distributor should have known that the pharmacy (or other actors) was diverting the drugs to illegal use, the plaintiff would have to trace his

specific illegal supply of the drugs to sales from the defendant distributor to that pharmacy in circumstances that made those sales negligent. Such proof might or might not be feasible. If the plaintiff himself obtained drugs illegally by obtaining prescriptions for which he had no medical need from a corrupt physician and the plaintiff himself filled those prescriptions at the pharmacy, then the causal chain might be simpler. But if the plaintiff obtained the prescription opioids he misused from street dealers, the pathway likely would be much more difficult to prove. The actual pathway could involve one person who obtained an illicit prescription from a corrupt physician and filled the prescription at the pharmacy, then sold the drugs to a dealer, with any number of additional illicit transactions before the ultimate street sale to the plaintiff.

Public nuisance law, as this Court has applied it, spares the City this almost impossible burden of proof. Instead of requiring the City to connect each Defendant's conduct with specific misused opioid medications and with specific individuals who developed opioid use disorder as a result of misuse of those specific drugs, the Court instructed the jury:

> . . . For Plaintiff City to recover, the public nuisance must result from and be a reasonably foreseeable consequence of the particular defendant's unreasonable conduct. There may be more than one cause of the public nuisance, that is, the conduct of multiple actors may work together to cause the harm. Each person whose conduct is a substantial factor in causing the public nuisance is responsible. In the context of this case, to prove causation Plaintiff City must prove not only that a defendant's unreasonable conduct created a possibility or risk of diversion of prescription opioids, but also that the defendant's conduct resulted in the actual diversion of prescription opioids that contributed to the alleged public nuisance. *Plaintiff City does not have to match specific allegedly suspicious orders of either defendant to specific instances of diversion,* but it must prove by a preponderance of the evidence that the conduct of the specific defendant for which you are answering the question resulted in the actual diversion of prescription opioids that contributed to the alleged public nuisance.

(Emphasis added.) Under this instruction, the City was relieved of what would have been a critical aspect of its burden to prove causation in an indivisible injury case. Although the City

had to prove actual diversion of opioids resulting from Defendants' unreasonable conduct, the City did not have to trace specific diverted opioids to the point of injury. If the City had to meet that more demanding level of proof, Defendants on this record plainly would have been entitled to judgment in their favor. The City barely proved actual diversion resulting from Defendants' unreasonable conduct, and it did not even attempt to connect Defendants' individual conduct with any specific harm to specific individuals.

The City cannot claim a benefit of substantial factor causation predicated on individual tort suits in which the plaintiff demonstrates indivisible injury while also escaping the strictures of causation proof those individual plaintiffs must satisfy. Substantial factor causation in this context must be understood differently. The City must prove that either Defendant's unreasonable conduct was a substantial factor in causing ultimate diversion of prescription opioids that contributed to the public nuisance. This ensures both that there is an actual causal connection from the unreasonable conduct to the public nuisance and that the effect was not trivial or minimal. But there is still considerable range between substantial and total. The City's causation burden includes proving the extent of the effect in creating or contributing to the public nuisance. The City does not have the burden to disprove the role of other actors, but the City is entitled to damages only to the extent they are connected to the harm the City links to a Defendant's unreasonable conduct.

iii. The Structure of the Verdict Sheet

The City draws some support for its position from the structure of the verdict sheet. Every question through and including Question 6 was premised on the City's burden of proof. Question 7 then signaled the shift to Defendants' burden of proof on the apportionment issues. The City seizes on this structure to characterize the answer to Question 6 – the total amount of damages the jury attributed to the public nuisance in Baltimore as a whole – as a finding that Defendants together caused this amount of damages. The City correctly states that if the jury

had answered "No" to Question 7 – no other actors contributed to causing the public nuisance – then the jury was instructed to apportion the entire amount of damages found under Question 6 between the two Defendants.

The City's argument based on the verdict sheet fails, however, because of the specific instructions that accompanied Questions 3, 5, and 6. Questions 3 and 5 on causation informed the jury of the connection required between either Defendant's unreasonable conduct and the resulting harm: "For Plaintiff City to recover, the public nuisance must result from and be a reasonably foreseeable consequence of the particular defendant's unreasonable conduct." Using language from the pattern instructions, the Court reinforced this required connection in the instructions relating to Question 6: "The plaintiff has the burden to prove by a preponderance of the evidence each item of damages claimed to be caused by the defendant. For the plaintiff to recover damages, the plaintiff's expenses must result from and be a reasonably foreseeable consequence of the particular defendant's conduct." The Court then made clear to the jury that Question 6 was being posed more broadly:

> It is very important that you recognize in answering this question that you are considering the alleged public nuisance **as a whole**. I am asking you here to state the full amount, if any, the City has proved that it experienced or will experience because of the public nuisance. For this question, you do not consider the extent of liability of either specific defendant. You will consider that issue in the subsequent questions.

(Emphasis in original.) Thus, the jury was never asked specifically, "What amount of damages do you find the City has proved were caused by Defendant McKesson's unreasonable conduct?", or the same question with respect to Defendant AmerisourceBergen. The jury was told at the end of the instructions how the answers to those questions would be derived from its ultimate answers:

> If you find liability and damages and apportionment, the amount that one defendant will be required to pay will be separate from the

> amount the other defendant will be required to pay. Those amounts will be calculated by me by multiplying the total amount, if any, that you state in your answer to Question 6 times the percentage for each defendant that you find in your answer to Question 8.

If the jurors were confused, that is both understandable and regrettable. But the sequence of questions cannot be understood to mean either that the City was relieved of its primary burden to prove for each Defendant unreasonable conduct, causation, and the extent of damages resulting from that conduct or that the jury's answers on the verdict sheet amount to a finding that each Defendant caused the entire amount of damages stated in the answer to Question 6.

b. Sufficient Proof of Causation

Defendants make several arguments that, if credited, would break the required causal chain and therefore warrant grant of a JNOV. They are the arguments labelled as items 5 and 8 above at pp. 54–55. Argument 5, made by both Defendants, is that the evidence linking either Defendant's conduct to any actual diversion was legally insufficient. Argument 8 is made by Defendant AmerisourceBergen only. Defendant ABDC argues that the City did not satisfy substantial factor causation because all the evidence against it related to a time period "*after* the prescription opioid epidemic already started and peaked" and because the opioids implicated in that evidence amounted to only 1.1% of the opioids distributed to all pharmacies in Baltimore City.

The City struggles to cite specific evidence it introduced to prove that prescription opioids sold by either Defendant while acting unreasonably were actually diverted. The City cites the following testimony and exhibits associated with it as "evidence allowing the jury to infer that as a result [of Defendants ignoring red flags of diversion at Baltimore pharmacies and failing to conduct adequate due diligence], Defendants' opioids got into the wrong hands, including customers of pill mill doctors," Pl.'s Opp. at 5 and n.3:

- Ruth Carter's initial, general testimony on why distributors need to have suspicious order monitoring systems, Tr. (9/24/24) at 96–97;

- Ms. Carter's general testimony that distributors are able to stop sales immediately, before pharmacies are investigated by law enforcement, Tr. (9/24/24) at 101–02;

- Ms. Carter's testimony that Drug City Pharmacy gave Defendant McKesson inconsistent information about its filling of prescriptions from pain clinics, Tr. (9/24/24) at 312–13;

- Ms. Carter's testimony that the Rosen-Hoffberg clinic was the "main supplier of scripts" filled at Drug City Pharmacy, Tr. (9/24/24) at 347–48;

