No. SC-2023-0269

IN THE SUPREME COURT OF ALABAMA

Ex Parte Janssen Pharmaceuticals, Inc. *et al.*,
Petitioners

———————————

IN RE: The DCH Healthcare Authority, *et al.*,
Plaintiffs,
v.
Purdue Pharma LP, *et al.*
Defendants

Consolidated With

Fort Payne Hospital Corp., *et al.*,
Plaintiffs
v.
McKesson Corp., *et al.*
Defendants)

On Petition for a Writ of Mandamus to the Circuit Court of Conecuh County (CV-2019-000007; CV-2021-900016)
(The Honorable Jack B. Weaver, Circuit Judge, Presiding)

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

Philip S. Goldberg
(*pro hac vice* admission pending)
SHOOK, HARDY & BACON L.L.P.
1800 K St., NW, Ste 1000
Washington, DC 20006
(202)783-8400
pgoldberg@shb.com

Ivan Cooper (COO052)
(Counsel of Record)
IVAN COOPER LAW, LLC
6 Office Park Cir., Ste. 215
Mountain Brook, AL 35223
(205) 651-2050
ivan@ivancooperlaw.com

Attorneys for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

PUBLICATIONS

INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") and its members are troubled by the lower court's ruling that allows a major departure from long-standing public nuisance law. The liability in this case is not grounded in traditional legal principles and, if allowed here and by other Alabama courts, threatens open-ended, potentially industry-wide liability for a variety of products that may have foreseeable risks or inherent externalities. Manufacturers of these products, from pharmaceuticals to oil and gas to household chemicals, engage in commerce of such products every day. The NAM is concerned the Circuit Court's ruling could lead to more litigation against these manufacturers regardless of fault, the regulatory structures in place to balance those risks, or the benefits the products provide.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.9 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in

the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

STATEMENT OF THE ISSUE DISCUSSED IN THIS BRIEF

Whether the Court should issue a writ of mandamus directing the Circuit Court to dismiss Plaintiffs' public nuisance claim, because Alabama's law of public nuisance has never been and should not be extended to the marketing or distribution of lawful products, including FDA-approved medications, and essential elements of a public nuisance claim are lacking, including Petitioners' interference with a public right and Petitioners' control over the instrumentality at the time the product is alleged to have cause a public nuisance.

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit is part of a speculative litigation trend, where manufacturers, distributors and sellers of products are being sued because their products—from lead paint to oil and gas to household chemicals to prescription drugs—have downstream risks. These suits try to force the companies into funding private and public efforts to deal with those risks, irrespective of traditional causes of action. However,

liability laws in Alabama and other states do not impose such blame or obligations for these types of harms on companies who put lawful, beneficial products into the stream of commerce. The claims do not satisfy the elements of any liability theory. The hallmarks of these litigations, as here, are novel uses of legal theories—often public nuisance—and attenuated notions of wrongdoing that are generally intended to drive settlement, not prevail in court. Most state high courts, when given the opportunity, have properly rejected these claims, ruling that fundamental liability principles cannot be cast aside.

Here, Alabama hospitals are pursuing companies involved in making and selling prescription opioid medication, trying to subject them to liability for costs associated with treating people addicted to opioids. As a threshold matter, the hospitals have no right to pursue the costs of treating patients from these entities; any claims they may have related to the costs of patient care are dictated by Alabama's hospital lien statute and do not include suing these third parties. In an effort to circumvent this statute, Plaintiffs have invoked Alabama's public nuisance law, claiming that social, economic and health effects of illegal use of opioids qualify as a public nuisance, and all of these entities

should be responsible because they made, distributed and sold the medications. As this brief shows, public nuisance theory neither applies to this situation nor imposes such unprincipled, open-ended liability.

For more than a century, this Court has been clear that public nuisance law has a separate and distinct purpose: to resolve local disturbances that interfere with the right of the public to use public property—namely a public road, communal space, or local waterway. *See Ex parte Ashworth*, 2014 Ala. 391 (1920) (blocking a "public street"); *Stone Container Corp. v. Stapler*, 263 Ala. 524 (1995) (polluting waterway). As in other states, the tort of public nuisance here is a land and water use tort. A public nuisance is a condition that blocks the public's ability to use the right of way. In determining whether a public nuisance exists, the court asks whether the public, in trying to access a public road, communal space or waterway would "come within the sphere" of the public nuisance and be stopped from their right to "use and enjoy" that public resource. *Russel Corp. v. Sullivan*, 790 So.2d 940, 953 (Ala. 2001). Public nuisance law has nothing to do with selling products; product liability laws govern those liabilities.

