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 ON ABATEMENT REMEDY

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 beginning in September 2024 against two of the distributor Defendants: McKesson Corporation ("McKesson") and AmerisourceBergen Drug Corporation ("AmerisourceBergen" or "ABDC"). 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.

Based on the Court's pretrial rulings, the sole claim against Defendants McKesson and AmerisourceBergen is for public nuisance under the common law of Maryland. Before trial, the Court also ruled: (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; and (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.

The jury phase of the trial occurred in September, October, and November 2024. The jury found both Defendants liable and awarded a total of $266,310,333 in damages allocated

between them. The Court conducted the abatement phase of the trial, without a jury, in December 2024. The Court 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.

On June 12, 2025, the Court issued a Memorandum Opinion deciding all post-trial motions filed by both Defendants. To avoid repetition, the Court here assumes the reader's familiarity with that Memorandum Opinion both for a more detailed procedural history of the action and for discussion of the evidence presented and findings emerging from the jury phase of the trial. The Court denied both Defendants' motions for judgment notwithstanding the verdict and granted in part both Defendants' motions for new trial. The grants of a new trial were coupled with specific remittiturs as to each Defendant that allow Plaintiff City to avoid a new trial if it chooses to accept the reduced amounts of damages. The Court issued a separate Order for New Trial and Remittitur with respect to each Defendant.

In broad terms, the Court concluded that the jury's award of damages was excessive because it rested on a conclusion that these two Defendants were responsible for 97% of the total harm caused by the entire opioid epidemic from 2011 to 2029 alleged by the City as the public nuisance. The Court concluded, based on the evidence presented to the jury, that the largest verdict that would not be considered legally excessive would be premised on a conclusion that these two Defendants were responsible, at most, for just under 20% of the total amount of past and future damages claimed by the City. The derivation of that amount is explained in detail in the June 12, 2025 Memorandum Opinion and will be summarized below. The results were revised damages amounts after the remittiturs of $14,432,468 against Defendant AmerisourceBergen and $37,417,509 against Defendant McKesson, for a total damages recovery of $51,849,977.

The Court's original plan was to render a single decision resolving both post-trial motions and the abatement remedy. When the Court decided that a new trial on damages was potentially necessary, the Court deferred decision on the abatement remedy until after that possible new trial on limited issues. On June 11, 2025, the Court entered judgments in the full amounts awarded by the jury and immediately stayed those judgments. On June 12, 2025, the Court issued its Memorandum Opinion and the two Orders for New Trial and Remittitur.[1] The Orders required Plaintiff City to make its choice to accept or reject the remittiturs by July 7, 2025. Those decisions would determine whether a new trial was necessary as to one or both of the Defendants, and the Court would then set a date for the new trial or proceed with decision of the abatement remedy.

Plaintiff City then filed a letter request on June 18, 2025 asking the Court to proceed with decision of the amount the City would receive as an abatement remedy if it accepts the remittiturs so it can make a fully informed decision on the remittiturs. Defendants did not object to the request as long as the Court provided its full reasoning for the abatement amount and not simply the amount. Both requests are reasonable, and the Court therefore issued its Order Extending Time to Respond to Remittiturs on June 25, 2025. The Court extended the City's date to accept or reject the remittiturs to August 8, 2025, with the possibility of a further extension if the Court needed more time to issue this decision. The Court subsequently notified the parties that it would need more time to complete this decision and that it would extend the City's time to accept or reject the remittiturs to a date at least two weeks after this decision.

[1] Separating these actions by one day was not technically necessary because Maryland Rules 2-532 and 2-533 provide that post-trial motions filed under those rules that are filed "after . . . the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket." Md. Rules 2-532(b), 2-533(a). The Court separated the docketing events only to confirm the necessary sequence.

Evidence at the Abatement Phase of the Trial

The Court recognizes that all parties had to plan their abatement phase evidence in advance of the jury phase of the trial and that they had only several weeks to adapt that planned evidence to the outcome of the jury phase. The parties had no opportunity to adapt their claims in connection with the abatement phase to the Court's decision on Defendant's post-trial motions.

Plaintiff City presented four witnesses during the abatement phase of the trial. Three of the City's witnesses are expert witnesses offering interrelated opinions. Dr. Susan G. Sherman is a professor at the Bloomberg School of Public Health at Johns Hopkins University in Baltimore. She describes herself as a social behavioral scientist and a social epidemiologist with inter-disciplinary experience researching the negative impacts of drug use. As part of her work in this action, she prepared the City's Abatement Plan and a "Redress Model" based on the Abatement Plan. Before the abatement phase of the trial, she prepared a refinement of the Redress Model. In her work in this action, Professor Sherman used a model of the dynamics of the opioid epidemic in Baltimore created by Dr. David Dowdy. Dr. Dowdy is an epidemiologist and also a professor at the Bloomberg School of Public Health in Baltimore. He testified concerning his model during the jury phase of the trial. Among many other things, Professor Dowdy used his model to estimate, both currently and in the future, the number of individuals in Baltimore with opioid use disorder and the number of those people who are being treated for their opioid use disorder. Dr. William V. Padula, an economist and professor at the University of Southern California, testified to the estimated cost of the City's Abatement Plan. Professor Padula also testified during the jury phase of the trial as the City's primary witness to the amount of damages claimed. During the abatement phase of the trial, the City also presented the testimony of Dr. Joshua Sharfstein, a former City Public Health Commissioner and former Maryland Secretary of Health as well as other distinguished positions in public service.

Professor Sherman organized her Abatement Plan in five sections or components: (1) Harm Reduction; (2) Treatment & Recovery; (3) Education; (4) Special Populations; and (5) Monitoring & Implementation. Harm Reduction strategies acknowledge continuing opioid use and seek to mitigate the more immediate harms resulting from that drug use. Put bluntly, some of these measures are designed to keep individual drug users alive until they can begin treatment. These measures also provide opportunities to connect individuals with OUD with treatment. The Harm Reduction measures included in the City's proposed abatement plan include efforts to make naloxone more widely available in the community. Naloxone or Narcan is a effective drug to counteract the effects of opioids in a person suffering from an overdose. They are highly effective in saving lives when they are available to be administered in an overdose emergency.