- Ms. Carter's testimony that Defendant McKesson recognized that Bayview Pharmacy filled a large number of prescriptions from pain clinics, including the Rosen-Hoffberg clinic, Tr. (9/24/24) at 394–95;

- Ms. Carter's testimony that Defendant McKesson knew from a questionnaire completed by Joppa Road Pharmacy that that pharmacy filled prescriptions from pain clinics, including the Rosen-Hoffberg clinic, Tr. (9/24/24) at 414–16;

- Ms. Carter's testimony that Belvedere Pharmacy identified to Defendant ABDC prescribers at the Rosen-Hoffberg clinic as the highest volume source of prescriptions it filled, Tr. (9/25/24) at 339;

- Ms. Carter's testimony about the information Defendant ABDC received from Campus Pharmacy, including its filling of prescriptions written by Dr. Kofi Shaw-Taylor and red flags about him, Tr. (9/25/24) at 367–75;

- Ms. Carter's testimony that Defendant ABDC was aware of information in connection with Hillendale Pharmacy about the consent suspension of Dr. Babaturk's medical license for illegitimate prescribing of controlled substances, Tr. (9/26/24) at 22–26; and

- Ms. Carter's testimony that Defendant ABDC learned of the corrupt conduct of a pharmacist at Hillendale Pharmacy and did not do due diligence in response concerning the co-owned Belvedere and Campus Pharmacies, Tr. (9/26/24) at 34–35.

If the Court were judging this issue based exclusively on this evidence cited by the City, the Court would grant JNOV in favor of both Defendants.

This testimony supports Ms. Carter's opinions that Defendants had red flags available to them concerning certain pharmacies in Baltimore City and County and that Defendants failed to investigate or to heed those warning signs. The Court has already accepted Ms. Carter's testimony as a sufficient basis for a reasonable juror to conclude Defendants acted unreasonably. The issue here, however, is the causal link to actual diversion. The Court ruled before trial that Ms. Carter was not permitted to offer "[a]ny opinion that any particular order or group of orders that she has identified as 'suspicious' or that she opines should have been identified by a Defendant as 'suspicious' did or likely did result in the diversion of opioids to illegal or inappropriate use unless the opinion is supported by specific investigation of a pharmacy or other recipient of the order or group of orders." Order (Defs.' Mot. Exclude Test. Ruth Carter) (8/16/24). Thus, nothing in Ms. Carter's testimony could satisfy the necessary causal link unless it connects to other evidence that diversion actually occurred through sales to the pharmacies she identified. The only possible exception is her testimony about Dr. Babaturk's consent suspension of his medical license – not because it is her opinion but because the suspension included information about his improper prescribing behavior.

On this issue, the City's case hangs by a thread. The Court considers more than just the specific testimony cited by the City. The trial evidence included many oblique and insinuating references to conduct, primarily by physicians and others at the Rosen-Hoffberg clinic. That evidence teeters on the edge of conjecture. It is mystifying that the City did not present more solid evidence about misconduct at that clinic because Drs. Rosen and Hoffberg and their practice were Defendants until the City dismissed its claims against them before trial.

Presumably the City conducted discovery concerning their conduct and developed what would have been evidence against them.

On balance – and it is an uneasy balance – the Court concludes there was minimal but sufficient evidence on which a reasonable juror could conclude that to some extent prescription opioids actually became available for misuse as a result of prescriptions filled at pharmacies identified by Ms. Carter during the time periods that, according to her opinions, Defendants should not have been selling controlled substances to them. This evidence consists primarily of an inference that some of the prescribers whose prescriptions those pharmacies were filling in substantial quantities were engaged in improper prescribing. It also includes indirect testimony that illicit drug transactions were being conducted in the parking lot of Drug City Pharmacy.

Defendant ABDC's specific arguments that go to the causation issue as a dispositive matter, Argument 8 above, are more easily addressed. Defendant ABDC argues that the City did not satisfy substantial factor causation because the only evidence of its unreasonable conduct, beginning in 2013, came "*after* the prescription opioid epidemic already started and peaked." Defendant ABDC is correct that the evidence against it is time-limited, but that does not mean the City did not introduce evidence that its conduct was a substantial factor contributing to the public nuisance. The public nuisance is dynamic, and even later unreasonable conduct can be a contributing factor. The time element reduces Defendant ABDC's potential liability, but it does not eliminate it as a matter of law. Defendant ABDC also argues that the prescription opioids implicated in the evidence against it amounted to only 1.1% of the opioids distributed to all pharmacies in Baltimore City. Even one percent of a large volume can be substantial. Without deciding whether there is some level at which sales would be considered *de minimis* as a matter of law, Defendant ABDC's sales were not at that low a level.

At this point, the Court has considered every argument by Defendants that might result in judgment in their favor despite the jury's verdict. Defendants' remaining arguments all relate to the extent of their liability. As discussed above, those arguments go only to Defendants' motion for new trial, including the possibility of a remittitur, not to their motion for JNOV. Defendants' motions for JNOV must be denied.

6. Apportionment and Damages

The Court assesses as a whole the jury's conclusion that these two distributor Defendants are responsible for 97% of all prescription opioids diverted to misuse in Baltimore over a fourteen-year period. The Court concludes that the evidence presented at trial cannot possibly justify a finding of that extent of liability for damages. Defendants are entitled to a new trial on the issues of causation and apportionment, which determine the amount of damages, for three reasons: (1) because the erroneous admission of the Schafer/Tuggle testimony may have distorted the jury's assessment of the extent of Defendants' liability; (2) because the Court gave an erroneous instruction on the apportionment issue; and (3) because the weight of the evidence clearly does not support the jury's finding. Although the Court may grant a new trial based on its assessment of the weight of the evidence, the evidence on these issues actually meets the more stringent standards that no reasonable juror could conclude that Defendants are responsible for 97% of the misuse of prescription opioids in Baltimore and that much of the evidence on these topics is uncontroverted. Finally, the Court finds that the verdict rendered is grossly excessive in light of the evidence and is shocking to the Court. The Court will identify the maximum amount of damages that is not excessive based on the evidence and will grant a remittitur to reduce the judgments to that amount, which Plaintiff City may accept to avoid a new trial on limited issues.

a. The Schafer/Tuggle Opinions

The Court has discussed above the fundamental flaws in the testimony of Dr. Schafer and Mr. Tuggle. As stated, their opinions could not provide any basis for a finding of unreasonable conduct on the part of either Defendant. The separate testimony of Ruth Carter, however, could be the basis for the jury's conclusion that both Defendants acted unreasonably. There is significant risk that the jury considered the Schafer/Tuggle opinions to support a conclusion that Defendants' unreasonable conduct was longer in duration and more widespread than Ms. Carter's narrower testimony about Defendants' sales to certain pharmacies during certain time periods. A new trial is warranted on this basis not to reconsider the issue of liability, but to reconsider the extent of damages linked only to the unreasonable conduct within the scope of Ms. Carter's opinions. This is an independent basis to grant a new trial.

b. The Apportionment Instruction

Defendants argue that the Court erred when it instructed the jury, in connection with apportionment: "If you find that other actors caused part of the harm of the alleged public nuisance, you should attribute to those other actors *only that portion for which neither defendant played any substantial causative role*." (Emphasis added.) The City argues first that both Defendants failed to preserve any challenge to this instruction by not objecting to it "distinctly" after the Court instructed the jury. *See* Md. Rule 2-520(e). The issue clearly was preserved by Defendants.