Alabama cases have illustrated this distinction, *i.e.*, that public nuisance is an activity based tort for interfering with the use of public land and water, not a manufacturing tort. To be liable for a public nuisance, the defendant must have "authorized or participated" in the activity that caused the nuisance or "had control" of the instrumentality at the time it created the public nuisance. *Russell Corp.*, 790 So.2d at 946; *Tipler v. McKenzie Tank Lines*, 547 So.2d 438 (Ala. 1989) (explaining that public nuisance does not make one liable for "maintaining, or for failing to prevent, a chain of events and circumstances over which it had no reasonable means of control"). For example, if someone spills metal spikes onto a public road to stop traffic, only those who participated in spilling the spikes or controlled the spikes when they were spilled would be liable for the public nuisance—not the company that manufactured, distributed or sold the spikes. "To hold otherwise would require" these companies to "assume the responsibility" for the acts of others over which it had no control. *Id.*

Amicus fully appreciates that opioid abuse in Alabama and other states is a critical public health issue, but there is a substantial dissonance between the allegations against Petitioners and Alabama's

public nuisance law's purpose, terms, and remedies. Petitioners are engaged in the commerce of beneficial, regulated products, not a public nuisance. *Amicus* urges the Court to stay within mainstream American jurisprudence by granting this writ and rejecting the broad expansion of public nuisance law sought here. The Court should ensure that Alabama courts do not encourage deep pocket jurisprudence through causes of action never intended for that purpose.

ARGUMENT

I. THIS LITIGATION IS PART OF A 50-YEAR EFFORT TO EXPAND PUBLIC NUISANCE TO CLAIMS AGAINST PRODUCT SELLERS IN AN EFFORT TO EVADE APPLICABLE LAW

The Circuit Court's ruling to allow the tort of public nuisance to be invoked in this case represents a radical departure from public nuisance law, both in this state and elsewhere. Going back to English common law—and through more than 250 years of American jurisprudence—public nuisance law has provided governments with the ability to force people to stop and abate interferences with the public's rights to use public land, communal property and waterways. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 743-47 (2003). Also, public nuisances have no redeeming qualities

for anyone. As indicated, Alabama has always followed these parameters. The person engaging in the activity causing the nuisance, such as by polluting a river, is responsible for the nuisance—not the manufacturer of the products dumped. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 565-66 (2006).

Since the 1970s, there has been an effort to transform public nuisance from a local public land and water-use tort into a tool for requiring large businesses, rather than individual wrongdoers or taxpayers, to remediate environmental damage or pay costs of social harms associated with categories of products. *See id.* at 547-48. Proponents of this effort believed suing individual wrongdoers would be inefficient, whereas presumed deep-pocketed manufacturers could address the issue on a macro scale. In these cases, though, the elements of the tort—the existence of a public right, unlawful interference with that public right, causation of the nuisance, and control over the nuisance—are not satisfied. So, those seeking to transform public nuisance have been trying to change the tort's requirements.

The first act of this effort was pursuing changes to the public nuisance chapters of the Restatement (Second) when it was being drafted in hopes of breaking "the bounds of traditional public nuisance." Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). Among other things, advocates for reform sought to remove the wrongful conduct requirement so claims could be brought, as attempted here, even when defendants engaged in lawful commerce. *See id.* None of their changes were adopted in the black letter of the Restatement.

The advocates' first test case also failed. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971). In that case, they pursued businesses that sold products or engaged in activities that contributed to smog in Los Angeles. The intermediate appellate court dismissed the claims as being inconsistent with public nuisance law. *See id.* at 645. As the court explained, the plaintiffs were "asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of court." *Id.* The advocates expressed frustration that courts adhered to the tenets of

public nuisance law as a "gatekeeper to control broad access to this powerful tort." Antolini, 28 Ecol. L.Q. at 776.

The strategy of using public nuisance law to try to circumvent products liability and marketing laws began in the 1980s and 1990s. *See* Gifford, 71 U. Cin. L. Rev. at 809 (observing the changes sought by the environmentalists "invite[d] mischief in other areas—such as products liability"). These cases targeted manufacturers of products that had inherent risks or could be used or misused in ways that created harm. *See, e.g., Johnson County, by and through Bd. of Educ. of Tenn. v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984) *set aside on other grounds*, 664 F. Supp. 1127 (E.D. Tenn. 1985) (asbestos); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1990) (PCBs); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (tobacco). Again, judges schooled in the elements of public nuisance law did not embrace this strategy; the cases were dismissed.