The City's proposed harm reduction measures also include syringe service programs ("SSPs"), which among other things provide needle exchanges; syringe and paraphernalia disposal facilities; harm reduction vending machines to provide after-hour supplies of harm reduction products; drug checking supplies, both machines and test strips, that can be used to detect fentanyl and other particularly dangerous components in street drugs; and overdose prevention sites ("OPSs"). Overdose prevention sites, sometimes called safe injection sites, are a place where illegal drug users can use drugs under the supervision of a health professional, with the goal of having someone available to administer naloxone or other life-saving measures in emergencies. The City also proposes funding for PrEP medications, medications that are effective in preventing infection with HIV. The City's proposed harm reduction measures include establishing drop-in centers, drug stabilization and health centers, and street outreach programs. Drop-in and stabilization centers are multiservice centers located in the community where drug users (and others) can obtain a variety of services with little administrative burden,

including obtaining services anonymously. Street outreach includes mobile vans that bring services to varying locations in the community.

Professor Sherman includes a harm reduction section for the treatment of comorbidities. These conditions include HIV, hepatitis C ("HCV"), endocarditis, wound and infection care, chronic conditions, and care coordination. The City also proposes several measures intended to improve police interactions with drug users. These include pre-booking diversion programs, called LEAD in the Baltimore Police Department; specialized overdose units in the Police Department; and opioid-related stigma reduction programs.

Professor Sherman's plan for Treatment and Recovery stresses medications for opioid use disorder ("MOUD"), sometimes also called medication assisted treatment ("MAT"), as the "gold standard for addiction treatment." Methadone, buprenorphine, and naltrexone are used in every level of treatment provided by the American Society of Addiction Medicine ("ASAM"). Methadone and buprenorphine are themselves opioids and operate as full or partial opioid agonists. They activate opioid receptors in the body, but they diminish cravings and control withdrawal symptoms. Naltrexone is an opioid antagonist. It works to block opioid receptors in the body and to prevent activation of them by opioids. The proposed funding for MOUD treatment is by far the most expensive single category of services in the City's proposed abatement plan.

Professor Sherman proposes a series of measures to lower barriers to individuals beginning treatment and to support individuals in treatment to encourage them to stay in treatment. Helplines, Emergency Department Bridge programs, Hospital Consultation Teams, and Overdose Response Teams are designed to identify and to connect people needing treatment with treatment respectively at hospital emergency department visits, inpatient hospital stays, and when a person overdoses. Professor Sherman proposes wraparound services combined with treatment to provide transportation, employment, housing, and food assistance. Needs in these

areas impede treatment, and combining such assistance with treatment encourages individuals to sustain treatment. This subcategory also includes Assertive Community Treatment ("ACT"), which uses teams of providers to address multiple issues that maybe affecting an individual with OUD. Professor Sherman also proposes interventions targeted at individuals recently released from jail or prison, who are at higher risk of OUD relapse and overdose, and at individuals who are homeless or experiencing housing instability. She also proposes mental health services to increase the effectiveness of OUD treatment for individuals who also have mental illnesses. This category also includes a significant number of personnel under the heading "Workforce Expansion and Support."

Professor Sherman divides the Education category in two parts: health professional education and patient and public education. One of the goals of health professional services is to increase the availability of buprenorphine as part of office-based treatment ("OBOT).

The Special Populations category includes services targeted to (1) children, adolescents, and young adults; (2) children in foster care, adopted children, and children living with parents with OUD; (3) pregnant women, new mothers, and neonates; (4) women who use opioids ("WWUO"); and (5) Black populations and non-native English speakers.

The category for "Metrics to Monitor the Opioid Epidemic" includes staffing for an Opioid Abatement Coordinating Unit.

Two features of Professor Sherman's work and testimony in this action were striking to the Court. First, she intentionally avoided conducting a needs assessment that would have examined what services in these area currently exist and where there are gaps between the existing and needed services or programs. Second, although she stated broad objectives that she opined would be achieved if the proposed abatement plan were implemented as a whole over a fifteen-year period, she did not conduct any cost-benefit analysis of the specific components of her proposed plan.

The work of Professors Sherman, Dowdy, and Padula is impressive in its detail. Without over-simplifying the extent of the detail, the City's approach through these experts was for Professor Sherman to define the desired programs and services. She then quantified the resources needed either through her own expertise or in combination with Professor Dowdy's counts of individuals in different categories. Professor Padula then used these quantities to assign a cost to each proposed resource, using various local or national measures. The result is a staggering amount. For the full proposed abatement plan, Professor Padula produced a cost over fifteen years of more than $9 billion: $9,049,900,000.

Professor Padula then applied a series of adjustments. First, he estimated that $25.5 million in costs included in the proposed abatement plan overlap with City costs included in the future damages awarded by the jury. He applied reductions of $5.0 to $5.2 million in each of the first five years of the plan to reduce the cost by this total of $25.5 million. Second, in each year he applied a factor developed by Professor Saloner in his testimony that is intended to state the percentage of all individuals with OUD who developed their OUD through the misuse of prescription opioids. That factor varies from year to year, but it averages about 81%. This adjustment, combined with the damages overlap reduction, produced a total fifteen-year cost of $7.2128 billion. Third, Professor Padula applied the jury's factor of 97% to reduce the amount to the amount attributed to these two Defendants. This adjustment produced a new total cost of $6.9664 billion. As discussed below, this factor is significantly different based on the Court's decision on the post-trial motions. Professor Padula did not have the benefit of that decision. Finally, Professor Padula reduced the amount to present value using a discounting approach based on the interest rates for various U.S. Treasury bills, notes, and bonds with different maturity periods. He advanced a present value of $5.2584 billion. The City proposes that the Court should order the Defendants to pay this amount as the abatement remedy, dividing it between the Defendants in the proportions found by the jury.

Defendants have not advanced any alternative abatement plan. At the abatement phase of the trial, they challenged the City's proposed plan through cross-examination and by presenting several expert witnesses. The Court will discuss some of those issues below. Defendants argue the City has failed to sustain it burden of proving an appropriate abatement remedy and the Court therefore should not grant any relief beyond the damages awarded by the jury.