The purpose of Maryland Rule 2-520(e) is "to enable the trial court to correct any inadvertent error or omission in the oral [or written] charge, as well as to limit the review on appeal to those errors which are brought to the trial court's attention." *Hoffman v. Stamper*, 385 Md. 1, 40 (2005) (quoting *Fisher v. Balto. Transit Co.*, 184 Md. 399, 402 (1945)) (alteration in

original). It is critical and useful to alert the trial judge to mistakes in the instructions so the judge can correct those mistakes before the jury retires to deliberate. *Id.* In limited circumstances, substantial compliance with the rule is sufficient to preserve an objection to an instruction. *Gore v. State*, 309 Md. 203, 208 (1987) (interpreting the parallel rule applicable in criminal cases, then Md. Rule 4-325(e) and now Rule 4-325(f)). One such instance is when the court prepares written instructions in discussion with counsel and then delivers those written instructions orally. *Id.* In those circumstances, "it is clear that the trial court was fully aware of the particular instruction the defendant desired" despite the absence of a specific post-instruction objection. *Id.* (quoting *Bennett v. State*, 230 Md. 562, 568 (1963)). "[N]o specific ground need be stated where the record makes clear that all parties and the court understood the reason for the objection." *Exxon Corp. v. Kelly*, 281 Md. 689, 695 n.6 (1978).

In this case, to try to avoid making inadvertent mistakes and also to give the jurors a resource during deliberations, the Court prepared its instructions in written form, read them to the jury, and then gave them to the jury in writing. The Court received proposed jury instructions from the parties, prepared and circulated a draft of the instructions, and discussed and refined that draft with the parties both in writing and in discussions on the record. Drafting of the verdict sheet was part of the same process. In the course of those discussions, Defendants made clear in writing and orally that they opposed variations of the phrasing italicized above that would restrict the range of "other actors" to whom the jury might apportion some liability. After the Court instructed the jury orally, the Court invited counsel to the bench, and the following exchange occurred:

> THE COURT: Any further objections from Plaintiff as to the instructions as given?

> MR. POLKY [for Plaintiff City]: Only the ones we've previously made that are preserved.
>
> THE COURT: Any further objections from McKesson?
>
> MR. STANNER [for Defendant McKesson]: Same for McKesson.
>
> THE COURT: Any further objections from AmerisourceBergen?
>
> MR. NICHOLAS [for Defendant ABDC]: Same.

Tr. (11/6/24) at 194–95. Apparently even counsel for the City believed that a simple incorporation of "previously made" objections would be sufficient to preserve those issues. The Court was informed fully of Defendants' objections to the instruction. The issue was preserved.

When the Court was discussing this issue with the parties, the Court gave two illustrations of instances in which the Court then believed apportionment to other actors would not be appropriate:

> Let me give two examples. One is if you had a truly bad pharmacy, a corrupt pharmacy, and one of the distributors knew that and continued to sell to that pharmacy. Well, that pharmacy is certainly acting unreasonably and is responsible for the diversion of those particular opioids. But the distributor would be as well.
>
> I think the jury could [conclude] that the distributor is being unreasonable [in] continuing to supply the pharmacy, if it had actual knowledge of the bad conduct.
>
> And so, you know, that is an instance where two different registrants could be violating their duties, and they are co-liable for the particular opioids that passed through that channel.
>
> Another example would be the City's theory of someone who develops opioid use disorder because of misuse of prescription opioids, assuming that that could be traced at some level to the defendants, and then goes on to use heroin and then uses fentanyl or gets fentanyl mixed in with that.
>
> Sure, the cartel or the supplier of the heroin has acted illegally and is liable for that harm. But there could be co-liability

> with the distributor if the jury credits that fairly complicated causal chain.

Tr. (11/1/24) at 107–09. Based on Defendants' arguments and the discussion above, the Court now concludes that it was mistaken in confusing the joint and several liability that goes along with concurrent tortfeasors causing indivisible harm with the availability of apportionment of liability even among concurrent tortfeasors when the harm is divisible.

The clearest example of the distinction is the multiple actors who may have a role in diverting the same prescription opioids. Viewing the evidence in the light most favorable to the City, the jury reasonably could have concluded that some quantity of opioids were sold by Defendant McKesson to Drug City Pharmacy with knowledge that Drug City's lax controls were permitting individuals to have prescriptions filled at that pharmacy even though those prescriptions were written at pill mills. Defendant McKesson is justified in claiming, as to any such diverted opioids, that Drug City Pharmacy and the physicians who wrote those prescriptions and the "patients" who obtained the prescriptions and then diverted the drugs to the illegal market all are *more* responsible than Defendant McKesson for the diversion of those particular drugs. Defendant McKesson cannot escape all liability, however, because its duty is premised on a duty to monitor its customers and, within reason, to prevent or diminish the possibility of downstream diversion. As to these diverted drugs, all of these parties have concurrent responsibility. If the resulting injury were indivisible, these concurrent tortfeasors would have joint and several liability for the indivisible injury, assuming that the conduct of each of them was a substantial factor in causing the injury. But the harm in this action is divisible. There is no reason the jury could not evaluate the relative culpability of each of those actors and assess shares of responsibility based on that evaluation.

The contrast also applies to the second illustration. Viewing the evidence most favorably to the City, the jury reasonably could have concluded that Defendant ABDC's unreasonable conduct contributed to the diversion of some quantity of prescription opioids. Some unidentified individuals misused those drugs and developed opioid use disorder. Some number of those individuals progressed to use of heroin and illicit fentanyl. If any one of those individuals brought an individual tort claim based on her opioid use disorder, her individual injury likely would be considered to be indivisible. Such a claim would be extraordinarily difficult to prove, but any defendant playing a substantial causal role in that causal chain would have liability for the full, indivisible injury. The public nuisance claim in this action, however, is not an individual tort claim. The jury should have been allowed to evaluate the role that each actor in this causal sequence played in contributing to the aggregate harm of the public nuisance and to apportion responsibility among those actors, including Defendant ABDC.

On this further consideration, the Court concludes that its instruction on apportionment was erroneous and that Defendants were prejudiced by that error. This mistake provides an independent basis to grant Defendants a new trial on apportionment.

c. Excessiveness of the Verdict

In addition to these two grounds to grant a new trial, the Court considers the magnitude of the verdict as a whole. This requires consideration of the factual basis for the City's claimed damages and the result produced by the jury's apportionment percentages.