The courts explained that there is a clear dissonance between the manufacture and sale of goods and public nuisance liability, regardless of the product. Manufacturers and sellers "may not be held liable on a nuisance theory for injuries" caused by a product. *Detroit Bd. of Educ. v.*

Celotex Corp., 493 N.W.2d 513, 521 (Mich. App. 1992); *see also Am. Tobacco Co.*, 14 F. Supp. 2d at 973 ("The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law."). They do not have the requisite control over the product to be liable for any public nuisance that others cause with the products. Otherwise, plaintiffs could "convert almost every products liability action into a nuisance claim." *Johnson County*, 580 F. Supp. at 294. Product sellers would be liable whenever someone uses a product to cause harm regardless of their "culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

In *Westinghouse*, the U.S. Court of Appeals for the Seventh Circuit explained this point. Westinghouse was charged with releasing PCB-waste into Bloomington, Indiana's sewers and landfills, thereby creating a public nuisance. In addition to suing Westinghouse, the city named the company that sold Westinghouse the PCBs in a public nuisance action. The court dismissed the seller, explaining that once the seller sold PCBs to Westinghouse, "Westinghouse was in control of the product purchased and was solely responsible for the nuisance it created by not safely disposing of the product." 891 F.2d at 614.

Thus, in response to these early cases, the nation's courts spoke with clarity and uniformity: the boundaries of public nuisance law do not extend to the manufacturing, selling and promotion of products.

II. THE COURT SHOULD OVERTURN THIS ATTEMPT TO CONVERT ALABAMA'S PUBLIC NUISANCE LAW INTO AN ALL-ENCOMPASSING CAUSE OF ACTION

Nevertheless, these cases have continued to be filed and, on a few occasions such as here, trial courts have allowed these diversions from public nuisance law. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort' The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15 (Nov. 1, 2022). Some have been candid about their desire to address a problem—even if the liability finding was admittedly not based on the law. *See*, *e.g.*, *People v. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *53 (Cal. Super. Ct. Mar. 26, 2014) (not wanting to "turn a blind eye" to lead poisoning); Transcript, In re Nat'l Prescriptions Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Dec. 19, 2018) (trial judge stating his focus was not "figuring out the answer to interesting legal questions," but to "do something" about prescription drug abuse). Other courts have been more circumspect. Either way, they have succumbed to the allure of

creating a catch-all cause of action for making companies pay for social and environmental problems regardless of fault or a tort's elements.[1]

When high courts have been called upon to review these rulings, the high courts have adhered to the law and largely overturned them. For example, the first major victory for proponents of expansive public nuisance litigation was the Rhode Island lead paint case, which made national headlines. As here, the trial court found that manufacturers of a product (lead pigment and paint) could be subject to public nuisance liability for the downstream risks of the product (lead poisoning). *See State of R.I. v. Lead Indus. Assoc., Inc.*, C.A. No. PC 99-5226 (R.I. Super. Ct. Feb. 26, 2007). The Rhode Island Supreme Court overturned this verdict. *See State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008). It found "[t]he law of public nuisance never before has been applied to products, however harmful." *Id.* at 456. "[P]ublic nuisance law simply does not provide a remedy for this harm." *Id.* "However grave the problem of lead poisoning . . . [Plaintiff] has not and cannot allege facts

---

[1] *Cf.* Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 4 (1998) ("As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so.").

that would fall within the parameters of what would constitute a public nuisance." *Id.*

The New Jersey and Missouri Supreme Courts issued similar rulings in their lead paint cases. The New Jersey Supreme Court explained that "plaintiffs' loosely-articulated assertions here . . . cannot sound in public nuisance." *In re Lead Paint Litig.,* 924 A.2d 484, 494 (N.J. 2007). "[T]he use of land by the one creating the nuisance" is "essential to the concept of public nuisance." *Id.* at 495. "[W]ere we to conclude that plaintiffs have stated a claim, we would necessarily be concluding that the conduct of merely offering an everyday household product for sale can suffice for the purpose of interfering with a common right as we understand it. Such an interpretation would far exceed any cognizable cause of action." *Id.* at 501. The Missouri Court likewise rejected St. Louis's attempt to depart from traditional public nuisance. *See St. Louis v. Benjamin Moore & Co.,* 226 S.W.3d 110 (Mo. 2007).