Discussion

A. The Role of the Jury's Findings of Fact

Where, as here, an action combines legal and equitable claims or issues based in part on common issues of fact, the right to a jury determination of the facts necessary to decide the legal claims must be preserved. *Higgins v. Barnes*, 310 Md. 532, 551–52 (1987). In this situation, once the legal claims or issues are tried to verdict before a jury, the Court must respect the jury's factual findings in its verdict when the Court decides the equitable claims or issues. *Hawes v. Liberty Homes, Inc.*, 100 Md. App. 222, 229, *cert. denied*, 336 Md. 300 (1994). In *Hawes*, the jury trial featured a mix of legal and equitable claims arising from a contract dispute. The central issue was whether the buyers had satisfied a contractual financing contingency or whether the sellers had waived that contingency. The jury found a breach of contract, thereby implicitly concluding that the contingency was either satisfied or waived. The trial court, however, then denied the equitable remedy of specific performance.[2] The appellate court reversed:

> From the manner in which the breach of contract claim was presented and argued, the jury necessarily concluded that either the financing contingency had been satisfied or that it was waived by appellees. . . . In this circumstance, it was simply not permissible under the controlling Maryland law set forth in *Higgins* and *Edwards* for the circuit court to reach a contrary, inconsistent conclusion in ruling on the specific performance claim . . . .

[2] The actual procedural history of *Hawes* is more complicated and features the trial court's rulings on post-trial motions and a first appeal to the Court of Special Appeals. In reversing the trial court's actions, the appellate court also took the unusual step of reconsidering and reversing part of the first appellate decision in the case.

> . . . The trial judge could have denied specific performance for reasons relating more particularly to the appropriateness of that remedy; he could have required appellants to choose between specific performance and damages, on the basis that they were inconsistent remedies; but he was not empowered to deny specific performance on the ground that appellees had not breached the contract after the jury concluded that they had.

Id. at 229–30 (referring to *Edwards v. Gramling Eng'g Corp.*, 322 Md. 535 (1991)).

The City correctly cites these cases and principles, although the City minimizes the Court's role in deciding factual issues that were not necessary for the jury's verdict. Defendants' reliance on *Leet v. Totah*, 329 Md. 645 (1993), is misplaced because Defendants ignore the particular procedural features in that case. *Leet* involved a contract to acquire and develop a large parcel of property in Montgomery County. The contract included a remedies provision that purportedly limited the developer to the remedies of rescission or specific performance in the event of a breach by the sellers. The developer (Totah) sued for breach of contract, claiming both damages and specific performance. During a jury trial, the trial court ruled as a matter of law that the limitation of remedies provision was unenforceable, and Totah then waived his claim for specific performance. The jury returned a verdict for Totah, awarding $15 million in damages. The sellers (the Leets) appealed on the single claim that the trial court erred in not enforcing the limitation of remedies provision. The Court of Appeals, now the Supreme Court of Maryland, agreed and reversed the verdict for damages. The effect of that ruling was that the case should have presented only equitable claims. There were no legal issues that should have been tried to a jury.

The Court then faced the problem of remand because Totah had waived during trial the primary equitable remedy, specific performance, to which he would now be entitled. The Court ended its opinion by relieving him of that election:

> It is clear . . . that the erroneous construction of the Remedies Limitation Clause substantially altered the entire course of the proceedings. Based upon that ruling, Totah elected to pursue expectation interest damages and withdrew his requests for specific performance relief that appeared as the second prayers for relief in Counts I and II of the consolidated amended complaint. We cannot reverse the ruling and vacate the judgment without relieving Totah of the effect of that election. On the remand which we order, further proceedings will be based on the consolidated amended complaint in the form in which Counts I and II included claims for specific performance relief.

Id. at 666. Totah then sought reconsideration to clarify the nature of the proceedings on remand. Not surprisingly because the jury had found a breach of contract in his favor, he argued that "the further proceedings should consist only of fashioning an appropriate decree of specific performance." *Id.* at 667. Also not surprisingly because they wanted the chance to negate that finding, the Leets argued that "the jury verdict has no effect in the subsequent proceedings and that issues peculiar to specific performance must be fully litigated as well." *Id.* As an additional complication, the judge who presided over the jury trial had died during pendency of the appeal. *Id.*

Citing *Higgins*, the Court on reconsideration recognized the clear distinction between cases involving equitable issues only and cases involving a mix of legal and equitable issues:

> The jury verdict has not decided common issues for the subsequent proceedings. "[I]f all claims are equitable in nature, the entire case is decided by the court." P. Niemeyer & L. Richards, *Maryland Rules Commentary* 156 (2d ed. 1992); *cf. Higgins v. Barnes,* 310 Md. 532, 530 A.2d 724 (1987) (where counterclaim asserting claims at law is filed to complaint seeking specific performance, and counterclaimant demands jury trial, common factual issues are tried to the jury).

Id. at 667–68. If the trial judge who had presided with the opportunity to observe the demeanor of the witnesses had been available on remand, the jury's verdict would have been treated as an advisory verdict only, and the judge could have rendered a new verdict considering all the factual

issues in that light, although Maryland procedure generally does not allow for advisory juries. *Id.* at 668 (citing Md. Rule 2-511(d)). But because the trial judge was not available to perform this role, a substitute judge would have to review the record of the trial to determine whether she or he could properly render an independent equitable judgment based on that record. *Id.* at 669–70. If the substitute judge could not do so, then the factual issues would have to be tried again to the court alone. *Id.* at 670. In the context of this action, *Leet* stands only for the proposition that an action that involves equitable claims only is tried entirely to the court. It does not disturb the principles applied in *Higgins* and *Hawes* to actions that include both legal and equitable claims.

