

**IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA**

-----X  
1. LESSIE BENNINGFIELD RANDLE, )  
Tulsa Race Massacre Survivor, )  
2. VIOLA FLETCHER, )  
Tulsa Race Massacre Survivor, )  
3. HUGHES VAN ELLISS, SR., )  
Tulsa Race Massacre Survivor, )  
4. HISTORIC VERNON A.M.E. CHURCH, INC., )  
a domestic not-for-profit corporation, )  
5. LAUREL STRADFORD, )  
great-granddaughter of J.B. Stradford, )  
6. ELLOUISE COCHRANE-PRICE, )  
daughter of Clarence Rowland and )  
cousin of Dick Rowland, )  
7. TEDRA WILLIAMS, )  
granddaughter of Wess Young, )  
8. DON M. ADAMS, )  
nephew and next friend of Dr. A.C. Jackson, )  
9. DON W. ADAMS, )  
great-grandson of Attorney H.A. Guess, )  
10. STEPHEN WILLIAMS, )  
grandson of A.J. Smitherman, )  
11. THE TULSA AFRICAN ANCESTRAL )  
SOCIETY, )  
an unincorporated association, )  
Plaintiffs, )  
v. )  
1. CITY OF TULSA, )  
a municipal corporation, )

Case No.: CV-2020-01179  
Judge Caroline Wall

2. TULSA REGIONAL CHAMBER, )  
a domestic not-for-profit corporation, )  
3. TULSA DEVELOPMENT AUTHORITY, )  
4. TULSA METROPOLITAN AREA )  
PLANNING COMMISSION, )  
5. BOARD OF COUNTY COMMISSIONERS )  
FOR TULSA COUNTY, OKLAHOMA, )  
6. VIC REGALADO, IN HIS OFFICIAL )  
CAPACITY AS SHERIFF OF TULSA COUNTY, )  
7. OKLAHOMA MILITARY DEPARTMENT, )  
Defendants. )  
-----X

**PLAINTIFFS' OPPOSITION IN RESPONSE TO DEFENDANT STATE OF**  
**OKLAHOMA'S MOTION TO DISMISS**

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In accordance with the Court’s April 23, 2021 order, Plaintiffs have prepared separate opposition briefs to the seven motions to dismiss filed by Defendants on March 12, 2021.<sup>1</sup> However, because arguments overlap among the motions to dismiss and because there are cross references between the opposition briefs, Plaintiffs provide here, in its Opposition to the Motion to Dismiss filed by Defendant State of Oklahoma, *ex. rel.*, the Oklahoma Military Department (the “State”), an overall introduction that addresses the arguments made in all of its June 1, 2021 opposition briefs (the “June 1 Oppositions”). Following the introduction is a chart which sets forth where arguments are made in the motions to dismiss and where they are addressed in the opposition briefs. Plaintiffs hope that this introduction and the accompanying chart will assist the Court in its review of June 1 Oppositions.

**INTRODUCTION TO ALL JUNE 1, 2021 OPPOSITION BRIEFS**

Sixty-four years before the Tulsa Race Massacre of 1921, in *Dred Scott v. Sandford*, 60 U.S. 393, 407, 15 L. Ed. 691 (1857), *superseded* (1868), Chief Justice Taney infamously argued that Black people “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”

Similarly, in Tulsa, for the last one hundred years, the Black communities of Greenwood and North Tulsa have been regarded of an inferior order. Defendants have not respected Black Tulsan’s rights to their property, their lives, and their rights to live in peace as full humans.

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<sup>1</sup> Defendants City of Tulsa and Tulsa Metropolitan Area Planning Commission are represented by the same counsel and made largely overlapping arguments in their respective motions. Accordingly, Plaintiffs requested, and Defendants consented to, Plaintiffs filing a single brief in response to their respective motions.