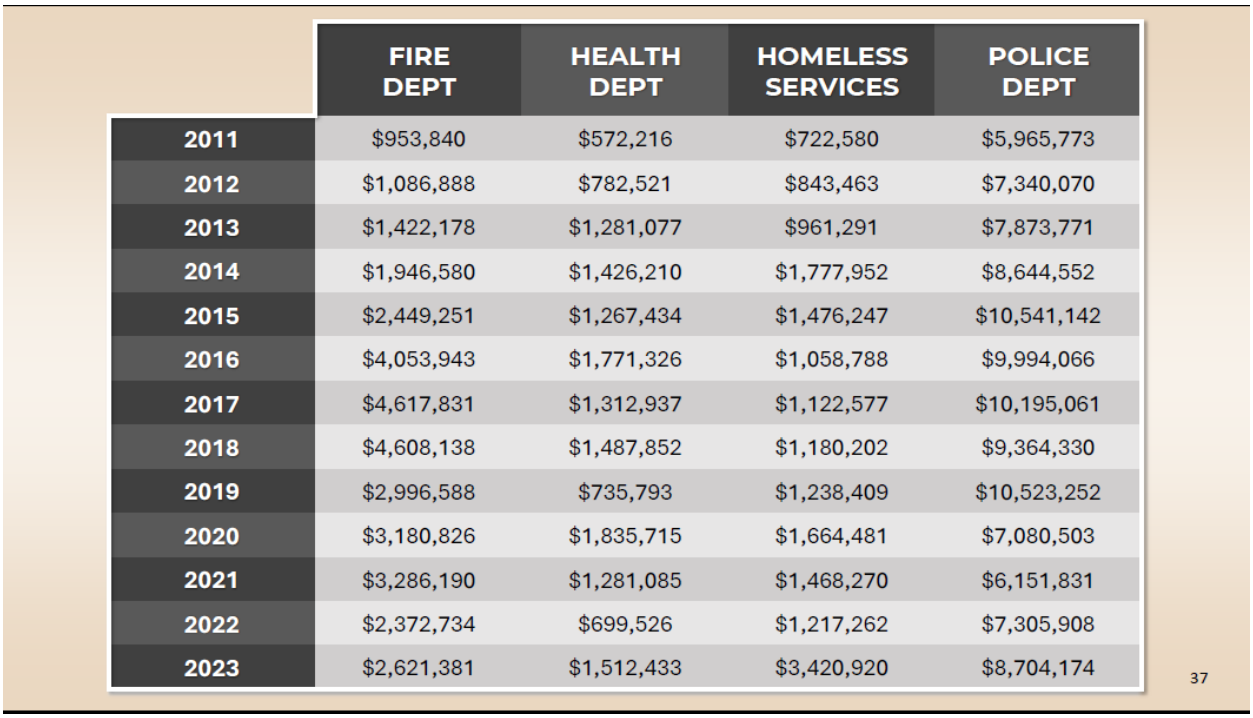
i. The City's Damages Claim

William V. Padula, a professor of pharmaceutical and health economics at the University of Southern California, was the City's primary witness on damages. He performed an analysis of City expenditures from 2011 through 2023 to identify the City's actual spending to prevent

opioid use disorder or in immediate response to opioid use disorder and overdoses.[18] He included only spending from the City's general fund and excluded spending that was funded from other sources like federal and State grants. He then tried to limit the City's claimed damages to expenditures that could be attributed to opioid use disorder caused by the misuse of prescription opioids. Using his analysis of past expenses, Dr. Padula also made a projection of likely expenditures by the City for the same purposes for 2024 and for five years into the future, 2025 through 2029.

Dr. Padula considered spending by four agencies: the Baltimore Fire Department, the Baltimore Health Department, the Mayor's Office of Homeless Services, and the Baltimore Police Department. For the first three agencies, Dr. Padula analyzed City finance records himself. For the Police Department, he adopted the analysis performed by another expert witness retained by the City, Dr. Harold Pollack. For each agency, Dr. Padula's approach was to identify budget items that included services involving OUD or overdose response and then to estimate what part of those budget items could be attributed to immediate response services or activities. To focus the claim further, Dr. Padula then used the opinions of Dr. Brendan Saloner on the portion of all OUD in Baltimore that could be causally attributed to the misuse of prescription opioids. That portion, according to Dr. Saloner, varies over the years but averaged about 83%. Dr. Padula applied the factors derived by Dr. Saloner to all of his past damages claim estimates. Using this methodology, Dr. Padula generated the following amounts as the City's claim for past damages, excluding 2024:

[18] Most of Dr. Padula's testimony appeared to be based on calendar years. It is not clear how his analysis related to the City's fiscal years for budgeting and spending purposes.



	FIRE DEPT	HEALTH DEPT	HOMELESS SERVICES	POLICE DEPT
2011	$953,840	$572,216	$722,580	$5,965,773
2012	$1,086,888	$782,521	$843,463	$7,340,070
2013	$1,422,178	$1,281,077	$961,291	$7,873,771
2014	$1,946,580	$1,426,210	$1,777,952	$8,644,552
2015	$2,449,251	$1,267,434	$1,476,247	$10,541,142
2016	$4,053,943	$1,771,326	$1,058,788	$9,994,066
2017	$4,617,831	$1,312,937	$1,122,577	$10,195,061
2018	$4,608,138	$1,487,852	$1,180,202	$9,364,330
2019	$2,996,588	$735,793	$1,238,409	$10,523,252
2020	$3,180,826	$1,835,715	$1,664,481	$7,080,503
2021	$3,286,190	$1,281,085	$1,468,270	$6,151,831
2022	$2,372,734	$699,526	$1,217,262	$7,305,908
2023	$2,621,381	$1,512,433	$3,420,920	$8,704,174

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Exh. P02365, Slide 37 (identification only)

When he performed his analysis, Dr. Padula did not have actual spending data for 2024. To estimate City spending in 2024 and to project spending five years into the future, Dr. Padula used a different methodology. He took the OUD and overdose responses costs he had already calculated for 2019 to 2023 and divided those by an estimate of the number of individuals in Baltimore with active OUD, based on the expert opinions of Dr. David Dowdy, another expert witness retained by the City. That calculation produced a cost per capita for the City's OUD and overdose response costs, which Dr. Padula then multiplied by Dr. Dowdy's estimates for the predicted number of individuals with active OUD in the future years. Dr. Padula then applied the same approximate 83% factor derived from Dr. Saloner's opinions to reduce his future estimates to costs attributable to OUD caused by misuse of prescription opioids. Finally, Dr. Padula applied a discount rate to reduce the 2025 through 2029 estimated costs to a present value as of the time of trial.

Totaling the actual figures from his analysis for 2011 through 2023 plus the estimated amount for 2024, Dr. Padula produced a total City claim for past damages of $193,808,035. He calculated the present value of the City's claim for future damages for 2025 through 2029 to be $66,435,552. The City's total claim put before the jury thus was $260,243,587. This is the full, 100% amount of damages, within the boundaries set by the Court, that the City claims in damages based on the misuse of prescription opioids, from any source. Dr. Padula made clear that he did not analyze and therefore had no opinion concerning the causation of the expenses he calculated by either of the two Defendants.

ii. The Jury's "Bonus" on Damages

In Question 6 on the verdict sheet, the jury was asked to "consider[ ] the alleged public nuisance **as a whole**. I am asking you here to state the full amount, if any, the City has proved that it experienced or will experience because of the public nuisance. For this question, you do not consider the extent of liability of either specific defendant." (Emphasis in original.) The jury answered Question 6 by finding "Past damages" of $193,808,635, "Future damages" of $80,738,100, and "TOTAL DAMAGES" of $274,546,735. The jury thus awarded $600 more in past damages than the City requested and $14,302,548 more in future damages than the City requested. It is impossible to know how the jury calculated these bonuses, but the additional amount of future damages is approximately the amount Dr. Padula assigned to each future year in his analysis. The jury may have thought it could add another year to the future damages.

The City concedes that the jury's award exceeds the maximum amount included in the City's evidence, and the City has agreed to accept a remittitur of the amount of the surplus that affects the judgments. Based on the 70% and 27% factors applicable respectively to Defendants McKesson and AmerisourceBergen, the total surplus of $14,303,148 in Question 6 would

increase the judgment against Defendant McKesson by $10,012,204 and the judgment against Defendant ABDC by $3,861,850. These amounts will be included in the remittiturs granted by the Court.

iii. The Result of the 97% Finding

To the extent Defendants argue that any category of the City's claimed damages was unsupported by evidence or legally impermissible, the Court rejects that argument. Defendants direct this argument primarily at the City's claim for policing costs, contending that those costs do not qualify under the Court's rulings as immediate or "first layer" response costs. Those policing costs account for a large portion of the damages claimed by the City. If the Court were making its own findings of fact, the Court likely would not credit all of Dr. Pollack's and Dr. Padula's testimony, but those opinions provided a sufficient basis for a reasonable juror to find that the damages claimed were expenses the City has incurred in the past or is reasonably likely to incur in the future because of the misuse of prescription opioids in Baltimore. The Court ruled during trial that the policing costs as a category were sufficiently immediate and related to the opioid epidemic, and the Court does not see a basis to disturb that ruling. Thus, except for the unjustified surplus in future damages discussed above, the Court will not grant either Defendants' motions based on the factual basis for damages provided by the City.