The Court thus accepts from the jury phase of the trial those findings of fact that were essential to the jury's verdict. At a minimum, those findings include that both Defendants acted unreasonably in their distribution of prescription opioids, that the Defendants' unreasonable conduct contributed to a legally substantial degree in causing the public nuisance alleged by the City, and that the public nuisance, caused in part by Defendants' conduct, continues to exist and is reasonably likely to continue to exist for at least five years. There are two important limitations, however, on the extent to which the jury's findings apply to the Court's resolution of the equitable abatement issues. First, consistent with *Higgins* and *Hawes*, the Court is not bound on any issue that was not necessary for the jury's verdict. For example, the *Hawes* court stated that "[t]he trial judge could have denied specific performance for reasons relating more particularly to the appropriateness of that remedy." 100 Md. App. at 230. This Court therefore will weigh the equitable considerations related to the abatement remedy, mindful that the resolution of those issues must be consistent with the jury verdict. *See Edwards v. Gramling Eng'g Corp.*, 322 Md. at 542–48 (holding that injunction granted was consistent with jury's finding of breach of fiduciary duty and not inconsistent with jury's rejection of conversion

claim). The jury was not required to consider issues involving how the public nuisance could be abated, and the Court is not restricted by the jury's verdict in deciding those issues.

Second, at the request of the City, the Court is deciding the abatement issues in the context of the Court's resolution of Defendants' post-trial motions. Initially, the Court intended to wait for the outcome of the new trial on damages, if one was necessary, to decide the abatement remedy. This was so the Court would have the benefit of new jury findings on certain of the issues. The City has now reasonably requested that the Court change that approach to decide the abatement issues in the current status of the action. As a result, the Court applies the outcome of the trial, but it is modified by the Court's analysis of the parts of the verdict that cannot be justified by the evidence the jury had before it. The most important of these modifications is the series of reductions in the amount of damages the Court applied in its remittitur analysis.

The Court concluded that the amount of damages awarded by the jury was grossly excessive because the jury based its assessment of damages on a conclusion that these two Defendants together are responsible for 97% of the total losses experienced by the City from the public nuisance. The Court concluded that the evidence, even viewed in the light most favorable to the City, could not justify that conclusion. To determine the maximum amount of damages that could be justified by the evidence and not be considered excessive, the Court applied a series of reductions based on the evidence introduced at trial. Starting with the full amount of past and future damages claimed by the City, the Court first reduced the amount to 73.6% of the total amount based on the evidence that at least 26.4% of prescription opioids that were misused reached the point of misuse through good faith prescribing, conduct for which Defendants cannot be liable. Second, the Court reduced that resulting amount by 10% to account for prescription

opioid sales that had no connection to Defendants' unreasonable conduct. Third, the Court reduced the resulting amount by another 10% based on the role played by sellers of heroin and illegal fentanyl. This reduction was applied from 2014 on only because 2014 was the beginning of Wave 3 of the opioid epidemic, when fentanyl entered the illegal drug supply in the United States. Fourth, the Court reduced the amount to one third of the resulting amount to account for the roles played by pharmacies and illegal sellers of prescription opioids even for those prescription opioids that could be connected to Defendants' unreasonable conduct. As the Court explained in its June 12, 2025 Memorandum Opinion, each of these reductions is favorable to the City because of the remittitur principle that the Court seeks the greatest amount of damages that can be considered not excessive. Because each of these reductions was applied to the result of the preceding reduction, the effect is cumulative. The end result is .736 x .9 x .9 x .333 or 19.85% of the total amount claimed by the City. The actual result, as calculated, is slightly higher – 19.92% – because of the effect of not applying the 10% heroin/fentanyl reduction for the three years from 2011 to 2013. Thus, to the extent the Court uses this type of factor in fashioning the abatement remedy, the factor will be 19.92% rather than 97%.

B. The Collateral Source Rule

The largest single cost component in the City's proposed abatement plan is for OUD treatment. Most such treatment is currently funded through the Maryland Medical Assistance or Medicaid program. That program is funded jointly by the federal and State governments. Some treatment is also supported through private insurance. The City argues that the Court is required to make Defendants pay for the full cost of any treatment included in the abatement remedy because of the collateral source rule. Defendants argue the collateral source rule does not apply to the equitable abatement remedy. The Court agrees with Defendants.

The collateral source rule is well established in Maryland tort law. *See Kremen v. Md. Auto. Ins. Fund*, 363 Md. 663, 671–72 (2001).[3] Maryland appellate courts have applied the collateral source rule to claims for personal injury arising under the Federal Employers' Liability Act, *Norfolk S. Ry. Corp. v. Henry Tiller*, 179 Md. App. 318, 330–45, *cert. denied*, 405 Md. 292 (2008), but have declined to apply it, as a matter of statutory interpretation, to a claim against the Motor Vehicle Administration's Assurance Fund, *Motor Vehicle Admin. v. Seidel Chevrolet, Inc.*, 326 Md. 237, 253 (1992) ("[M]ost courts have restricted application of the rule to tort litigation[.]").

Among courts handling opioid litigation, the decisions concerning application of the collateral source rule have been mixed. Courts in Florida and New Mexico have applied the collateral source rules in those states to exclude expert testimony as irrelevant. *State of Florida v. Purdue Pharma L.P.*, No. 2018-CA-001438, 2022 WL 22782278, at *1 (Fla. Cir. Ct. Apr. 19, 2022); *State of New Mexico v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541 (N.M. 1st Jud. Dist. Ct. Aug. 8, 2022).[4] A federal court in California rejected on summary judgment defendants' arguments that the collateral source rule should not apply to an abatement remedy. *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, No. 18-CV-07591-CRB, 2022 WL 4625624, at *5 (N.D. Cal. Apr. 18, 2022). In contrast, a federal court in West Virginia

[3] The City cites an unreported decision of the Maryland Court of Special Appeals from 2018 for the proposition that the collateral source rule applies in tort cases to property damages as well as personal injury damages. The Court does not disagree with the proposition, but citation of the unreported decision is improper. Unreported opinions of the Appellate Court may be cited as persuasive authority only if there is no reported authority for the proposition and only if the decision was issued after July 1, 2023. Md. Rule 1-104(a)(2)(B).