These courts, along with the Illinois Supreme Court and others, reinforced the tort's traditional requirements. There is no "public right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm." *City of*

Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1114-16 (Ill. 2004). And, "control" of the public nuisance is a "basic element of the tort." *Lead Indus. Ass'n*, 951 A.2d at 449. As the New Jersey Supreme Court made clear, "a public nuisance, by definition, is related to conduct, performed in a location with the actor's control." *In re Lead Paint Litig.*, 924 A.2d at 499. In product cases, these elements are missing. "[T]he manufacturer or distributor who has relinquished possession by selling or otherwise distributing the product" does not control the product when the nuisance is created. Gifford, 71 U. Cin. L. Rev. at 820.

The Oklahoma Supreme Court is the only high court to rule in an opioid case, overturning a trial court ruling that would have applied the state's public nuisance law to manufacturing, marketing, and selling products. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). In doing so, the Supreme Court echoed the courts that traced the origins and history of the tort, noting public nuisance applies only to "conduct, performed in a location within the actor's control, which harmed those common rights of the general public." *Id.* at 724 (citing Restatement (Second) of Torts § 821B cmt. b (1979)). Indeed, the Court reiterated that public nuisance "has historically been linked to

the use of land by the one creating the nuisance," such that "[c]ourts have limited public nuisance claims to these traditional bounds." *Id.*

The court then reinforced that "[p]ublic nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap." *Id.* at 725. The responsibility of product sellers "is to put a lawful, non-defective product into the market. There is no common law tort duty to monitor how a consumer uses or misuses a product after it is sold." *Id.* at 728. Nor should a manufacturer or seller be held liable for its products years after its products entered the stream of commerce. *See id.* at 729. Also, any public nuisance that is alleged to be caused by opioid abuse occurs after the product has been sold. Finally, it also cautioned that applying public nuisance liability to lawful products "would create unlimited and unprincipled liability for product manufacturers." *Id.* at 725.

Many other courts in opioid cases have reached the same conclusions. They have held that public nuisance does not apply to "the marketing and sale" of a product, only the "misuse, or interference with, public property or resources." *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 472 (S.D.W. Va. 2022). The theory

does not hinge on whether the product is associated with known or knowable risks that the company failed to prevent; otherwise the theory could be used "against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product." *Id.* at 474. These courts have also joined the chorus against creating a "super tort":

> The phrase "opening the floodgates of litigation" is a canard often ridiculed with good cause. But here, it is applicable. To apply the law of public nuisance to the sale, marketing and distribution of products would invite litigation against any product with a known risk of harm, regardless of the benefits conferred on the public from proper use of the product. . . . If suits of this nature were permitted any product that involves a risk of harm would be open to suit under a public nuisance theory regardless of whether the product were misused or mishandled.

Id. As courts have acknowledged, "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money. . . . But it's bad law." *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990 (Conn. Super. Ct., Jan. 8, 2019); *see also North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, 2019 WL 2245743, at *11 (N.D. Dist. Ct. May 10, 2019). The Supreme Court of Iowa made this point in a different context, stating "[d]eep pocket jurisprudence is

law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted).

Thus, courts around the country have not embraced this novel litigation. They apply "what appears to be an absolute rule": a seller of a product that "after being sold, creates or contributes to a nuisance cannot be liable for the nuisance-causing activity after the sale unless the manufacturer somehow controls or directs the activity." *SUEZ Water New York Inc. v. E.I. du Pont de Nemours and Co.*, 578 F. Supp. 3d 511 (S.D.N.Y. 2022). Put simply, public nuisance does not create liability for hazardous products or shift costs associated with these risks to manufacturers and sellers when the elements of the tort are missing.

III. TRADITIONAL BODIES OF LAW, INCLUDING PRODUCTS LIABILITY AND THE REGULATORY PROCESS, SHOULD NOT BE SUPPLANTED BY PUBLIC NUISANCE LITIGATION

Given this history, the goal in many of these cases has been to avoid appellate review. When a trial court has allowed the claims to survive a motion to dismiss, plaintiffs have tried leveraging the threat of massive, unpredictable liability to pressure defendants into settling, irrespective of the merits. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (with "even a small chance of a devastating loss,

defendants will be pressured into settling questionable claims"). In opioid litigation, this tactic has often worked. Some may applaud this Machiavellian result, but unmerited mass liability must not be coerced through leveraging the transaction costs and inefficiencies of litigation. Here, Plaintiffs tried avoiding this Court's review by dropping the pharmacy defendants from the litigation after the Court agreed to hear their Writ of Mandamus over the denial of their motions to dismiss.