The Court finds the jury's award against each Defendant, based on the jury's overall 97% factor and the individual 70% and 27% factors, to be grossly excessive based on the absence of evidence to connect either Defendant's unreasonable conduct, as proved in this trial, to those proportions of the damages awarded. This gross excessiveness is a combination of insufficient causal proof offered by the City and the jury's failure to apply uncontroverted proof of other causes of the City's damages for which these Defendants cannot be liable.

The crux of the City's claim in this trial was diversion or, more accurately, the Defendants' failure to prevent diversion. It is appropriate to start with the total volume of prescription opioids that were misused by individuals in Baltimore during the period at issue. Some of those drugs were diverted from the lawful distribution system in the technical sense that they left the regulated distribution channels as a result of the wrongdoing of a registrant – one of the four classes of actors required by federal law to be registered. This category includes prescription opioids that were wrongfully prescribed by pill mill doctors using their prescribing authority improperly. Some misused prescription opioids were not "diverted" in this technical sense. They became available for misuse despite having been initially prescribed and sold properly. This category includes medicine cabinet "diversion" even though that passage to misuse does not involve misconduct by any federal registrant. The Defendant distributors in this action may be responsible for some of the diversion that occurred with the first category of misused prescription opioids. Defendants cannot possibly be liable for any prescription opioid that falls in the second category of misused prescription opioids.

To justify the jury's extraordinary 97% conclusion, the evidence must support one of two scenarios. First, the evidence would have to support a conclusion that the first category of misused opioids amounts to 97% of all prescription opioids misused in Baltimore and that only 3% of all prescription opioids that were misused reached the point of misuse by other means. In that scenario, the evidence would have to show that these two Defendants through their unreasonable conduct had a substantial role in the diversion of every one of those misused pills in the first category. Alternatively, the evidence could show that *more* than 97% of all misused prescription opioids were in the first category. In this scenario, there could be some very small percentage of opioids in this category the diversion of which is not attributable to either

Defendant, but this scenario would require that the second category, including all medicine cabinet diversion, amounts to a miniscule percentage of all misused prescription opioids – between 0% and less than 3%. Neither scenario is sustainable on this record.

As discussed above, the City introduced sufficient proof for the jury to find that Defendants acted unreasonably. But that proof was limited to sales to specific pharmacies during specific time periods. The City argues it presented ample evidence from which the jury could find "that pill mill diversion bears material responsibility for the public nuisance as defined by the Court." The City cites Dr. Barnett's testimony that "1 percent of doctors are responsible for 50 percent of the opioid dosages that get into the community,"[19] Tr. (10/17/24) at 178, and testimony from cross-examination of one of Defendants' expert witnesses, Dr. Peter Boberg, that the Rosen-Hoffberg clinic accounted for almost ten percent of all the oxycodone prescribed in Baltimore from 2006 to 2017, Tr. (10/22/24) at 370–73.[20] Pl.'s Mem. at 10. According to the City, this testimony and Dr. Barnett's testimony about a study that drew a connection between DEA enforcement actions against distributors and a reduction in opioid supply and overdose deaths supported a finding that pill mill practices or conduct play a substantial and central role in creating the public nuisance. The City also argues that the jury was empowered to make qualitative and not only quantitative judgments about the seriousness of Defendants' conduct.

The City is correct that there was sufficient evidence introduced from which a reasonable juror could conclude that pill mills, in the Baltimore area and elsewhere, are or were a significant

[19] Dr. Barnett did not explain what he meant by "get into the community," so it is not clear what the denominator is in his statement. He might have meant that one percent of doctors write the prescriptions for half of all opioid doses – both legitimate and illegitimate – or he might have meant that those doctors are responsible for half of all opioid doses that are illegitimate and become available for misuse.

[20] This information was not part of Dr. Boberg's opinions but was elicited by the City based on a dataset used by Dr. Boberg.

source of misused opioids and that physicians and other medical professionals at pill mills amounted to a very small percentage of all prescribers, thus meaning that they were a concentrated problem in the medical profession. A reasonable juror also could have concluded based on the evidence that pill mills played a greater role in the misuse of opioid medications than did medicine cabinet "diversion." These general propositions, however, do not provide a basis on this record to conclude that 97% of all misused prescription opioids in Baltimore came from pill mills *and* that a handful of pill mills or corrupt physicians were responsible for virtually all of the diversion of prescription opioids to misuse *and* that the two Defendants in this action were responsible for virtually all of the supply from which the prescriptions from that handful of pill mills or corrupt physicians were filled. All of those conclusions would have to be true to support the verdict in this action.

The City's claim for damages spans fourteen years, 2011 to 2024, plus five years into the future. The City's evidence of unreasonable conduct by Defendant McKesson, in the light most favorable to the City, covered the following pharmacies during the time periods stated:

> NewCare Pharmacy: October 2005–October 2006
> Drug City Pharmacy: March 2009 to March 2012
> Bayview Pharmacy: November 2012 to July 2013
> White Marsh Pharmacy: November 2012 to July 2013
> Joppa Road Pharmacy: May 2012 to October 2013
> Harford Road Pharmacy: May 2012 to October 2013
> Northern Pharmacy: May 2012 to September 2014
> Keystone Pharmacy: March 2014 to at least 2019
> Poplar Grove Pharmacy: March 2017 to 2018

Thus, the only evidence of sales linked to Defendant McKesson's unreasonable conduct before the start of the damages period are one year of sales to NewCare Pharmacy and about ten months of sales to Drug City Pharmacy. In contrast, the City's own evidence placed the start of the opioid epidemic fifteen years earlier, in 1996, and Dr. Barnett testified that Wave 1 of the epidemic, from 1996 to 2010, was marked by "a huge increase in opioids and the opioid

oversupply [that] resulted in more cases of addiction and more people getting sick and dying." Tr. (10/17/24) at 89. It is inescapable that the opioid epidemic in Baltimore and elsewhere was already well underway by 2011 and that the harm resulting from it at that point was caused by factors with no connection to either Defendant in the evidence. Yet the jury attributed 97% of the damages caused by the opioid epidemic in 2011 to these two Defendants, which would have to mean Defendant McKesson only because the City's evidence against Defendant ABDC did not even begin until 2013. Even if one includes McKesson's sales to Drug City during 2011, it is impossible to conclude that 97% of all misused prescription opioids causing 97% of the entire harm in 2011 is attributable to Defendant McKesson's sales to NewCare and Drug City.

It is also notable that the City's only evidence of any unreasonable conduct by Defendant McKesson after 2014 involves McKesson's sales to only two pharmacies: Keystone and Poplar Grove. Defendant McKesson is liable for the ongoing effects of its earlier unreasonable conduct, but there is no dispute that McKesson was adding very little to the public nuisance for the last fifteen years of the City's claimed damages.