[4] The action by the New Mexico court is a one-page order provided by the City as an exhibit. The court does not refer to the collateral source rule, but the City has shown that at least part of the basis for the motion to exclude the testimony was the collateral source rule.

concluded there was "[s]ufficient doubt" about the application of the collateral source rule to equitable remedies and therefore conditionally allowed evidence of other sources of funding for remedies. *City of Huntington v. AmerisourceBergen Drug Corp.*, No. CV 3:17-01362, 2021 WL 1556788, at *2 (S.D.W. Va. Apr. 20, 2021). Judge Polster, presiding over the MDL case and in the one Ohio case to proceed to a remedy, held that the collateral source rule did not apply: "The goal of reducing the population of individuals with OUD, which is the Court's top priority in fashioning this remedy, does not hinge on where the money comes from." *In re Nat'l Prescription Opiate Litig.*, 622 F. Supp. 3d 584, 616 n.53 (N.D. Ohio 2022).[5]

This Court concludes that the collateral source rule, as applied in Maryland, does not prevent the Court from recognizing the availability of funding sources for remedial measures other than Defendants. Like Judge Polster, this Court places the goal of providing treatment to as many people with OUD as possible above the interest in placing costs of abatement exclusively on Defendants. Although public nuisance may be classified generally as a tort, this action – and particularly the remedial phase of this action – is not an ordinary tort action for personal injuries. If an individual with OUD had sued either of these or other Defendants for his or her injury, that plaintiff likely would be able to shift to a liable defendant all future medical costs, including the expense of treatment. But the City does not stand in the place of an ordinary tort plaintiff.[6] To the extent the City itself incurred or will incur expenses traceable directly to

[5] The United States Court of Appeals for the Sixth Circuit vacated this judgment, *In re Nat'l Prescription Opiate Litig.*, No. 22-3750, 2025 WL 354758, at *1 (6th Cir. Jan. 31, 2025), after the Ohio Supreme Court answered the Sixth Circuit's certified question and concluded that the common law public nuisance claims under Ohio law on which the decision was based were abrogated by the Ohio Product Liability Act, *In re Nat'l Prescription Opiate Litig.*, No. 2023-1155, ___ N.E.3d ___, 2024 WL 5049302 (Ohio Dec. 10, 2024).

[6] It also should be noted that in the ordinary personal injury tort situation in which the collateral source rule is applied, a collateral source that has paid medical costs that the plaintiff is allowed

the conduct of these Defendants, the City has been permitted to recover those expenses as damages. The issue now before the Court is not damages but the cost of an equitable remedy. Where funding sources other than the City are already addressing this complex social problem, those sources may be recognized as part of overall efforts to address the public nuisance. This may not be appropriate in every case. For example, if a defendant were responsible for a much simpler and well-defined public nuisance, like a landslide blocking a public road or even discharge of a pollutant into a river or bay, the Court may assess the full cost of remediation against the defendant even if a governmental entity had already done or would ordinarily do the remedial work itself. Here, however, the problem is extraordinarily complex. In fashioning a remedy, the Court can and will examine available resources as part of its equitable responsibilities.

C. Treatment Rates

The Court finds that Professor Sherman is well qualified both academically and practically to offer opinions on social programs to address OUD. She has deep research experience in the field, and she has specific experience with certain initiatives in Baltimore. The Court accepts the basic premises of Professor Sherman's opinions: (1) that treatment of more individuals with OUD will decrease the number of individuals with OUD; (2) that MOUD – treatment with medications – at least when combined with counseling, is the preferred method of

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to claim acquires a subrogation right against the plaintiff's recovery . Thus, if a tort plaintiff recovers damages based on past medical expenses, the insurer that paid those medical expenses has a lien against the plaintiff's recovery. If the collateral source rule applied in this way here, and the City recovered based on costs paid in part by the State of Maryland through the Medical Assistance program, the State would have a claim to recoup those costs. But the State in fact has asserted claims against opioid defendants, presumably including these Defendants, for costs, presumably including treatment costs. As far as this Court knows, the State has settled those claims.

treatment; (3) that there are barriers in Baltimore (and elsewhere) to individuals entering into and remaining in treatment; and (4) that measures designed to lower those barriers therefore are likely to increase the volume and effectiveness of treatment. These basic ideas are intuitive, and Professor Sherman has provided a solid expert basis for them at least at a general level.

The Court is not convinced by Professor Sherman's opinions quantifying the likely effects of the abatement plan she advances, especially as those opinions use or depend on the model constructed by Professor Dowdy. The Court focuses on Professor Sherman's opinion that full implementation of her plan for fifteen years will produce an increase in treatment rates from 13% to 41.7%. Those percentages are derived from two measures – the number of individuals with active OUD at any point in time and the number of those individuals who are receiving treatment at the same point in time. It is striking to the Court that it is so difficult to get reliable estimates of these two numbers at any given point in time.

Professor Sherman took the starting point – 13% – entirely from Professor Dowdy's model. He estimates that as of June 30, 2024, there were approximately 32,710 residents of Baltimore, age twelve and older, with active OUD and that only 4,746 of them were in treatment on any given day.[7] Professor Dowdy derived his estimate of the number of individuals with active OUD from one source – the NSDUH survey. That source depends on respondents' willingness to answer questions about highly personal and illegal conduct, plus the illegal drug-

[7] It is very important to distinguish between point-in-time and annual measures. It is undisputed that individuals with OUD often start and stop treatment over time. Because of this, the number of people who were in treatment at some point over the course of a year (or some other period of time) generally will be much higher than the number of people who are in treatment on a specific date. Indeed, some people may go in and out of treatment more than once in the course of a year. Professor Dowdy designed his model to provide point-in-time estimates. When he cited a population number in a category for a year, he generally was using the number as of June 30 in that year.

consuming population is difficult to reach reliably with a survey, so that response data requires multiple and substantial adjustments. The Court would expect, however, a greater degree of confidence in treatment numbers because treatment is obtained from conventional providers who can be expected to report their activities more reliably. Professor Dowdy based his treatment population numbers on data from the Maryland Health Care Commission ("MHCC"). On cross-examination of Professor Dowdy, Defendants exposed a potentially serious flaw in his efforts to arrive at an accurate estimate of the population in treatment using the MHCC data. It appears that he or coders working with him failed to include in their tallies substantial numbers of people being treated with buprenorphine provided through office-based providers rather than through clinics. While testifying, Professor Dowdy was understandably reluctant to commit on detailed technical information, but the City has never provided a clear response to explain this potential discrepancy. Instead, the City retreats to the arguments that Professor Dowdy's estimates are intentionally conservative and that any undercount benefits Defendants because the City uses this number from the model as the multiplier for treatment expenses. But those arguments only mask what appears to be a significant and unintentional distortion in the model. If there is a basic error and if that error were corrected, the starting point of 13% would be higher, maybe significantly higher.

