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

BREANN STEED, Next Friend of S.S., a Minor, et al,	)	
Plaintiffs,	)	
v.	)	Case No.: CJ-2013-4297
	)	Judge: Jefferson D Sellers
CONNOR ALEXANDER ACEBO, et al,	)	
Defendants.	)	

RESPONSE OF PLAINTIFFS IN OPPOSITION
TO MOTION TO DISMISS OF DEFENDANT BAIN-HOLLOWAY

Plaintiffs, thorough the undersigned counsel, hereby respond to the "Defendant Chase Bain-Holloway's Motion to Dismiss With Prejudice" (hereinafter "Motion to Dismiss"), filed on December 3, 2013, and set for hearing, before the court on January 22, 2014, at 10:00 A.M.

Introduction/Statement of Facts

1. ***Facts***

On March 15, 2012, Detective Westerfield with the Broken Arrow Police Department Street Crimes Unit observed an individual (later determined to be Chase Bain-Holloway) in a black Mazda parked in a Walmart parking lot. Detective Westerfield detected odor of marijuana eminating from the Mazda and then recovered and seized 232 grams of marijuana in a large ziptop bag from the glove compartment of the Mazda. Also, the police recovered approximately four (4) grams of marijuana in a prescription bottle of Chase Bain-Holloway (hereinafter "Bain-Holloway") in his right cargo pocket, located $1,560 cash in the center console of the Mazda, and a search "of one of two of Holloway's cell phones by Westerfield revealed text messages where he was arranging to sell

marijuana by the pound."[1]

On March 23, 2012, District Attorney Tim Harris, filed an Information, alleging that Bain-Holloway, on or about March 15, 2012, committed the felony of unlawful possession of a controlled drug, marijuana, with intent to distribute in violation of 63 O.S. §2-401(A)(1). On July 12, 2012, with his counsel Paul Brunton, Bain-Holloway, entered his plea of guilty, admitting that on March 15, 2012, "I possessed marijuana with intent to sell. This took place in Tulsa County, OK."[2] The court accepted the guilty plea and found the plea of Bain-Holloway to be knowingly and voluntarily entered. Id. The court did not enter any conviction, but deferred the sentence to June 12, 2017. Id. Under the DDLA 63 O.S. §2-431(C), "[t]he absence of [a] criminal drug conviction of a person against whom recovery is sought does not bar an action against that person."

2. ***Drug Dealer Liability Act***

The illegal drug trade is a monster that preys on our society. It destroys individual lives and tears families apart. It undermines our economic well-being by impairing productivity, requiring taxpayers to bear the expense of treatment and social services for the drug abusers and their families, and forcing the public to bear the collateral expenses of drug-related crimes. The "war on drugs" currently being waged by federal, state, and local law enforcement agencies has resulted in dramatically increased expenditures for additional law enforcement personnel, prosecutors and

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[1] See Broken Arrow Police Department Arrest and Booking Report, attached hereto as Exhibit "A", and filed of record in State of Oklahoma v. Chase Patterson Brian-Holloway, Case No. CF-2012-1220, on March 28, 2012, in the District Court of the Fourteenth Judicial District of the State of Oklahoma Sitting In and For Tulsa County.

[2] See Plea of Guilty, attached hereto as Exhibit "B", and filed of record in State of Oklahoma v. Chase Patterson Brian-Holloway, Case No. CF-2012-1220, on July 12, 2012, in the District Court of the Fourteenth Judicial District of the State of Oklahoma Sitting In and For Tulsa County.

public defenders, the courts, and correction facilities to house persons convicted of drug-related crimes. The question of how society should counteract the harmful effects of illegal drugs and deter those engaged in the illegal drug trade presents complex policy issues that are particularly suited for legislative action. Among the most traumatically effected victims of the illegal drug market are children, such as the plaintiffs herein. The drug babies are often the most physically and mentally damages individuals and their only hope often is extensive medical and psychological treatment, physical therapy, and special education. All of these remedies are very expensive. In fact, it is not hard for the cost to exceed $1.0 million for each drug-addicted baby. See Janet W. Steverson, *Stopping Fetal Abuse With No-Pregnancy and Drug Treatment Probation Conditions,* 34 Santa Clara L. Rev. 295 (1994). Additionally, approximately one-half of mothers who are drug addicts and are not in a drug treatment program will lose custody of their child within a year of birth. Janet R. Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, Children's Legal Rts.J., Fall 1989, at 7. William F. Bickley, Jr., in an address to the New York Bar Association, commented that:

> We are speaking of a plague [illegal drug distribution and abuse] that consumes an estimated $75 billion per year of public money, extracts an estimated $70 billion a year from consumers, is responsible for nearly 50 percent of the million Americans who are today in jail, occupies an estimated 50 perfect of the trial time of our judiciary, and takes the time of 400,000 policemen-yet a plague for which no cure is at hand, nor in prospect.

William F. Buckley, Jr., Address to the Panel of the New York Bar Association Considering the War on Drugs (Summer 1995), in Nat'l Rev (Feb. 12, 1996), at 35.

The Oklahoma Legislature, like Congress and other state legislatures, has traditionally emphasized deterrence through criminal prosecution and incarceration. More recently, however, the Oklahoma Legislature, has created additional tools and statutes to address the illegal drug trade. In

this regard, the Oklahoma Legislature, in 1994, enacted the Drug Dealer Liability Act ("DDLA"), 63 O.S. §2-421 *et seq* (a copy of the entire Act, for the court's convenience is attached hereto as Exhibit "C"), to provide persons injured by illegal drugs with a civil cause of action for damages against persons who knowingly participate in the illegal drug market in Oklahoma. Under the DDLA, "[a] person who knowingly participates in the illegal drug market within this state is liable for civil damages. . ." 63 O.S. § 2-423(A). Oklahoma adopted most of the provisions of the model DDLA, with only very minor modifications.[3] The purpose of the DDLA is to relax causation requirements to prove civil liability because the common law effectively barred family members of drug users from filing suit against illegal drug dealers. The DDLA stated purpose is "[a]n Act relating to public health and safety. . .providing civil liability for participation in the illegal drug market; providing for recovery of damages;. . ." 63 O.S. §2-421. And, in order to recover damages a person need only prove a person knowingly participated in the marketing of illegal controlled substances at any time during which a person used the same type of illegal drugs in the same geographical area. 63 O.S. §2-424(B)(2) and §2-427. There is no evidence that the Oklahoma Legislature adopted the DDLA for any other purpose other than to impose civil liability on illegal drug dealers.

Constitutional Challenge By Defendant Chase Bain-Holloway

Defendant claims that this case should be dismissed, with prejudice, because the DDLA violates the Oklahoma and United States Constitutions in that the statute infringes upon the

[3] The DDLA provides a civil cause of action for damages for those harmed by illegal drug use under a market participant liability theory. Oklahoma adopted the Model Drug Dealer Liability Act promulgated by the American Legislative Exchange Council. Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Michigan, New Hampshire, Tennessee, South Carolina, and South Dakota have also adopted the model legislation.

Defendants' procedural due process rights in violation of Art. II, Section 7 of the Oklahoma Constitution ("[n]o person shall be deprived of life, liberty, or property, without due process of law") and the Fourteenth Amendment to the United States Constitution (no state shall deprive any person of life, liberty, or property, without due process of law."). Particularly, Defendant asserts that the "DDLA violates procedural due process protections through its use of statutory presumptions to shift, or eliminate completely, Plaintiffs' burden of proof on key elements of legal claims to damages" and "impermissibly creates liability where there is no causal relationship between Defendants and Plaintiffs." Motion to Dismiss, p.4.

1. ***Preliminary and Procedural Response to the Constitutional Challenge***

At the outset, it should be noted that, under well-settled Oklahoma law, the party asserting that a statute is unconstitutional bears the burden of proof establishing that the statute is unconstitutional. In Lafalier v. Lead-Impacted Communities Relocation Assistance Trust, 2010 OK 48, 237 P.3d 181at ¶15, the Oklahoma Supreme Court stated:

> Even though the moving party must show that there is no dispute of fact and that they are entitled to judgment as a matter of law, there is a presumption that every statute is constitutional. The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution. We scrutinize a constitutional attack on a statute with great caution and grave responsibility.