The City explicitly stated that its claims against Defendant AmerisourceBergen did not begin until 2013, when Defendant ABDC's sales of opioids increased substantially because it became the distributor for Walgreen retail pharmacies. The City's evidence of unreasonable conduct by Defendant ABDC, again in the light most favorable to the City, covered the following pharmacies during the time periods stated:

> Orchard Pharmacy: 2017 to at least 2020
> Belvedere Pharmacy: October 2017 to at least January 2018
> Campus Pharmacy: September 2016 to at least January 2018
> Hillendale Pharmacy: 2016 to 2018
> Walgreen Pharmacy #5686: 2013 to at least 2019
> Walgreen Pharmacy #6779: 2013 to at least 2019
> Walgreen Pharmacy #7574: 2013 to at least 2019

The City's evidence of unreasonable conduct by Defendant ABDC, although it starts later, is at least arguably more sustained because of the claim that ABDC exercised inadequate diligence concerning the Walgreen pharmacies beginning when ABDC first assumed the opioid distribution function for those pharmacies.

There was evidence at trial that the Rosen-Hoffberg clinic and several other clinics or doctors were engaged in improper prescribing and that most of the specifically identified pharmacies filled prescriptions from those prescribers. Aside from the brief testimony the City gained on cross-examination of Dr. Boberg, discussed above, the City did not even attempt to prove either (a) the extent to which the Rosen-Hoffberg clinic and the several other clinics or doctors identified as likely corrupt prescribers were the source of misused opioids in Baltimore or (b) the extent to which the prescriptions of those corrupt prescribers were filled at the specifically identified pharmacies. The City could have presented such analysis. Drs. Rosen and Hoffberg and their practice were Defendants in this action and subject to discovery until months before trial. There was evidence at trial that the parties had access to prescribing data of individual pharmacies. Without such analysis, the jurors were left to guess or to assume the extent of the role of these prescribers as a source of misused opioid medications in Baltimore over a fourteen-year period. Even if that role was dominant, it is very unlikely that it amounted to 97% of all misused prescription opioids. Moreover, even if the role were 100%, it is logically impossible for the unreasonable conduct of the two Defendants to have been causally connected to 97% of that diversionary conduct. That would require that prescriptions from the Rosen-Hoffberg clinic and other improper prescribers were almost never filled at any pharmacy other than those identified at trial and that the filling of prescriptions from these prescribers at those particular pharmacies started and stopped to coincide with the periods of time of each

Defendant's unreasonable conduct with respect to each pharmacy. The Court does not expect the City to have proved these issues with that kind of precision. The point is that the fragmentary nature of the proof provided cannot support generalization to an overwhelming conclusion like 97% liability for these two Defendants.

The City also cannot deflect the clear evidence of the substantial role of medicine cabinet "diversion." Even viewing the evidence most favorably to the City, this factor has to account for far more than 3% of the overall damages. Before looking more specifically at the evidence relating to medicine cabinet diversion, the Court will examine the parties' arguments about "overprescribing." Defendants divide overprescribing into "good-faith overprescribing" and "bad-faith overprescribing." By good-faith overprescribing, they seem to mean primarily or maybe even exclusively prescribing of quantities of prescription opioids that leave excess quantities available for medicine cabinet "diversion." By bad-faith overprescribing, they seem to be referring to pill mills, that is, prescribers who write prescriptions without any legitimate medical need. The evidence, although not well developed on this issue, points to a more difficult gray area of prescribing activity.

Dr. Barnett testified, without contradiction, that prescribing of opioids expanded rapidly in Wave 1 of the opioid epidemic. He attributed that expansion to manufacturer misconduct. Defendants presented evidence, also uncontroverted, of the changes in prescribing guidance that occurred in Wave 1 of the epidemic. According to Dr. Barnett, these inappropriate changes in the medical standards for prescribing produced "a frantic reexamination of [prescribing] guidelines" in Wave 3 of the epidemic, beginning in 2013. Tr. (10/17/24) at 92. As already noted, Dr. Barnett opined that this overprescribing at the beginning of the epidemic caused increased opioid use disorder and overdose deaths. Presumably because there were no

Defendant manufacturers in this trial, there was minimal evidence of the responsibility for these fundamental changes in prescribing guidance and behavior.

The definitional gray area is prescribing that may have been undertaken with some medical justification – in "good faith" by the physician – but with adverse consequences. If a physician prescribed opioids for a patient to address a new category of pain based on expanded prescribing criteria, and the patient actually had pain and took the medications as directed by the physician, then the prescription was written in good faith, and the use of the opioids was not misuse. This is true even if it could be proved in a case against a manufacturer that the expanded prescribing guidance was produced by wrongful conduct of the manufacturer. That patient might begin to develop tolerance or dependence on the drug and therefore might ask the physician for prescriptions for greater quantities or increased potency. Both the physician and the patient may enter a gray area. According to Dr. Barnett: "So a typical doctor, if someone is increasingly misusing opioids, it's going to be pretty easy to spot the red flags. If someone is asking for increasing doses or asking for refills early or saying they lost their refill, and a typical doctor will actually say no."[21] *Id.* at 70. Dr. Barnett described that patient as already "misusing opioids," *id.*, but that misuse plainly started with appropriate, supervised medical use. The doctor who does not "say no" may move from good-faith to bad-faith prescribing, but this is not the situation that normally would be labelled as a "pill mill." There was no development in the evidence of the extent to which corrupt pill mills started as clinics using expanded prescribing guidance at least arguably in good faith. The one aspect of this issue that is clear is that the Defendants in

[21] Dr. Barnett testified that, as a resident physician in 2011, he noticed "that there were many, many patients who were on long-term opioid therapy, often very high doses, and they were not doing well." *Id.* at 50. Although he was critical of this care, it does not appear that he regarded these physicians as corrupt.

this trial could not be held liable for misuse of prescription opioids that originated in arguable good-faith overprescribing of this sort.

The City challenges Defendants' emphasis on good-faith prescribing or overprescribing as the primary or an important source of misused opioid medications. The City argues that good faith prescribing by definition cannot account for misuse because misuse necessarily refers to opioids that are used without a valid medical purpose. Relying on testimony from one of Defendants' expert witnesses, Dr. Christopher Gilligan, the City points out that only a very small percentage of people who ever take an opioid go on to misuse them and develop opioid use disorder and, of that small group, only a very small percentage of misusers go on to use heroin. Finally, the City argues that medicine cabinet diversion resulting from good-faith prescribing produces only small quantities of available opioids and those quantities are insufficient to fuel misuse in the quantities necessary to develop opioid use disorder.

"Misuse" cannot be parsed as finely as the City does in this argument. The City is correct that the definition of misuse, supported by Dr. Brendan Saloner's testimony, is any use of an opioid medication that is contrary to the directions of the person's physician. But the City then argues that misused opioids, for purposes of this case, must be limited to those opioid medications the misuse of which actually leads to opioid use disorder. The City suggests, in effect, that only opioids diverted through pill mills are misused in this way and that opioids that become available for misuse through good faith prescribing, especially through medicine cabinet diversion, are not misused in this way. The City effectively is trying to limit the denominator of all misused opioids so that a numerator that produces 97% becomes more plausible. The evidence does not support that constriction.

Dr. Barnett downplayed the significance of medicine cabinet diversion. It might be "a nice surprise" for someone misusing opioids, but it could never be a sufficient quantity to drive

or to sustain opioid use disorder. Tr. (10/17/24) at 180. That testimony must be accepted for purposes of these motions, but that does not mean that the non-medical consumption of opioid medications that become available in this way does not constitute misuse. Plus, Dr. Barnett testified that all opioid use disorder starts with some initial use of the drugs. Thus, the City cannot simply exclude any consideration of good-faith prescribing or medicine cabinet diversion as having no role in the problem by definition.