The Court should grant this Writ to make it clear that the bodies of law applicable to Petitioners' conduct at issue in this litigation remain products liability. Product defect causes of action have their own purposes, elements, and remedies. Collectively, they manage the risks product manufacturers can control, namely putting lawful, non-defective products into the market. These laws, not public nuisance, should continue to be the basis of liability for claims related to products. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991); Restatement of the Law, Torts: Liability for Economic Harm § 8, cmt. g (2020) (concluding that public nuisance "is an inapt vehicle for addressing the conduct at issue" and

that "[m]ass harms caused by dangerous products are better addressed through products liability, which has been developed and refined with sensitivity to the various policies at stake").

Otherwise, manufacturers could be subject to industry-wide liability in Alabama merely for selling and marketing products with known risks of harm. This concept has been termed "category liability" and has been widely rejected in products liability law. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997). As Professors Henderson and Twerski have explained, the effect of "holding producers liable for all the harm their *products* proximately cause" is to "prohibit altogether the continued commercial distribution of such products." Henderson & Twerski, 66 N.Y.U. L. Rev. at 1329 (emphasis added); *see also* Restatement of the Law, Third: Prods. Liab. § 2 cmt d (1998) (reporting "courts have not imposed liability for categories of products that are generally available and widely used"). Manufacturers cannot police customers to ensure products are not misused or neglected in ways that could create a public nuisance. They are not insurers against abuse. *See* John W. Wade, *On*

the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 828 (1973) ("[L]iability for products is clearly not that of an insurer.").

Allowing courts to manage these risks through public nuisance law is particularly inappropriate in opioid litigation given that the Food and Drug Administration ("FDA") is directly engaged in the risk assessments and balancing the lower court purports to do here. All aspects of prescription drugs are highly regulated, from their risks and benefits to human health to their design and labeling. *See* 21 U.S.C. § 821 *et seq*. When Petitioners sold these FDA-approved medications, they were engaged in legal sales of legal drugs in a highly regulated distribution chain. They and the distributors are registered with state and federal governments to sell these medicines, the medicines must be dispensed at licensed pharmacies, and each person must obtain a prescription from a licensed physician to purchase them. Further, the FDA is working on collaborative risk management plans based on improved surveillance, better education, and stronger warnings calling attention to opioid diversion. *See* Opioid Medications, U.S. Food & Drug

Admin. ("One of the highest priorities of the FDA is advancing efforts to address the crisis of misuse and abuse of opioid drugs.").[2]

Using the blunt tool of public nuisance law to supplant or second-guess these policy decisions will undermine this regulatory regime. Ensuring liability law properly aligns with these regulations is a significant concern for *amicus* and its members because manufacturers of all types of products with inherent risks—from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance consumer and public risks. If a company violates any of these regulations, there are enforcement remedies tailored to the violations available to the government agencies.

Here, the Court should not allow Plaintiffs or the lower courts to circumvent these regulatory or enforcement laws by misapplying public nuisance to create a backdoor right of action. This case finds no support in Alabama's public nuisance law or the public nuisance law in other states. Plaintiffs' public nuisance claims should be dismissed.

---

[2] https://www.fda.gov/drugs/information-drug-class/opioid-medications

CONCLUSION

For these reasons, the Court should grant the Petition and issue a Writ of Mandamus and dismiss the public nuisance claims in this case.

Respectfully submitted,

/s/Ivan B. Cooper
Ivan Cooper (COO052)
(Counsel of Record)
IVAN COOPER LAW, LLC
6 Office Park Cir., Ste. 215
Mountain Brook, AL 35223
(205) 651-2050
ivan@ivancooperlaw.com

Philip S. Goldberg
(Of Counsel)
SHOOK, HARDY & BACON L.L.P.
1800 K St., NW, Ste 1000
Washington, DC 20006
(202) 783-8400
pgoldberg@shb.com

May 1, 2023

CERTIFICATE OF COMPLIANCE

I certify that this submission complies with the word limitations set forth in Ala. R. App. P. 32(b)(3). According to the word-count function of Microsoft Word, the motion contains 4,292 words. I further certify that this submission complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The submission was prepared in the Century Schoolbook font using 14-point type. *See* Ala. R. App. P. 32(d).