One hundred years ago, Defendants committed one of the worst acts of domestic terrorism in the history of the United States. Triggered by a false accusation that a Black teenager, Dick Rowland, assaulted a white woman and incited by the *Tulsa Tribune*'s headlines encouraging white people to "Nab Negro for Attacking Girl in an Elevator" and "To Lynch a Negro Tonight," a State sanctioned and armed mob of white people descended on Tulsa's thriving Black community, Greenwood. During the course of the next twenty-four hours, the white mob killed hundreds of Greenwood residents, looted homes and businesses and reduced approximately forty blocks to ash and rubble. This extraordinary act of violence and destruction was done with the blessing and participation of Defendants in this case. Today, this violence is known as the Tulsa Race Massacre of 1921 (the "Massacre").

But the Massacre did not end after the fires went out. Defendants rounded the victims, separated families, and held humans in internment camps. Continuously, for the past one hundred years, Defendants have continued to deprive Black Tulsans of their property, their lives, and their ability to live in peace. Defendants rezoned Greenwood property to prevent rebuilding and denied Black Tulsans the national influx of money destined to help them reconstruct the community. In the 1940s and 1950s, Defendants refused to provide proper infrastructure and sanitation; in the 1960s and 1970s, when urban redevelopment split the Greenwood neighborhood apart, Defendants ran a highway through the middle, fragmenting the community and carving it off from the rest of Tulsa.

Greenwood is poor – a ghetto. Due to the Defendants' actions Black Tulsans are more likely to be impoverished, uneducated, and unhealthy. Some may say, pull yourself up by your own bootstrap – but there are no bootstraps in North Tulsa, Defendants have taken them for themselves.

But of all the sins that occurred after the Massacre in 1921 – perhaps the most egregious is Defendants’ failure to acknowledge the harms they caused. They called their killing, looting, and burning a race riot, started by the Black community. It was lie. Defendants did this to marginalize and exploit the Black community in Greenwood and North Tulsa, while at the same time, rewriting the historical record to benefit themselves at the expense of the Black community.

Now, under the guise of unity, Defendants claim to help Greenwood rise; but what they have done instead is give money and resources to commercial developers and not a dime to the survivors or descendants who suffer today. But here we are today, with the knowledge of what happened, knowledge that we cannot ignore. Given what we know now, and the truths that we can no longer hide from, how can we now ignore the victims who have suffered for so long? Before the Court is a group of eleven plaintiffs. Three of the plaintiffs, Lessie Benningfield Randle (106 years old), Viola Fletcher (107 years old), and Hughes Van Ellis, Sr. (100 years old), are the last known survivors of the Massacre. Each of the Survivor Plaintiffs lived in a community known as “Black Wall Street,” where Black people – only a generation or two removed from slavery – had built a thriving, prosperous community that served as a model of Black success and liberation for the entire country. Each of the Survivor Plaintiffs have watched for exactly one century as the dream and promise of Greenwood has been denied to Black Tulsans. Each of the Survivor Plaintiffs have watched for exactly one century as the effects of the Massacre and the actions that Defendants have prevented Greenwood from ever fully rebuilding. Each of the Survivor Plaintiffs have waited for exactly one century for justice. As current City of Tulsa Mayor G.T. Bynum has acknowledged, “In Tulsa, the racial and economic disparities that still exist today can be traced to the 1921 massacre.”

The acceptance by the courts of this country of the degradation of Black lives and dignities as a fact of the Black experience in America for which courts can provide no justice is a thread that started with *Dred Scott*, continued to the Massacre, and is present with this case before the Court today. In the motions before the Court, Plaintiffs ask only for the opportunity to prove two claims arising under Oklahoma law: Plaintiffs seek abatement of an ongoing public nuisance under Oklahoma’s uniquely broad nuisance statute 50 O.S. § 1 and a claim for unjust enrichment. For over 100 years these laws have been applied in other instances, flexibly supporting injustices that this State has sought to remedy. Plaintiffs ask the Court today to do the same.

With respect to the public nuisance claim, the application of 50 O.S. § 1 is not a radical reimagining of public nuisance law. Under its plain, broad terms of the statute, the Massacre and its continuing effects clearly constitute “unlawful acts” that “[a]nnoys, injures or endangers the comfort, repose, health, or safety of others” and “renders other persons insecure in life.”