The Court is very skeptical of Professor Dowdy's and Professor Sherman's endorsement of 13% as the current treatment rate for OUD in Baltimore.[8] Both experts accepted 41.7% as the current average treatment rate for all of Maryland. That average is based on one article. Professor Dowdy acknowledged that Maryland is one of the leading states in the nation for OUD

[8] At one point, Professor Sherman testified that it was beyond her expertise to question Professor Dowdy's calculation that the current OUD treatment rate for Baltimore residents is 13%.

treatment rates. It is undisputed that OUD treatment providers in Maryland are concentrated in Baltimore. In fact, Professor Dowdy sought to explain some of the seemingly high numbers of people receiving treatment in Baltimore by suggesting that a significant percentage of those receiving treatment in Baltimore are not Baltimore residents. If one posits that at least half of all OUD treatment in Maryland occurs in Baltimore, then a statewide average treatment rate of 41.7% would mean that all other jurisdictions in Maryland would have to average a treatment rate of 70.4%. That seems highly unlikely, especially if a treatment rate of 41.7% is considered high compared to most other states. The Court finds that the current treatment rate of 13% calculated by Professor Dowdy and accepted by Professor Sherman is not reliable.

At the other end of the abatement plan, Professor Sherman opines that the measures she proposes, if implemented, would bring Baltimore's treatment rates up to what is now the statewide average, 41.7%. Why? The goal seems to be arbitrary. It is certainly laudable to aim for a higher treatment rate, but what is the particular significance of the current statewide average? Neither Professor Sherman nor Professor Dowdy gave any quantified explanation of how the measures proposed would move the City from one level to the other. Instead, Professor Dowdy took Professor Sherman's stated goal as a given and then adjusted the various inputs to his model to produce that result by the end of the abatement plan period. He acknowledged that he just tweaked the features of the model until it produced that result. In other words, the model is not producing an expected result; the posited result is producing the model.

The Court does not doubt the more general propositions that Baltimore residents who suffer with OUD face barriers to getting treatment, many or most of the related to poverty; that they therefore get treatment at a lower rate than other populations that do not face the same impediments; that at least some of the measures proposed by Professor Sherman have potential

to increase the rates of treatment for the Baltimore OUD population; and that implementation of at least some of those measures should produce an increase in the treatment rate for Baltimore residents. What the Court finds lacking is any convincing basis to say that these measures will more than triple the rate at which Baltimore residents receive OUD treatment over the next fifteen years.

For the Court, this point is emblematic of a broader issue with the City's approach to its proposed abatement plan. The City has intentionally avoided either a comprehensive needs assessment or any specific cost-benefit analysis. Instead, the City advances a theory that Defendants must be made to pay for every aspect of every measure, even if the measure already exists. The City also seems to suggest that the Court should include any measure that has any conceivably beneficial effect, without considering any assessment of whether the measure will have an effect that warrants its cost. The Court takes what it thinks is a more practical approach of building on existing resources and trying to target effective measures without excessive cost.

D. The Abatement Remedy

The objective of abatement is to fashion an equitable remedy that will (1) end the conduct of a defendant that has caused a public nuisance and (2) as feasibly as possible ameliorate the adverse conditions of the public nuisance. "[A]n effective abatement remedy: (i) stops the conduct of, or alleviates or completely removes a condition created by, a defendant; (ii) that if not stopped or remediated, will continue to harm the plaintiff in the future." *In re Nat'l Prescription Opiate Litig.*, 622 F. Supp. 3d 584, 607–08 (N.D. Ohio 2022), *vacated on other grounds*, No. 22-3750, 2025 WL 354758 (6th Cir. Jan. 31, 2025). A court in equity has "considerable latitude" in fashioning an abatement remedy, but the relief "should go no further than is absolutely necessary to protect the rights of the parties seeking such injunction." *Becker*

v. State, 363 Md. 77, 88 (2001) (quoting *Bishop Processing Co. v. Davis*, 213 Md. 465, 474 (1957), and *Singer v. James*, 130 Md. 382, 387 (1917)). Ordinarily, abatement involves injunctive relief. As the Court held before trial, a monetary abatement award is possible if it is not feasible or appropriate to order the defendant to accomplish the abatement. It must be emphasized, however, that this is a monetary substitute for injunctive relief, not a further award of damages.

Before trial, the City waived any request for injunctive relief against any Defendant. That may have been primarily a strategic decision in an attempt to avoid a trial to the Court of any issues, but it amounts to an admission that no injunction is needed to change the conduct of either Defendant to prevent any further contribution to causing the public nuisance. At trial, the City confirmed that neither Defendant is contributing to the public nuisance by not presenting any evidence of unreasonable conduct by either Defendant after 2019 or 2020. Thus, the first aspect of abatement relief is satisfied fully. There is no need for any remedial relief directed at the current conduct of either Defendant.

The fact that neither Defendant acted unreasonably in any way that has contributed to the public nuisance after 2019 or 2020 is significant in another way. The jury found, and the Court agrees, that the public nuisance in Baltimore is ongoing and can be expected to be ongoing for at least five years. This includes ongoing effects of these Defendants' past unreasonable conduct. Those ongoing effects arise from some number of individuals misusing prescription opioids that were diverted to misuse in part as a result of Defendants' unreasonable conduct and then some portion of that group of individuals developing OUD as a result of that misuse. Because OUD is a chronic disease and because treatment is often difficult to sustain, it is a fair inference that some number of those individuals with OUD causally linked to some degree to Defendants'

unreasonable conduct continue to experience periods of active OUD. Based on the evidence, however, because Defendants' unreasonable conduct ended five years ago, the effects of that conduct are diminishing with the passage of time.