/s/ Ivan B. Cooper
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, I electronically filed the foregoing via the Court's C-Track E-Filing system and electronically served counsel via email and/or by mail pursuant to Alabama Rule of Appellate Procedure 57 to the following:

The Honorable Jack Weaver,
Circuit Judge
Conecuh County Courthouse
111 Court Street
Evergreen, AL 36401
Tel: (251) 578-7015
jack.weaver@alacourt.gov
candy.sims@alacourt.gov

Counsel for Defendants

Christopher S. Berdy
Caroline D. Walker
Xan Ingram Flowers
BUTLER SNOW LLP
1819 Fifth Avenue N, Ste. 1000
Birmingham, AL 35203-2103
Tel: (205) 297-2200
chris.berdy@butlersnow.com
caroline.walker@butlersnow.com
xan.flowers@butlersnow.com

Charles C. Lifland (*pro hac vice*)
Justine M. Daniels (*pro hac vice*)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071

Tel: (213) 430-6000
clifland@omm.com
jdaniels@omm.com

Stephen D. Brody (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
Tel: (202) 383-5300
sbrody@omm.com

COUNSEL FOR DEFENDANTS JOHNSON & JOHNSON* AND *JANSSEN PHARMACEUTICALS, INC.

Alex S. Holdsford, Jr.
HOLTSFORD GILLILAND HITSON HIGGINS & HOWARD, P.C.
4001 Carmichael Road, Suite 300
Montgomery, AL 36103
Tel: (334) 215-8585
aholtsford@hglawpc.com

James F. Hurst, P.C. (*pro hac vice*)
Rebecca Fitzpatrick, P.C. (*pro hac vice*)
Hariklia Karis, P.C. (*pro hac vice*)
Maria Pellegrino Rivera (*pro hac vice*)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Tel: (312) 862-2000
mrivera@kirkland.com
james.hurst@kirkland.com
rebecca.fitzpatrick@kirkland.com
hariklia.karis@kirkland.com

Janine Metcalf (*pro hac vice*)
Meghan E. Breen (*pro hac vice*)

JONES DAY
1221 Peachtree Street NE, Ste. 400
Atlanta, Georgia 30361
Tel: (404) 521-3939
jmetcalf@jonesday.com
mbreen@jonesday.com

COUNSEL FOR DEFENDANTS ALLERGAN FINANCE, LLC, ALLERGAN SALES, LLC, ALLERGAN USA, INC.

Gerald C. Swann, Jr. (SWA005)
BALL, BALL, MATTHEWS & NOVAK, P.A.
445 Dexter Avenue, Suite 9045
Montgomery, AL 36104
Tel: (334) 387-7680

Jenny A. Hergenrother (*pro hac vice)*
ALSTON & BIRD LLP
1201 West Peachtree Street NW
Atlanta, GA 30309
Tel: (404) 881-7000
Fax: (404) 881-7777
cari.dawson@alston.com
jenny.hergenrother@alston.com

COUNSEL FOR DEFENDANT NORAMCO, INC.

Robert K. Spotswood (SPO001)
Michael T. Sansbury (SAN054)
Michael F. Morris (MOR183)
J. Park Wynn (WYN011)
SPOTSWOOD SANSOM & SANSBURY LLC
Financial Center
505 20th Street North, Suite 700
Birmingham, Alabama 35203
Tel: (205) 986-3620

Fax: (205) 986-3639
rks@spotswoodllc.com
msansbury@spotswood.com
mmorris@spotswoodllc.com
pwynn@spotswoodllc.com

Michael D. Godwin (GOD003)
J. David Jordan (JOR009)
OTTS MOORE LAW FIRM, LLC
P.O. Box 467
Brewton, Alabama 36427
Tel: (251) 867-7724
mgodwin@ottsmoorelaw.com
jdjordan@ottsmoorelaw.com

Jennifer G. Wicht (*pro hac vice*)
Steven M. Pyser (*pro hac vice*)
Neelum J. Wadhwani (*pro hac vice*)
Richard S. Cleary, Jr. (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, D.C. 20024
Tel: (202) 434-5000
jwicht@wc.com
spyser@wc.com
nwadhwani@wc.com
rcleary@wc.com

COUNSEL FOR DEFENDANT CARDINAL HEALTH, INC.