The City tries to exclude medicine cabinet diversion from all influence on the opioid epidemic. Dr. Saloner's testimony illustrates the point. His central point was that for approximately 83% of all individuals in Baltimore who had opioid use disorder from 2010 to 2021, their opioid use disorder was caused by misuse of prescription opioids. On cross-examination, Defendants sought to establish the extent of medicine cabinet diversion as the source of misused prescription opioids. Dr. Saloner acknowledged results of the National Survey of Drug Use and Health ("NSDUH") – the same data source he used in his calculations – that 70.8% of the respondents who stated they misused prescription opioids stated they obtained those drugs from friends or family, either for free, by paying for the drugs, or by taking them. Tr. (10/2/24) at 256. In answering those questions, Dr. Saloner consistently sought to distinguish between "low level" or "casual[ ]" misusers and the small group of people who engage in frequent misuse. *Id.* at 251–52. Dr. Saloner explained further on re-direct examination that the sources of prescription opioids tend to be different for frequent misusers. *Id.* at 262–63. On re-direct examination, he cited figures for frequent misusers of 26.4% obtaining drugs from friends and family *for free*, 27.3% obtaining drugs from physicians, and some unstated percentage obtaining drugs from other sources. *Id.* at 268. *See also* Exh. D1316 (identification only). Then, on re-cross-examination, Dr. Saloner acknowledged data in an article showing 52.5% of

frequent misusers obtaining prescription opioids from friends and family and 15.2% of them obtaining opioids from drug dealers. *Id.* at 272–73. *See also* Exh. P2333 (identification only).[22] Viewing the evidence in the light most favorable to the City, a reasonable juror could accept the conclusion that the sources of the prescription opioids are different for infrequent misusers and frequent misusers and that medicine cabinet diversion is more common for individuals with infrequent misuse. But even in the light most favorable to the City, medicine cabinet diversion was the source of prescription opioids for as many as a quarter of all frequent misusers and more likely for more than half of all frequent misusers. The evidence does not support dismissing that source altogether. It certainly does not support confining it to 3%.

The Court concludes, based only on the scope of causation that the City had the burden to prove, that the jury's verdict was grossly excessive and cannot be supported by the evidence introduced at trial.

Defendants also argue that the jury should have apportioned a larger share of liability to various other actors. These include opioid manufacturers and other distributors. Most likely for strategic reasons, Defendants did not introduce evidence of the unreasonable conduct of any manufacturer or other distributor. As noted above, there was generalized testimony about the role of manufacturers in causing the expansion in prescribing of opioids. There were a few references to other distributors but no specific evidence of unreasonable conduct by other distributors. Although manufacturers and other distributors very likely could be held liable for a

[22] The two exhibits, D1316 and P2333, are a Research Letter and an article from the same authors published at the same time. They therefore rely on the same data. Plaintiff City emphasized the lower percentage, 26.4%, by isolating the category of "Given by a friend or relative for free." Defendants emphasized a higher percentage, 52.5%, by combining "Given by a friend or relative for free" (26.4%), "Stolen from a friend or relative" (2.9%), and "Bought from a friend or relative" (23.2%). Exh. P2333 at Table 2. All of these percentages apply to the category of most frequent misusers of prescription opioids.

portion of the harm from the opioid epidemic, Defendants failed to sustain their burden to introduce evidence to apportion liability to specific actors in these two categories.

Defendants also complain that the jury failed to apportion any or sufficient liability to pharmacies and bad-faith prescribers. Here, the Court focuses on those specific pharmacies and prescribers who were associated with the specific unreasonable conduct proved by the City. The failure to apportion some liability to these actors may have been due to the Court's erroneous instruction on apportionment. The Court agrees with Defendants that apportionment to these actors was appropriate and that the failure to do so, even if understandable, renders the verdict grossly excessive.

Simplified, the City's theory was that pill mill doctors, exemplified most clearly by the prescribers at the Rosen-Hoffberg clinic, were writing prescriptions in bad faith that were then filled at the specifically identified pharmacies. Because the City presented relatively little testimony about the actual business practices of those pharmacies, it is difficult to say whether the City's theory is that the pharmacies were complicit in pill mill's corrupt activities or only that the pharmacies failed to refuse prescriptions they should have refused. Either way, however, for every single pill for which the City faults a Defendant, there is a pharmacy that is at least equally culpable. The pharmacy is on the front line handling the prescription, and the distributor's knowledge of the situation is at least secondary to that of the pharmacy. Moreover, the prescriber under this theory is the real bad actor. More than an equal share of responsibility should be assigned to the prescriber, but it is certainly the case that the prescriber should bear as much responsibility as either the pharmacy or the distributor. Finally, every one of these transactions necessarily features a person acting corruptly to obtain the prescription. In some instances, that may be a person suffering from opioid use disorder and under the compulsion to

obtain drugs to satisfy a habit. In other instances it may be a drug dealer using a pill mill to get drugs to be trafficked. Multiple people may be involved in illicit transactions of the particular drugs once they are obtained from a pharmacy.

Finally, Defendants complain that the jury assigned no blame to gangs and cartels, especially those responsible for the supply of illegal fentanyl. Again, the jury's failure to apportion any liability to this group (or to apportion no more than 3% of liability to this group) might have been due to the Court's erroneous apportionment instruction. The Court agrees with Defendants that some apportionment of liability to heroin and fentanyl traffickers was appropriate and that the failure to do so makes the verdict grossly excessive. The undisputed evidence was that some individuals who developed opioid use disorder from the misuse of prescription opioids then turned to heroin or even fentanyl because prescription opioids either became too difficult to obtain or because they were not strong enough. The initial introduction of illegal fentanyl was as an additive to other drugs, particularly heroin, but some users may now seek it out specifically. This progression to heroin and fentanyl makes Defendants liable for harm resulting from heroin and fentanyl use that results from prescription opioid misuse, but that does not mean the jury could not assess a portion of liability based on the particularly nefarious conduct of individuals who traffic in these dangerous drugs.

7. Remittiturs

The Court concludes that a new trial on limited issues is necessary, but the Court also finds it appropriate to order a remittitur that could avoid the need for a new trial. In doing so, the Court assesses the highest amount at which the verdict can be deemed no longer excessive. The first component of the remittitur is the surplus amount awarded by the jury over the maximum amount claimed by the City. To determine the additional amount of the remittitur, the Court will

begin with the verdict reduced to the maximum amount put forward by the City in its evidence through Dr. Padula. The Court makes the calculation by considering the highest percentages applied against that amount that could have been justified by the evidence, all as discussed above.

First, the Court reduces the amount of damages in each year by 26.4% to account for a percentage of prescription opioids that reached the point of misuse through good faith prescribing. Defendants have no conceivable liability for this category of misused prescription opioids. This reduction is made primarily in recognition of medicine cabinet diversion, but it also includes opioids misused while under the care of a physician operating at least arguably in good faith. Because the trial record contains no firm estimate of the misuse occurring in this way under the good-faith care of a physician, the Court does not assign a reduction percentage to that aspect of this category. The 26.4% reduction is based on Dr. Saloner's acknowledgement of that percentage in the literature as the number of frequent misusers who obtained prescription opioids for free from friends or family. This reduction could be justified at a percentage over 50% based on the same article by grouping together the percentages of frequent misusers obtaining drugs from friends or family for free, by purchase, or by theft. The smaller reduction is very favorable to the City and preserves as much of the jury's verdict as possible while eliminating or at least limiting excessiveness.