The City proposes an abatement plan spanning fifteen years. Professor Sherman testified that she believed that length of time to be reasonable and necessary given the chronic nature and persistence of OUD. In light of the earlier end to Defendants' unreasonable conduct, however, the Court concludes and exercises its discretion to limit the abatement plan for these Defendants to ten years.

The Court will construct its abatement remedy by selecting certain items from the City's proposed abatement plan. In doing so, the Court focuses on taking advantage of existing resources and creating or expanding activities that have reasonable potential to reach individuals in the community to connect them with treatment and other services. The Court recognizes that many of the items proposed have significant value as public health measures. Examples of these include HIV and HCV prevention and treatment, mental health services, and many of the services directed toward special populations. The Court determines and exercises its discretion not to include those items in the abatement plan because they are not as directly related to Defendants' conduct and the core issue of OUD treatment as the items included in the abatement plan.

The Court will explain here its basic rationale for including or excluding each item in the City's proposed abatement plan, proceeding in the sequence in which Professor Padula organized them based on Professor Sherman's work. In an Addendum to this Memorandum Opinion, the Court presents the cost figures, taken from Professor Padula's exhibit, in a somewhat similar form. In the Addendum, the Court shows the ten years as 2024 through 2033. This labeling is

used only to be consistent with the spreadsheets provided by Professor Padula. The abatement remedy is prospective, and those years could as easily be labelled Year 1 through Year 10. The Court also recognizes that there are instances where Professor Padula's exhibit shows only a certain number of digits, but his spreadsheets likely are operating with more precise values behind what is displayed. The Court must work only with what is displayed, so there may be some relatively minor discrepancies.

1. Harm Reduction

The first category in the City's proposed abatement plan is Harm Reduction. The Court includes the proposed supplies of naloxone for first responders, high-risk individuals, and to be placed in public lock boxes.[9] The Court does not include naloxone supplies for hospital emergency departments because those supplies should be provided by the hospitals. The Court does not include naloxone training expenses for first responders because such training should be incorporated into the training programs of those agencies as an operating cost.

In the harm reduction category, the Court has included the full proposed costs for syringe service programs and for syringe and paraphernalia disposal. The Court excludes the proposal to provide harm reduction vending machines as impractical. The Court is skeptical of the value of drug checking machines, but it has included those costs as proposed. Even as reduced, the Court finds the cost of drug testing strips to be excessive in terms of the number of strips proposed. The Court has include one half of the proposed cost for drug testing strips.

The Court excludes any cost for Overdose Prevention Sites, sometimes also known as safe injection sites. The concept is extremely controversial. Defendants even argue that this

[9] Whenever the Court states that it includes a cost as proposed, the Court means it includes the cost from the first ten years of the proposed abatement plan.

feature could not be ordered by the Court because the sites are not legal under Maryland law. Without making any determination whether this strategy is valuable from a public health perspective, the Court will not require this feature in the abatement plan. If the City believes this approach is valuable, it is up to City leaders both to resolve the legal issues with this type of site and to convince the community that these sites are valuable and appropriate.

PrEP treatment for the prevention of HIV infection is an example of a service with undeniable public health benefits. The Court excludes those costs, however, because they are not related sufficiently directly to remedying the unreasonable conduct of these Defendants.

The Court includes the full funding proposed for Drop-In and Stabilization Centers. These items are one of the largest cost items included in the abatement remedy. The Court was impressed by Professor Sherman's description of two existing drop-in centers in the community. These strike the Court as potentially one of the most effective means of putting access to services in the community with minimal barriers to access. These centers can both provide services and work to connect individuals with more traditional treatment. Although it is a much smaller expense, the Court also includes the full funding proposed for Street Outreach services through mobile vans. Again, the Court was impressed that these vans may have strong potential to reach into the community with available services.

Still in the harm reduction category, the Court has excluded all of the various items proposed as treatment of comorbidities. The Court accepts the evidence that these are important health issues that occur in relation to illegal drug use, particularly injectable drug use, but the Court finds these costs to be not related sufficiently directly to remedying the unreasonable conduct of these Defendants.

The Court also excludes the several items grouped in harm reduction under "Improving Police Interactions." These are valuable efforts that should be pursued, but they are costs that should be incorporated into the operating activities of the Baltimore Police Department and other law enforcement agencies.

2. Treatment and Recovery

The next major category in the City's proposed abatement plan – and by far the most expensive category – is Treatment and Recovery. The discussion of the parties' collateral source rule arguments above is particularly apt here. On that basis, the Court excludes all of the proposed costs for treatment services and for supplies of the three MOUD medications used in treatment. It is undisputed that extensive treatment programs are currently available in Baltimore at every level of the ASAM treatment guidelines. The Court finds that most of the cost of that treatment is paid through the Medical Assistance or Medicaid program in Maryland. The Court further finds that it is appropriate and preferable, as a matter of equity, to rely on the availability of those treatment providers and the funding for that treatment rather than attempt to shift to Defendants some portion of that funding obligation. This approach produces a result that is more proportional to the nature and extent of Defendants' conduct that led to liability in this action, and it preserves the resources that Defendants will be required to pay as an abatement remedy for other beneficial activities that may not already exist or may not have an established funding source.

The Court includes in the abatement remedy the full proposed finding for helplines as a form of outreach. With respect to the City's proposals for both emergency department bridge programs and hospital consultation teams for inpatients, the Court includes only a portion of the funding requested. The Court concludes that such programs are potentially valuable. In the

Court's judgment, they should be funded and operated by the individual hospitals. Because of their locations and the communities they serve, some hospitals have a greater need than others for these programs. Under these two items, the Court has included limited funding calculated on the basis of funding for two FTE positions. The Court's concept is that the City should promote these types of programs in hospitals. It may also be valuable for the City to provide clearinghouse services to inform social workers and others in hospitals of the treatment services they can connect patients to on discharge.

The Court has included in the abatement remedy the full funding requested for Overdose Response Teams. The Court finds the concept to be a valuable resource for concentrating services in response to overdose events.