Thomas E. Walker (WAL017)
WHITE ARNOLD & DOWD P.C.
2001 Park Place North, Suite 1400
Birmingham, Alabama 35203
Tel: (205) 323-1888
Fax: (205) 323-8907
twalker@whitearnolddowd.com

COUNSEL FOR DEFENDANT AMNEAL PHARMACEUTICALS LLC

H. Lanier Brown, II
J. Patrick Strubel
WATKINS & EAGER PLLC
1904 1st Avenue North, Suite 300
Birmingham, AL 35203
Tel: (205) 598-2100
lbrown@watkinseager.com
pstrubel@watkinseager.com

William E. Padgett (*pro hac vice*)
William J. Leeder, III (*pro hac vice*)
BARNES & THORNBURG, LLP
11 South Meridian Street
Indianapolis, IN 46204
Tel: (317) 231-7353
William.Padgett@btlaw.com
Bill.Leeder@btlaw.com

Brian T. Himmel (*pro hac vice*)
REED SMITH LLP
Reed Smith Centre, 225 Fifth Avenue
Pittsburgh, PA 15222
Tel: (412) 288-4058
bhimmel@reedsmith.com

COUNSEL FOR DEFENDANT H. D. SMITH, LLC F/K/A H. D. SMITH WHOLESALE DRUG CO.

John A. Henig, Jr.
Richard K. Vann, Jr.
COPELAND, FRANCO, SCREWS & GILL,PA
444 South Perry Street
Montgomery, AL 36104

Tel: (334) 834-1180
henig@copelandfranco.com
vann@copelandfranco.com

John P. McDonald (*pro hac vice*)
Brandan Montminy (*pro hac vice*)
Lauren M. Fincher (*pro hac vice*)
Nicholas S. Graber (*pro hac vice*)
LOCKE LORD, LLP
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
Tel: (214) 740-8000
jpmcdonald@lockelord.com
brandan.montminy@lockelord.com
lfincher@lockelord.com
nick.graber@lockelord.com

COUNSEL FOR DEFENDANT HENRY SCHEIN, INC.

Harlan I. Prater, IV (PRA004)
William H. Brooks (BRO109)
LIGHTFOOT, FRANKLIN & WHITE LLC
The Clark Building
400 20th Street North
Birmingham, AL 35203
Tel: (205) 581-0700
hprater@lightfootlaw.com
wbrooks@lightfootlaw.com

Paul J. Schmidt (*pro hac vice*)
Christian J. Pistilli (*pro hac vice*)
Stephen Petkis (*pro hac vice*)
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St., NW
Washington, DC 20001-4956
Tel: (202) 662-6000

pschmidt@cov.com
cpistilli@cov.com
spetkis@cov.com

COUNSEL FOR DEFENDANT MCKESSON CORPORATION

Bert P. Taylor (ASB-4006-L75B)
TAYLOR PARTNERS, LLC
26192 Canal Rd.
P.O. Box 489
Orange Beach, AL 36561
Tel: (251) 981-8430
bert@taylorpartners.legal

Michael D'Agostino (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
One State St.
Hartford, CT 06103
Tel: (860) 240-2700
michael.dagostino@morganlewis.com

Zachary R. Lazar (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
110 North Wacker Drive
Chicago, IL 60606-1511
Tel: (312) 324-1492
zachary.lazar@morganlewis.com

Mark A. Fiore (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540-6289
Tel: (609) 919-6712
mark.fiore@morganlewis.com

Nancy L. Patterson (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP

1000 Louisiana Street, Ste. 400
Houston, TX 77002
Tel: (713) 890-5195
nancy.patterson@morganlewis.com

COUNSEL FOR DEFENDANTS TEVA PHARMACEUTICALS USA, INC., CEPHALON, INC., WATSON LABORATORIES, INC., ACTAVIS LLC, AND ACTAVIS PHARMA, INC.