The Motion to Dismiss of Bain-Holloway fails to provide any persuasive or applicable, on-point, jurisprudence to support his contention that the DDLA is unconstitutional. The statute is presumed constitutional and Bain-Holloway has failed to overcome this presumption. Hence, the motion to dismiss, on a constitutional basis, should be summarily denied.

Additionally, at the outset, to challenge the constitutionality of the DDLA, Bain-Holloway is statutorily required to provide notice of his constitutional attack on the DDLA and serve a copy

of his motion on the Oklahoma Attorney General. §1653 (C). The certificate of service for the motion does not show notice or service on the Oklahoma Attorney General, and as such, the motion to dismiss, asserting a constitutional challenge to the DDLA should be summarily denied.

2. ***Substantive Response to the Constitutional Challenge***

In not one of the fifteen (15) states that have enacted the DDLA has a single court ever found any provision of the DDLA to be unconstitutional facially or in its application. Defendant cites not a single case (anywhere in any jurisdiction) holding any provision of the DDLA unconstitutional.

As a matter of well settled constitutional law, as a state statute that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification, this court must determine whether the DDLA passes constitutional muster, both as a matter of substantive and procedural due process by applying "rational-basis" judicial review. See e.g., General Motors Corp. v. Romein, 503 U.S. 181, 191, 112 S.Ct. 1105, (1992) (substantive due process).

"[T]he touchstone of due process is protection of the individual against arbitrary action of government." County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolf v. McDonnell, 418 U.S. 539, 558 (1974)). This constitutional requirement guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance. If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest. Washington v. Glucksberg, 521 U.S. 702, 721 (1997). But, as in this case, if an enactment burdens some lesser right, the infringement is merely required to bear a rational relation to a legitimate government interest. Id. 728; Reno v. Flores, 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest...demands no more than a 'reasonable fit' between governmental purpose...and the means chosen to advance that purpose."); Seegmiller

v. LaVerkin City, 528 F.3d 762, 771-72 (10th Cir. 2008) ("Absent a fundamental right, the state may regulate an interest pursuant to a validly enacted state law or regulation rationally related to a legitimate state interest."). In Dias v. City and Council of Denver, 567 F.3d 1169, 1182 (2009), the Tenth Circuit held:

> We clarify today that when ***legislative*** action is at issue, Glucksberg continues to govern, and only the traditional two-part substantive due process framework is applicable. . .Accordingly, because the "shocks the conscience" standard is inapplicable when a legislative enactment is challenged, we proceed to review the Ordinance under a rational basis analysis. (emphasis in original).

In order to satisfy the rational basis test, the DDLA need only be rationally related to a legitimate government purpose. As set forth above, the DDLA, constitutes a legitimate state interest in imposing civil liability on illegal drug dealers. (i.e. the DDLA stated purpose is "[a]n Act relating to public health and safety. . .providing civil liability for participation in the illegal drug market; providing for recovery of damages;. . ." 63 O.S. §2-421). This is clearly a rational and legitimate government purpose. Additionally, there is nothing irrational about the DDLA legislative provisions finding that if a drug dealer sells drugs of the same kind, during the same temporal period, in a defined specific geographical location that the person possessing with the intent to sell the drugs is harming those plaintiffs purchasing drugs in the defined marketplace. Furthermore, the DDLA civil liability scheme is tailored in such a manner that it links the amount of the drugs possessed or distributed to the specific size of the target market. The "market-share" statutory component of the DDLA is based on express mandate and guidance of the Oklahoma Legislature that common law causation requirements should be relaxed to prove civil liability because the common law effectively barred family members of drug users from filing suit against illegal drug dealers. In Agency For Health Care Administration v. Associated Industries of Florida, Inc., 678 So.2d 1239

(Fla. 1996), the Florida Supreme Court, stated that it could find no constitutional basis that would prohibit a legislature from approving the use of market-share liability as a means of apportioning liability under the Medicaid Third-Party Liability Act. Thus, this case clearly stands for the proposition and teaches that legislatures have the power and constitutional authority to create a cause of action that utilizes market-share liability.