No Defendant actually argues that allegations in the Petition do not satisfy the plain terms of the public nuisance statute. Nor could they. Indeed, and as all Defendants fail to acknowledge, the State and City Defendants have relied on *this very statute* to argue in actions brought against pharmaceutical companies that Oklahoma’s statewide, decades-long opioid crisis is a public nuisance that has harmed the lives, property, and peace of their residents, which requires abatement. Just eighteen months ago, the State actually prevailed on this theory after a 33-day trial before Judge Balkman.

Over seventy-two pages that include 185 paragraphs of substantive factual allegations and a detailed plan of abatement modeled on the abatement plan ordered by Judge Balkman, the Petition more than adequately alleges an ongoing public nuisance requiring abatement.

Under Oklahoma’s liberal notice pleading standard, where motions to dismiss are “disfavored,” it cannot be the case that it would be “impossible” for Plaintiffs to prove a set of facts giving rise to liability – the standard for a motion to dismiss – when it was possible for Judge Balkman to find the opioid crisis constitutes a public nuisance.

Aware of the obvious tensions with the opioid litigations, Defendants task the only non-governmental entity, the Tulsa Regional Chamber, with taking on Plaintiffs’ public nuisance theory. But in so doing, the Chamber makes a series of arguments already expressly rejected by Judge Balkman in the State’s opioid litigation and makes a grotesque argument that the injuries suffered by Plaintiffs here are insufficiently “special” because white mob violence against Black people has occurred throughout American history. This language echoes Justice Taney’s words: there is no recourse in the court system for Black suffering because Black suffering is just a fact of American life. Sadly, they make this argument notwithstanding that Oklahoma law provides a statutory remedy for these injustices.

As for the governmental entities themselves, all of them argue that Oklahoma’s Governmental Tort Claims Act, 51 O.S. §§ 151 *et seq.* (the “GTCA”) requires dismissal of this case. However, the GTCA is wholly inapplicable because it (1) only governs claims seeking monetary damages, but not the types of injunctive relief Plaintiffs seek; and (2) applies only to a prescribed type of “tort” claim, a definition that does not encompass the public nuisance and unjust enrichment theories raised in the Petition.

The government Defendants also rely on a laches defense. But such an equitable defense simply does not apply in a public nuisance action. And, even if a laches defense did apply, Defendants fatally fail to allege that they suffered any prejudice from the fact that this

case was not brought sooner. Further, such a defense is inappropriate to invoke on a motion to dismiss.

Plaintiffs are filing this opposition on the centennial of the Massacre and at a time when public awareness of the Massacre has finally broken through. But rather than use this time to abate the damage from the Massacre, Defendants have been unjustly exploiting the Massacre into a “brand.”

As set forth in the Petition, Defendants have utilized the story of the Massacre, the names and the likenesses of the people who suffered, who died, and who were treated as refugees, to raise more than \$30 million in the name of the Massacre for what they call “cultural tourism.” Not one penny of this enormous sum raised has gone to the survivors of the Massacre or descendants. This is unjust enrichment under any definition and the Petition more than adequately alleges this claim.

This may be the last chance for the last known survivors of the Massacre to have their day in court. At trial, Plaintiffs will have the burden of proof, and fully expect that the Court will hold Plaintiffs to their burden. But as to the questions before the Court today, Plaintiffs have clearly met their pleading burden of providing Defendants fair notice of their claims, which is all that Oklahoma law requires of them at this stage. All seven motions to dismiss should be denied.

Today, one hundred years after the darkest days in Tulsa, and in American history, we ask the Court to give Plaintiffs the opportunity to have their day in Court. The day before this brief was filed, Mayor Bynum said “I apologize for the city government’s failure to protect our community in 1921 and to do right by the victims of the Race Massacre in its aftermath.”

It is not too late to do right by the last remaining victims and the descendants. They have waited and waited, justice has long been denied and the law entitles Plaintiffs to more than apology decoupled from action. The Survivor Plaintiffs ask, that before they leave this lifetime to have the chance to say justice was possible in Tulsa, in Oklahoma and in the United States of America.