Bert P. Taylor – ASB-4006-L75B
TAYLOR PARTNERS, LLC
26192 Canal Rd.
Orange Beach, AL 36561
Tel: (251) 981-8430
bert@taylorpartners.legal

Evan K. Jacobs (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Tel: (215) 963-5329
evan.jacobs@morganlewis.com

Joshua Z. Rapoport (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
Tel: (617) 341-7846
josh.rapoport@morganlewis.com

COUNSEL FOR DEFENDANT ANDA, INC

Robert A. Nicholas
Joseph J. Mahady (*pro hac vice*)
REED SMITH LLP
1717 Arch Street, Suite 3100

Philadelphia, PA 19103
rnicholas@reedsmith.com
jmahady@reedsmith.com

Stan Perry (*pro hac vice*)
REED SMITH LLP
811 Main Street, Suite 1700
Houston, Texas 77002
sperry@reedsmith.com

H. Lanier Brown, II
J. Patrick Strubel
Emily S. Walters
WATKINS & EAGER PLLC
Saks Building
1904 1st Avenue North, Suite 300
Birmingham, AL 35203
Tel: (205) 598-2100
lbrown@watkinseager.com
pstrubel@watkinseager.com
ewalters@watkinseager.com

Jeff T. Brock
ATTORNEY AT LAW LLC
Cassady Law Building
201 Rural Street
Evergreen, AL 36401
jeffbrock.attorney@gmail.com

COUNSEL FOR DEFENDANT AMERISOURCEBERGEN DRUG CORP.

Counsel for Plaintiffs

Steven A. Martino
Ruth R. Lichtenfeld
Tiffany N. Ray
TAYLOR MARTINO, P.C.

P.O. Box 894
Mobile, AL 36601
Tel: (251) 433-3131
stevemartino@taylormartino.com
ruth@taylormartino.com
tiffany@taylormartino.com

Robert C. King
THE KING LAW FIRM, P.C.
36 West Claiborne Street
Monroeville, AL 36460
Tel: (251) 575-3434
rcking@frontiernet.net

Gary M. Yarborough, Jr.
YARBOROUGH LAW FIRM, PLLC
P.O. Box 4168
Bay Saint Louis, MS 39520
Tel: (228) 688-0708
gary@yarboroughlaw.com

John Russell Gibson, III
PHELPS, JENKINS, GIBSON & FOWLER, LLP
P.O. Box 020848
Tuscaloosa, AL 35402-0848
rgibson@pjgf.com

Gerald M. Abdalla, Jr.
ABDALLA LAW, PLLC
602 Steed Road, Ste. 200
Ridgeland, MS 39157
jerry@abdalla-law.com

John W. Barrett
Sterling Starns
David McMullan, Jr.
Richard Barrett

BARRETT LAW GROUP, P.A.
P.O. Box 927
404 Court Square North
Lexington, MS 39095
dbarrett@barrettlawgroup.com
sstarns@barrettlawgroup.com
dmcmullan@barrettlawgroup.com
rrb@rrblawfirm.net

Jonathan W. Cuneo
Monica Miller
Mark H. Dubester
David L. Black
Jennifer E. Kelly
Evelyn Li
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Ave., NW Ste. 200
Washington, DC 20016
jonc@cuneoalaw.com
monicam@cuneolaw.com
mark@cuneolaw.com
jkelly@cuneolaw.com
evelyn@cuneolaw.com

Robert P. Fitzsimmons
Clayton J. Fitzsimmons
Mark Colnatonio
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Ave.
Wheeling, WV 26003
bob@fitzsimmonsfirm.com
mark@fitzsimmonsfirm.com

Warren Burns
Darren Nicholson
BURNS CHAREST, LLP
900 Jackson St., Ste. 500
Dallas, TX 75202

wburns@burnscharest.com
dnicholson@burnscharest.com

Korey A. Nelson
Rick Yelton
Patrick Murphree
Leila Abu-Orf
BURNS CHAREST, LLP
365 Canal St., Ste. 1170
New Orleans, LA 70130
knelson@burnscharest.com
ryelton@burnscharest.com
pmurphree@burnscharest.com
laburn@burnscharest.com

Shannon M. McNulty
CLIFFLORD LAW OFFICES, P.C.
120 N. LaSalle St., 31st Floor
Chicago, IL 60602
smm@cliffordlaw.com

Timothy R. Linkous
LINKOUS LAW, PLLC
10 Cheat Landing, Ste. 200
Morgantown, WV 26508
tim@linkouslawpllc.com

G. Robert Blakey
7002 East San Miguel Ave.
Paradise Valley, AZ 85253
blakey.1@nd.edu

COUNSEL FOR PLAINTIFFS

/s/ Ivan B. Cooper
OF COUNSEL