Second, the Court reduces the amount of damages in each year by 10% to account for prescription opioids that were diverted from the lawful distribution channels but in sales that have not been connected in any way with either Defendant. The first reduction yields an estimate, albeit a high estimate, of the misused prescription opioids that reached the point of misuse through diversion associated with bad-faith prescribing. This 10% reduction will be

applied against that resulting 73.6% amount, not against the beginning total. As discussed above, the evidence of unreasonable conduct by either Defendant is limited in time and limited to sales to specific pharmacies in the Baltimore area. The portion of diverted prescription opioids not connected with these limited sales is likely much larger than 10%. A reduction of only 10% is very favorable to the City and preserves as much of the jury's verdict as possible while eliminating or at least limiting excessiveness.

Third, the Court applies a reduction based on the role of traffickers of heroin and fentanyl. This reduction will not be applied until 2014, the first full year after the beginning of Wave 3 of the epidemic, which was described in the evidence as beginning in 2013 with the introduction of fentanyl into the illegal drug supply. This reduction is 10% applied in 2014 and subsequent years against the amount of damages resulting after the first two reductions. It is not 15% against the total amount for any year. The perniciousness of fentanyl in causing opioid overdose deaths cannot be overstated, and the conduct of those who manufacture and distribute illegal fentanyl is purely malicious. The Court emphasizes that the Court is not rejecting the clear evidence that many misusers of prescription opioids turned to use of heroin and fentanyl and that that transition either could have been foreseen or became known to the Defendants and others in the legal pharmaceutical industry. It is appropriate, however, to allocate a portion of liability to this category of purely illegal actors. In proportion to culpability, this is a very small reduction that is very favorable to the City, and it preserves as much of the jury's verdict as possible while eliminating or limiting excessiveness.

Fourth, with respect to the diversion of prescription opioids that can be connected causally to Defendants' unreasonable conduct, the Court applies a reduction for other actors who also acted improperly with respect to those particular drugs. Two categories of such actors are

very clear. By the City's evidence, all of Defendants' unreasonable conduct was based on a failure to recognize and act on problematic conduct at a pharmacy. Every single pill sold unreasonably by a Defendant was also sold unreasonably by a pharmacy. It is fair to say that every one of those pharmacies was at least as culpable as Defendants. In addition, by the City's arguments, the overwhelming source of those sales was bad-faith prescribing at a pill mill. There was little evidence of that exact conduct, but again by its nature it was in violation of federal law (and Maryland law and medical standards) and far more culpable than Defendants' conduct. It is also inescapable that every inappropriate prescription emerging from a pill mill and filled at one of these pharmacies was obtained by an individual "patient." This group of actors is more difficult to characterize because some of them likely were individuals suffering from opioid use disorder using pill mills to obtain drugs to satisfy their habits. Others likely were drug dealers or agents of drug dealers using pill mills to obtain drugs to be sold illegally. The culpability of those "patients" thus varies. Considering these factors, the Court finds it appropriate to allocate the remaining liability after the other reductions have been applied in equal thirds to Defendants, pharmacies, and prescribers. The Court declines to assign a share to individuals obtaining and filling those prescriptions. Because of the greater culpability of prescribers and pharmacies and because some amount of culpability could be assigned to "patients," this allocation is favorable to the City and preserves as much of the jury's verdict as possible while eliminating or limiting excessiveness.

The Court presents the calculation of these reductions in an Addendum to this Memorandum Opinion. The Court notes again that it has applied these reductions in succession, that is, each reduction is applied against the yearly amount resulting from the previous reduction. The results are a total amount of past damages of $38,779,925 and future damages of

$13,070,052. The total amount of damages for both Defendants combined is $51,849,977. The Court will apply the same proportion of liability between the Defendants found by the jury, that is, a ratio of 27:70. That ratio presumably represents the jury's weighing of the relative seriousness of each Defendant's conduct and the differing time periods and volumes of each Defendant's sales to the identified pharmacies. Applying that ratio, Defendant AmerisourceBergen is liable for $14,432,468, and Defendant McKesson is liable for $37,417,509. The remittiturs necessary to reduce the judgments to these amounts will be ordered separately with respect to each Defendant.

8. Contributory Negligence

As a miscellaneous argument, Defendants renew their argument that contributory negligence applies to the City's public nuisance claim. The Court finds no reason to disturb its earlier rulings that Defendants' liability cannot be negated by inaction by the City. Although not developed in any depth, the evidence at trial supported the view that the Baltimore Police Department gave little priority to enforcement actions aimed at diversion of or trafficking in prescription opioids and that the City routinely paid for prescriptions for City employees obtained at the Rosen-Hoffberg clinic, but these facts, even if proved fully, would not relieve Defendants of their regulatory obligations. Similarly, the Court instructed the jury that it could not consider any lack of investigatory initiative by the DEA or State authorities to negate or diminish Defendants' liability.

B. Abatement Remedy

As stated at the outset of this opinion, the Court intended to decide all remaining issues together, including the abatement remedy to be ordered by the Court. Having decided that a new trial on damages may be necessary, it is not appropriate to continue with the abatement remedy. The Court, however, will give the parties very brief guidance on some of those issues. This

guidance is provided without prejudice to detailed resolution of the issues once the jury phase of the trial is completed. If Plaintiff City accepts the full remittitur ordered by the Court, the Court promptly will enter judgments in the reduced amounts and will proceed with decision of the abatement remedy without further evidentiary proceedings. If Plaintiff City rejects the full remittitur (but presumably accepts the smaller portion of the remittitur the City has already indicated it will accept), the Court will schedule the new jury trial on damages and will then evaluate, in consultation with the parties, whether any further evidentiary proceedings are needed on the abatement issues after that new trial.

At the abatement remedy phase of the trial, the City opted to put forward an extensive, fifteen-year plan to address opioid use disorder in Baltimore with a staggering cost in excess of $5 billion. The City's strategy was to ignore for the most part programs and services that are already in place and to design a comprehensive program of response in the abstract or from scratch. The City then priced its plan without regard for what components are or could be paid for by other levels of government or by private entities. The City argued that these two Defendants alone should be required to pay the full cost of that plan to the extent of their liability shares – together 97% – or still in excess of $5 billion.

The Court is not inclined to follow the City's proposed approach. Again, without deciding any of these issues at this point, the Court is struck by the fact that the City did not present any evidence of any unreasonable conduct by either Defendant after about 2019. The City also chose not to ask for any injunctive relief to change the practices of either Defendant in the future. Rather, any abatement remedy will be to deal only with the ongoing effects of Defendants' conduct in the past. As already decided above, the evidence at trial did not support the jury's conclusion that these two Defendants are responsible for 97% of all harm caused in

Baltimore by the misuse of prescription opioids. The degree of their liability for an abatement remedy remains to be determined based on any new trial on damages and based on the Court's determination of the extent to which that outcome binds the Court crafting the equitable portion of the remedy.

Rather than the City's ground-up approach, the Court is more likely to provide an abatement plan that builds on existing programs and resources. The Court most likely will focus on much narrower measures to increase harm reduction steps and to reach more individuals suffering from opioid use disorder to connect them with existing treatment resources.

Conclusion

For all these reasons, Defendants' motions for judgment notwithstanding the verdict will be denied. Defendants' motions for new trial will be granted. As part of the granting of those motions, the Court will issue a separate remittitur for each Defendant. The orders also will specify the ways in which a new trial will be limited if Plaintiff City rejects one or both of the remittiturs.

The Court has discussed with counsel previously issues of appealability. The Court recognizes that those issues are much more complex in light of this decision. Although the Court was inclined to give the City more time to accept or reject the remittiturs, the Court will restrict that time to require acceptance or rejection of the remittiturs by July 7, 2025 because that action may affect appealability. Any party may present motions pursuant to Maryland Rule 2-602 or any other rule that may affect finality or appealability.

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June 12, 2025

Judge Lawrence P. Fletcher-Hill