**KEY MATCHING ARGUMENTS MADE IN THE DEFENDANTS’ 7 MOTIONS TO DISMISS TO PLAINTIFFS’ 6 OPPOSITION BRIEFS**

*To assist the Court in its review of the seven motions, Plaintiffs have provided the below key:*

Motion to Dismiss	Issues Briefed by Defendants	Plaintiffs’ Responsive Briefing
Defendant <b>State of Oklahoma’s</b> Motion to Dismiss First Amended Petition	(i) Use of Federal Pleading Standards; (ii) GTCA Defense; (iii) Laches Defense; (iv) Dismissal with Prejudice v. Dismissal without Prejudice	Plaintiffs’ Opposition in Response to State of Oklahoma’s Motion to Dismiss, with cross references to the Opp’n to City/TMAPC MTD (defined below) for the GTCA and laches issues.
Defendant <b>City of Tulsa’s</b> Motion to Dismiss First Amended Petition	(i) GTCA Defense; (ii) Laches Defense; (iii) Adequacy of Unjust Enrichment Allegations	Plaintiffs’ Combined Opposition to the Motions of Defendants City of Tulsa and Tulsa Metropolitan Area Planning Commission’s to Dismiss the First Amended Petition (the “ <b>Opp’n to City/TMAPC MTD</b> ”).
Defendant <b>Tulsa Metropolitan Area Planning Commission’s</b> Motion to Dismiss Plaintiffs’ First Amended Petition	(i) GTCA Defense; (ii) Laches Defense; (iii) Adequacy of Public Nuisance Allegations as to TMAPC (iv) Adequacy of Unjust Enrichment Allegations	
<b>Tulsa Regional Chamber’s</b> Amended Motion to Dismiss and Brief in Support	(i) Standing - Injury for Descendant Plaintiffs and Church; (ii) Standing - Redressability for All Plaintiffs	Plaintiffs’ Response to Defendant Tulsa Regional Chamber’s Amended Motion to Dismiss and Brief in Support (the “ <b>Opp’n to Chamber Standing MTD</b> ”).
<b>Tulsa Regional Chamber’s</b> Amended General Motion to Dismiss as to All Plaintiffs and Brief in Support	(i) Adequacy of Nuisance Allegations; (ii) Adequacy of Unjust Enrichment Allegations; (iii) Political Question Doctrine	Plaintiffs’ Response to Tulsa Regional Chamber’s Amended General Motion to Dismiss and Brief in Support (the “ <b>Opp’n to Chamber Nuisance MTD</b> ”), with cross reference to the Opp’n to Chamber Standing MTD for the Political Question Doctrine.

<p>Defendant <b>Tulsa Development Authority</b>'s Motion to Dismiss Plaintiffs' First Amended Petition and Brief in Support</p>	<p>(i) GTCA Defense; (ii) Adequacy of Nuisance Allegations as to TDA</p>	<p>Plaintiffs' Opposition in Response to Defendant Tulsa Development Authority's Motion to Dismiss with cross references to Opp'n to City/TMAPC MTD for GTCA issue and Opp'n to Chamber Nuisance MTD for nuisance issue.</p>
<p>Motion to Dismiss Plaintiffs' First Amended Petition and Brief in Support by Defendants <b>Board of County Commissioners for Tulsa County and Vic Regalado, in His Official Capacity as Sheriff of Tulsa County</b></p>	<p>(i) Standing - Injury for Descendant Plaintiffs and Church; (ii) Standing - Redressability for All Plaintiffs; (iii) GTCA Defense</p>	<p>Plaintiffs' Opposition to Defendants Board of County Commissions and Vic Regalado's Motion to Dismiss with cross references to Opp'n to Chamber Standing MTD for standing issues and Opp'n to City/TMAPC MTD for GTCA issues.</p>