In order to pass "rational-basis" constitutional review, "[a] statutory classification fails rational-basis review only when it rests on grounds ***wholly*** irrelevant to the achievement of the State's objective." Heller v. Doe by Doe, 509 U.S. 312, 324 113 S.Ct. 2637 (1993) (quotations omitted) (emphasis added). Also, "[t]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights mor proceed along suspect lines. . ." New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513 (1976). Further, rational-basis review does not give courts the option to speculate as to whether some other legislative scheme could have better regulated the evils in question. Mourning v. Family Publ'n Serv., Inc., 411 U.S. 356, 378, 93 S.Ct. 1652 (1973). In fact, a court cannot strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish (Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 50, *abrogated on other grounds by*, Healy v. Beer Inst. Inc., 491 U.S. 324, 342 (1989)), or because the statute's classifications lack razor-sharp precision (Dandridge v. Williams, 397 U.S. 471, 485 (1970)). Nor, can a court overturn a statute as un-constitutional on the basis that no empirical evidence supports the assumptions underlying the legislative choice. Vance v. Bradley, 440 U.S. 93, 110-11 (1979)[4].

[4] In a constitutional jurisprudence context, whether a statute passes constitutional muster, applying a rational-basis review standard, converges in both equal protection and substantive due process cases. Hence, equal protection cases, applying the "rational-basis" standard are

In this case, the Defendant, "attacking the rationality of the legislative classification [has] the burden 'to negat[e] every conceivable basis which might support it[.]'" FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). Obviously, it is self evident that the Defendant cannot negate whatsoever the legitimate state interest of creating a statutory scheme to impose civil liability on illegal drug dealers. And, the very legitimate purpose of to provide persons injured by illegal drugs with a civil cause of action for damages against persons who knowingly participate in the illegal drug market in Oklahoma. And, the very legitimate purpose of relaxing common law causation requirements to prove civil liability. Moreover, it is a rational legitimate legislative purpose, to impose "market liability" in that a drug dealer like, Bain-Holloway, by possessing with intent to distribute marijuana is making more marijuana available within that market that harms plaintiffs.

"The Supreme Court has not invalidated a statute on substantive due process grounds where only economic rights are implicated since the Lochnerean period." Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U.DaytonL.Rev. 313, 321 (1991). The "Lochner Era" essentially ran from the Court's decision in Lochner v. New York, 198 U.S. 45 in 1905 to Nebbia v. New York, 291 U.S. 502 in 1934. The "Lochner Era" stood as a "symbol of unrestrained judicial activism" where the Court made the grave mistake of becoming involved in the formation of public policy by substituting its own judgment for that of the Congress and of the state legislatures. See *The Oxford Companion to the Supreme Court*, 511 (Kermit Hall ed. 1992) and William B. Lockhart, *Constitutional Law*, 359

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illustrative, persuasive, and helpful in the context of a due process constitutional challenge to a legislative statutory enactment.

(7th ed. 1991). The United States Supreme Court has not struck down economic legislation under the Substantive Due Process Clause since 1937. Id. at 359 Indeed, the "Lochner Era" is somewhat of a misnomer since the Supreme Court, despite invalidating an estimated 197 state or federal statutes, upheld an even larger number of statutes during the same era in cases that were challenged on due process or equal protection grounds. Laurence H. Tribe, *American Constitutional Law* §8.2, at 435, n.2 (1995).

It is presumed that the legislatures, having been elected by the people, understand and appreciate the needs of society. Additionally, the states have a broad range of legislative discretion, and courts generally cannot review the propriety of legislative acts unless the legislation is irrational, arbitrary, and unreasonable. Arizona Cooper Co. v. Hammer, 250 U.S. 400, 419 (1919). *Accord* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 Const. Comment 7 (1996), where Brownstein stated:

> Judicial decisions applying constitutional principles displace the people's judgment regarding the laws that govern society. The laws enacted by democratic representatives may not be wise. Indeed, they may be egregiously unfair and hurtful. Nonetheless, the appropriate response to such legislation should be political accountability, not judicial usurpation of the legislature's prerogatives.

It is no doubt that the DDLA may impose a harsh civil liability scheme on drug dealers, in Oklahoma, however, it is for the legislature, not the courts, to balance the advantages and disadvantages of the DDLA requirements. Under our system of government, Drug Dealer Defendants, such as Bain-Holloway, "'must resort to the polls, not to the courts'" for protection against the DDLA's perceived improper statutory civil liability scheme.