The Court agrees with the concept that wraparound services promote individuals staying in treatment longer. The Court concludes, however, that these services are another step removed from the conduct of Defendants that led to liability. The more expensive of these services become disproportionate to Defendants' unreasonable conduct. Balancing these considerations, the Court, in its discretion, has included the proposed funding for transportation services and for Assertive Community Treatment. The Court has excluded the proposed funding for job training and for food support.

In the subcategory of Wrap-Around Services for Special Populations, the Court has included the funding requested for individuals in the criminal justice system and for individuals experiencing housing instability and homelessness. The Court has included some of the proposed funding for mental health services and all of the proposed funding for coordination of care. The Court finds that the number of mental health providers proposed is high. The Court exercises its discretion to include one half those costs.

The Court excludes the items grouped under "Opioid Epidemic Related Workforce Expansion and Support." Some of these may be valuable expenditures, but the Court is not convinced by the City's evidence that these significant numbers of additional personnel will be needed under the abatement remedy as provided by the Court.

3. Education

In the City's third abatement plan category, Education, the Court includes only two items. In the Health Professional Education subcategory, the Court includes only the item for academic detailing. The Court does not specifically endorse the idea of academic detailing, but this funding is appropriate to provide for promotion of the use of buprenorphine. The Court notes that the City's own evidence indicates that buprenorphine is now widely available. The Court also includes the item for mass media campaigns under the Patient and Public Education subcategory. The Court finds the other education and training expenses to be unwarranted.

4. Special Populations

The City's fourth category, Special Populations, includes services that are valuable from a public health perspective. The Court includes some of these proposed activities selectively to target certain populations. In the subcategory of Children, Adolescents, and Young Adults, the Court includes the requested funding for STIR, support for children in foster care, and support for adopted children and their families. With respect to children living with parents with OUD, the Court includes some of the proposed items. The separate items for intensive parent-child interventions and peer/family mentoring services for families show the same number of families in need of the services. The City has not shown adequately how these proposed services are different. The Court has included one half of the first of these two items.

5. Monitoring

The final category proposed by the City is Metrics to Monitor the Opioid Epidemic. The Court agrees that some staff for monitoring and evaluation is needed, but the Court seeks to avoid funding bureaucracy at the expense of services located closer to the population in need. The Court has included one director-level position instead of two such positions, and the Court has included one half the proposed funding for "manager" positions.

6. Summary and Adjustments

After the individual pages showing each category of items included in the abatement remedy, the Addendum contains a summary page. In the summary, the Court totals the amounts from each category and then applies adjustments in a similar sequence to the adjustments made by Professor Padula.

First, the Court provides a reduction for overlap between future damages awarded by the jury and the costs included in the abatement remedy. Because the Court's post-trial decision reduced the amount of future damages, the adopts reductions that are one-quarter of what Professor Padula applied.

Second, the Court applies the same year-by-year reductions done by Professor Padula based on the factors calculated by Professor Saloner.

Third, the Court applies a reduction in each year to 19.92% of the amounts after the first two adjustments. As explained above, this percentage is based on the reductions made in the Court's post-trial decision.

Fourth, the Court reduces the amounts to present value. The Court has difficulty doing this precisely because Professor Padula explained his methodology generally but did not show the factor used for each year. The Court has estimated his discount rate and applied the estimate.

As shown in the Addendum, the result after these adjustments is an abatement remedy cost, at present value, of $100.545 million. The Court has then divided this amount between the two Defendants using the same ratio of 70:27 that was used in connection with the remittiturs and that is based on the jury's apportionment between the two Defendants. That ratio produces abatement liability for Defendant AmerisourceBergen of $27,986,753 and for Defendant McKesson of $72,558,247.

E. Scope of the City's Discretion and Reporting Obligations

Although the Court has used a detailed approach to the City's proposed abatement plan to fashion the Court's abatement remedy, the Court does not intend to constrain the City unduly. The Court recognizes that the City has accumulated funds from its settlements with other Defendants and that the City has a planning and implementation process with respect to those funds. It would not be productive for the City to design and operate two parallel programs separating the settlement funds and the funds from these two Defendants. The Court therefore will allow the City to use the funds obtained from the abatement remedy with settlement funds to contribute to the City's overall abatement efforts.

The City will be subject to certain restrictions. First, the funds provided under this abatement remedy may not be used to displace expenditures the City has or would budget for ordinary City operations. The Court recognizes that this is a difficult line to draw, but the City in its reporting will have to demonstrate that the abatement remedy funds are being used for programs or services that the City could not otherwise be expected to be provided. Second, the City will not be required to segregate the abatement remedy funds in the sense that they must be maintained in a separate account, but the City must account in detail for all of the abatement remedy funds. Third, within the City's overall program, the City must develop comprehensive

information concerning the treatment resources that are available in Baltimore for Baltimore residents. At a minimum, that information must include the providers, the nature of the services they provide, and how many individuals they are serving. Fourth, it is critical that the City play a role in raising the quality of the treatment services provided. The Court recognizes that the licensing of treatment providers may not the City's responsibility, but the City must be alert to problems with treatment providers and must have clear and active lines of communication to State and other regulators so the City brings any such problems to the attention of the appropriate regulators.

Because this is the Court's abatement remedy, the City must remain accountable to the Court and to the Defendants. Here again, however, the Court does not wish to impose unnecessary expense on the City for reporting. The Court will require the City to report in writing to the Court initially every four months for the first two years, then every six months thereafter unless the Court modifies the reporting schedule. After each report, Defendants may object to the report and request a hearing. The Court also may request clarifications in writing or schedule a hearing *sua sponte*. The Court expects these reports to be detailed and to highlight activities and progress since the previous report as well as challenges and difficulties. The Court will not prescribe the format of the reports, but it may request changes or additional information in response to the City's first report or reports.

Conclusion

For all these reasons, the Court will issue a separate Abatement Order consistent with this Memorandum Opinion. The Court will also extend the date for the City to accept or reject the remittiturs to August 22, 2025. Depending on the City's decision then and any requests by the parties, the Court will enter further Orders then.

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August 8, 2025

Judge Lawrence P. Fletcher-Hill