**INTRODUCTION TO ARGUMENTS IN RESPONSE TO STATE BRIEF**

The State makes four arguments in support of its motion to dismiss. First, the State argues generally that federal pleading standards apply. As set forth below, that is a categorical misstatement of the law as Oklahoma applies a liberal notice pleading standard and has never adopted the more stringent federal pleading standards. Second, the State argues that this case is barred by the GTCA. As explained below and as explained more fully in the Opposition to City/TMAPC MTD, the GTCA applies only to actions seeking money damages and to tort claims, neither of which is alleged in this case. Third, the State argues that the equitable doctrines of laches applies, but this is also incorrect as, among other reasons, the doctrine of laches simply does not apply to a public nuisance claim. Lastly, the State requests dismissal with prejudice, but by Oklahoma statute should the Court conclude that the Petition requires dismissal in whole or part, the Court must provide Plaintiffs with an opportunity to amend the Petition.

## ARGUMENT

### **I. Contrary to the State’s Position, Federal Pleading Standards Do Not Apply in Oklahoma State Court**

The State, incorrectly at best and disingenuously at worst, argues the federal pleading standard governs the Court’s decision on the State’s Motion to Dismiss. State Mot.<sup>2</sup> 2-4. As the State is aware, this case presently sits in Oklahoma state court under state-law theories of public nuisance and unjust enrichment. Pet.<sup>3</sup> ¶¶ 186-200. The Oklahoma Pleading Code (the “Pleading Code”), 12 O.S. §§ 2001-2100, dictates the applicable pleading standards in this action.

Under 12 O.S. § 2008(A)(1)-(2), “[a] pleading which sets forth a claim for relief . . . shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled.” The State filed a motion to dismiss under § 2012(B)(6) of the Pleading Code, which permits a motion for “failure to state a claim upon which relief can be granted.” 12 O.S. § 2012 (B)(6).

The State argues that in *Frazier v. Bryan Memorial Hospital Authority*, 1989 OK 73, 775 P.2d 281, the Oklahoma Supreme Court “interpret[ed] 12 O.S. § 2012(B) as the equivalent to Federal Rule 12(b).” State Mot. 2. Not so. *Frazier* does not mention Federal Rule of Civil Procedure 12(b)(6), nor does it suggest the federal pleading standard is applicable for motions made under 12 O.S. § 2012(B)(6). Because of this, the State’s reliance on the federal pleading standards outlined in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), among other federal cases, is wholly misplaced. State Mot. 2-4.

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<sup>2</sup> “State Mot.” refers to Defendant State of Oklahoma’s Motion to Dismiss Plaintiffs’ First Amended Petition filed March 12, 2021.

<sup>3</sup> “Pet.” refers to the First Amended Petition filed February 2, 2021.

Nor is the State correct that Plaintiffs “must allege facts which plausibly demonstrate that [ ] [Defendants’] conduct was intentional under the substantial certainty standard.” State Mot. 3 (citing *Parret v. UNICCO Serv. Co.*, 2005 OK 54, ¶ 26, 127 P.3d 572, 579, *superseded by statute on other grounds*). That is simply wrong. The *Parret* Court answered a certified question as to the standard of intent necessary for the intentional tort exception to the Oklahoma Workers’ Compensation Act. *Parret*, 2005 OK at ¶¶ 1, 26, 127 P.3d at 573, 579.

However, as the State is surely aware, Plaintiffs’ claims are not brought under the Workers’ Compensation Act, nor are they even intentional torts. The Amended Petition sets forth claims under theories of public nuisance and unjust enrichment, neither of which contains an element of intent. *See* Opp’n to Chamber Nuisance MTD, at § I (a public nuisance is an unlawful act that “annoys, injures, or endangers the comfort, repose, health or safety of others” or “[i]n any way renders other persons insecure in life, or in the use of property” (citing 50 O.S. § 1)); Opp’n to Chamber Nuisance MTD, at § II (“[i]n general, unjust enrichment consists of (1) the unjust (2) retention of (3) a benefit received (4) at the expense of another” (citing *Okla. Dep’t of Sec. ex rel Faught v. Blair*, 2010 OK 16, ¶ 22, 231 P.3d 645, 658-59, *as corrected* (Apr. 6, 2010))).

**A. Oklahoma Uses a Liberal, Notice Pleading Standard**

Oklahoma is a notice pleading state. 12 O.S. § 2001 (adopting the Pleading Code); *Gens v. Casady Sch.*, 2008 OK 5, ¶ 9, 177 P.3d 565, 569. Under § 2008(A)(1) of the Pleading Code, the petition need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” 12 O.S. § 2008(A)(1); *Gens*, 2008 OK at ¶ 9, 177 P.3d at 569. Indeed, “[a]ll that is required under notice pleading is that the petition give fair notice of the plaintiff’s claim and the grounds upon which it rests.” *Gens*, 2008 OK at ¶ 9, 177 P.3d at 569; *Powers v. Dist. Ct. of Tulsa Cty.*, 2009 OK 91, ¶ 17, 227 P.3d 1060, 1073, *as corrected*

*Dec. 29, 2009* (same); *Ind. Nat'l Bank v. State Dep't of Human Servs.*, 1994 OK 98, ¶ 2, 880 P.2d 371, 375 (the pleading requirement “is not onerous, but is merely to give an opposing party fair notice”). A dismissal for a failure to state a claim is “premature” *unless* “*all claims appear to be frivolous on their face or without merit.*” (emphasis added) *Gens*, 2008 OK at ¶ 8, 177 P.3d at 569. Accordingly, courts view motions to dismiss with disfavor under Oklahoma’s liberal pleading standard. *Ladra v. New Dominion, LLC*, 2015 OK 53, ¶ 8, 353 P.3d 529, 531; *Ind. Nat'l Bank*, 1994 OK at ¶ 4, 880 P.2d at 375.

The State argues, without support in Oklahoma law, that 12 O.S. § 2008 requires “sufficient and plausible factual allegations.” State Mot. 3. To the contrary, “[w]hen evaluating a motion to dismiss, [the] [c]ourt examines only the controlling law, *taking as true all of the factual allegations* together with *all reasonable inferences* that can be drawn from them.” (emphasis added) *Ladra*, 2015 OK at ¶ 8, 353 P.3d at 531 (citing *Wilson v. State ex. rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157); *Ind. Nat'l Bank*, 1994 OK at ¶ 3, 880 P.2d at 375. That is because “[t]he function of a motion to dismiss is to test the law of the claims, not the facts supporting them.” *Gens*, 2008 OK at ¶ 8, 177 P.3d at 569; *State ex. rel. v. Okla. Corp. Comm'n v. McPherson*, 2010 OK 31, ¶ 25, 232 P.3d 468, 464-65 (“[n]otice pleading does not require pleading every fact upon which a claim is based, but merely a short and plain statement of the claim . . .”).

Under the Pleading Code, “a pleading *must not* be dismissed for failure to state a legally cognizable claim *unless* the allegations indicate *beyond any doubt* that the litigant can prove *no* set of facts which would entitle relief.” *Frazier*, 1989 OK at ¶ 13, 775 P.2d at 287; *accord Gens*, 2008 OK at ¶ 8, 177 P.3d at 569. Because the State plainly fails to satisfy this high bar for dismissal, its Motion to Dismiss must be denied.

**B. The Petition Provides Fair Notice of Plaintiffs' Claims**

The seventy-six page Petition, complete with five exhibits, exceeds Oklahoma's pleading standard that merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 12 O.S. § 2008(A)(1); *Gens*, 2008 OK at ¶ 9, 177 P.3d at 569. The Petition faithfully pleads for recovery under long-recognized theories of public nuisance and unjust enrichment. Pet. ¶¶ 186-200.

As explained herein, and throughout the five other briefs filed by Plaintiffs in Opposition to Defendants' Motions to Dismiss, these claims are a far cry from "frivolous on their face or without merit." *See Gens*, 2008 OK at ¶ 8, 177 P.3d at 569. In fact, Plaintiffs' claims stand in stark similarity to the claims for public nuisance and unjust enrichment the *State itself* made in the recent opioid litigation. *See* Original Petition ¶¶ 27-30, *State v. Purdue Pharma, et. al.*, No. CJ-2017-816 (Ok. Dist. Ct. Nov. 15, 2019) (No. BL-4) (arguing the opioid epidemic constitutes a public nuisance and the pharmaceutical company defendants were unjustly enriched at the State's expense).

Given that "[t]he function of a motion to dismiss is to test the law of the claims, not the facts supporting them[.]" *Gens*, 2008 OK at ¶ 8, 177 P.3d at 569; *accord McPherson*, 2010 OK 31, ¶ 25, 232 P.3d at 464-65, the State's misplaced insistence that the Petition "lacks sufficient facts[.]" State Mot. 4, is without merit. Even so, in the 185 substantive paragraphs of the Petition, the Plaintiffs detail the events leading up to the Massacre, Pet. ¶¶ 37-49, the atrocity of the Massacre itself, Pet. ¶¶ 50-78, the ways in which Defendants' actions taken during the past 100 years injure Plaintiffs today, Pet. ¶¶ 79-176, and how the Defendants gained from exploiting the Massacre at Plaintiffs' expense, Pet. ¶¶ 177-185. As the State acknowledges itself, in the Petition the Plaintiffs thoroughly detail the role of the National Guard and State Officials in the public nuisance alleged in the Petition. State Mot. 1 (citing Pet. ¶¶ 2, 22, 45,

51-52, 54, 57, 58-59, 61-63, 71-72, 83, 85, 87, 177). Accordingly, the Petition clears the liberal bar of the Pleading Code which only allows dismissal where “*beyond any doubt* [] the litigant can prove *no* set of facts which would entitle relief.” *Frazier*, 1989 OK at ¶ 13, 775 P.2d at 287; *accord Gens*, 2008 OK at ¶ 8, 177 P.3d at 569. Indeed, the day before this brief was filed, Maj. Gen. Michael C. Thompson, who commands the Oklahoma Army and Air National Guard issued a formal statement making it clear that the National Guard understands what role it played in the Massacre and the claims that are asserted against it:

No room for debate about what the Guard did not do. What the Guard didn't do is protect this community. What the Guard didn't do is save your houses from being burnt to the ground. What the Guard didn't do is save businesses from being ruined. And we didn't stop you from freeing the area for your life. And some people never returned. So because I am here today, and because I do represent the Guard, and you are here as representatives of that horrific event, I want to give you my heartfelt and most sincere apology for our unwillingness to do the right thing.

## **II. The GTCA is Inapplicable and Cannot be the Basis for a Dismissal**

The State's argument that Plaintiffs' claims are barred under Oklahoma's GTCA is unavailing because the GTCA does not govern the claims asserted in this action. Specifically, the State argues that Plaintiffs failed to comply with the notice requirements and the prescribed limitations period of the GTCA as set forth in 51 O.S. §§ 156-157. State Mot. 5-6. The State also argues that even had the notice requirements been satisfied, Plaintiffs' claim is barred by the tort liability immunity the GTCA provides to the State (1) for acts of its employees outside their scope of employment, State Mot. 5-7; and (2) under several enumerated exemptions where the State has not consented to be sued, State Mot. 5, 7-8. The State's arguments are inapposite.

The GTCA is wholly inapplicable here because it (1) only governs claims seeking monetary damages, but not the types of injunctive relief Plaintiffs seek; and (2) applies only to

a prescribed type of “tort” claim, a definition that does not encompass the public nuisance and unjust enrichment claims raised in the Petition. In order to avoid overburdening the Court with duplicative and overlapping arguments, Plaintiffs adopt and incorporate herein the arguments made by Plaintiffs in their Opposition to City/TMAPC MTD, at §§ II(A)-(D).

### **III. Equitable Defenses Provide No Basis for Dismissal**

The State devotes two paragraphs to the argument that Plaintiffs’ claims are barred under the doctrines of laches and equitable estoppel. State Mot. 8-9. Indeed, the State dedicates little beyond the statement “it is obvious” to explain how those doctrines apply to Plaintiffs’ claims.

The State’s arguments are wholly insufficient to dismiss Plaintiffs’ claims, where the moving party bears the “substantial” burden to show the legal insufficiency of the petition. *Ladra*, 2013 OK at ¶ 8, 353 P.3d at 531; *Ind. Nat’l Bank*, 2015 OK at ¶ 3, 880 P.2d at 375, *Gens*, 2008 OK at ¶ 8, 177 P.3d at 569. *See also Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844-45 (the “burden of demonstrating a petition’s insufficiency is not a light one”).

The State’s arguments for dismissal under the doctrines of laches and equitable estoppel are equally unavailing because (1) those equitable defenses simply do not apply in actions for public nuisance, but (2) even if the doctrines could be invoked, the State fails to establish a defense under either doctrine. To avoid overburdening the Court with duplicative and overlapping arguments, Plaintiffs adopt and incorporate herein the arguments made by Plaintiffs in their Opposition to City/TMAPC MTD, at §§ I(A)-(B).

### **IV. The Court Must Grant Plaintiffs Leave to Amend if Any Defect Can Be Remedied**

The State argues that “this Court must dismiss the State from this lawsuit with prejudice.” State Mot. 4. Plaintiffs respectfully request that the Court deny the State’s Motion to Dismiss in its entirety. In the alternative, if the Court grants any or all of Defendants’

motions, the Court has a mandatory duty to grant Plaintiffs leave to amend the Petition if the defect can be remedied. 12 O.S. § 2012(G) (“[o]n granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied . . .”); *Kelly v. Abbott*, 1989 OK 124, ¶ 6, 781 P.2d 1188, 1190 (“Because the statute provides that the trial court ‘shall’ grant leave to amend if the defect can be remedied, the duty is mandatory.”).

Owing to the policy that “[g]enerally motions to dismiss are viewed with disfavor[,]” *Lockhart v. Loosen*, 1997 OK 103, ¶ 5, 943 P.2d 1074, 1078, *as corrected* Aug. 21, 1997, Plaintiffs’ Petition may only be dismissed with prejudice if it appears “the claim does not exist rather than the claim has been defectively stated[.]” *Fanning*, 2004 OK at ¶ 23, 85 P.3d at 848. *See also* Committee Comment to 12 O.S. § 2012 (“[T]he court must allow the plaintiff an opportunity to amend the petition within a specified time and should not dismiss the action, unless it appears to a certainty that the plaintiff cannot state a claim.”).

In other words, contrary to the State’s assertions, dismissal with prejudice is only proper where there is no cognizable legal theory of liability. *Fanning*, 2004 OK at ¶ 23, 85 P.3d at 848 (holding the trial court erred in dismissing plaintiff’s petition that was factually insufficient because the trial court did not “provid[e] [the plaintiff] with an opportunity to amend her complaint . . . since [the plaintiff] pled a cognizable legal theory, i.e. piercing the corporate veil”); *Lockhart*, 1997 OK at ¶ 5, 943 P.2d at 1190 (drawing a distinction between dismissal for lack of a cognizable legal theory and dismissal for insufficient facts advanced under that theory).

The State has caused a continuous injury to Plaintiffs since the night of the Massacre. Plaintiffs seek redress under two longstanding, cognizable legal theories—public nuisance and unjust enrichment. Pet. ¶¶ 186-200. Plaintiffs reiterate that the State’s Motion to Dismiss

should be denied in its entirety, but should the Court grant any or all of the State's Motion, Plaintiffs request leave to amend to cure any defect.

**CONCLUSION**

For the reasons set forth herein, the Court should deny the State's Motion to Dismiss the Petition, allowing discovery to proceed and allowing the parties to build a complete record on which the Court can address each of the issues presented by Plaintiffs' claims. In the alternative, the Court should grant Plaintiffs leave to amend to cure any defect in the Petition.

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I hereby certify that on the 1st day of June 2021, I served the foregoing by email and U.S. Mail to the following:

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