In short, the provisions of the DDLA advance a legitimate state interest and the DDLA is rationally related to this legitimate end. The motion to dismiss should be summarily denied.

3. ***Unique Issues re Constitutional Challenge By Chase Bain-Holloway***

The crux and foundation of the "irrational [un-constitutional] statutory presumptions" of the DDLA asserted by Defendant Bain-Holloway are premised on the contention that he, under the statute, is "presumed" to have participated in the illegal drug market which was the same market as that in which Plaintiffs' mothers participated. Motion to Dismiss, p.5. As stated above, On July 12, 2012, with his counsel Paul Brunton, Bain-Holloway, entered his plea of guilty, admitting that on March 15, 2012, "I possessed marijuana with intent to sell. This took place in Tulsa County, OK."[5] The court accepted the guilty plea and found the plea of Chase Brian-Holloway to be knowingly and voluntarily entered. Id. ***The Court then did not enter any conviction, but deferred the sentence to June 12, 2017.*** Id. Under the applicable DDLA statutory market presumption provision, there is a two (2) year presumption prior to the "conviction." In the case of Defendant Brian-Holloway, he was not "convicted"-he received a deferred sentence. Therefore, the constitutional "market place" presumption attack of Brian-Holloway is totally misplaced and does not even apply to him. Indeed, in the case of this Defendant, it will be under the DDLA a question of fact for the jury to determine if he participated in the same illegal drug market as that in which Plaintiffs' mothers participated. Since, Defendant Brian-Holloway never received a "conviction" the purported un-constitutional presumption of 63 O.S. §2-431(B) (when a defendant is convicted under state or federal drug laws, that defendant is estopped from denying participation in the relevant drug market target community) is not even applicable! Defendant Brian-Holloway has the right and ability to present whatever

[5] See Plea of Guilty, attached hereto as Exhibit "B", and filed of record in State of Oklahoma v. Chase Patterson Brian-Holloway, Case No. CF-2012-1220, on July 12, 2012, in the District Court of the Fourteenth Judicial District of the State of Oklahoma Sitting In and For Tulsa County.

evidence he so chooses to persuade the jury that he was not a participant in the defined illegal drug market target community. Plaintiffs, through counsel, under the DDLA civil liability scheme have always planned to introduce sufficient evidence, as to the "deferred", non-conviction, defendants, such as Defendant Brian-Holloway, to meet the DDLA act burden of proof that by, clear and convincing evidence, the "deferred" defendants were a actual participant in the defined illegal drug market target community of Tulsa County. The motion to dismiss should be summarily denied.

DDLA Does Not Violate The Double Jeopardy Clause

It would be only if and when a state government entity initiates and files a civil lawsuit under the DDLA (63 O.S. §2-424(A)(4) allowing a "governmental entity" to bring an action for damages caused by use of an illegal drug by an individual) against a drug dealer whom the government has already convicted of illegal drug dealing, and whose property may have been forfeited, that a double jeopardy constitutional attack of the DDLA could arise where the damages sought by the government under the DDLA are more punitive than remedial. However, it is elemental that the Double Jeopardy Clause is not implicated, as in this civil proceeding, where there has been no state action. United States v. Halper, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.). The motion to dismiss should be summarily denied.

Standard Regarding Motion to Dismiss

It is well settled jurisprudence that "[n]o dismissal for failure to state a claim upon which relief may be granted should be allowed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle relief." Gens v. Casady School, 2008 OK 5, ¶ 8, 177 P.3d 565, 569 (citation omitted). "When reviewing a motion to dismiss, the court must take as true all of the challenged pleading's allegations together with all reasonable inferences which

may be drawn from them." Fanning v. Brown, 2004 OK 7, ¶ 4, 85 P.3d 841, 844 (citing Hayes v. Eateries, Inc., 1995 OK 108, 905 P.2d 778, 780). "The function of a motion to dismiss is to test the law of the claims, not the facts supporting them." Gens, 2008 OK 5, ¶ 8, 177 P.3d at 569 (citing State ex rel. Wright v. Oklahoma Corp. Comm'n, 2007 OK 73, ¶ 52, 170 P.3d 1024; Estate of Hicks ex rel. Summers v. Urban East, Inc., 2004 OK 36, ¶ 5, 92 P.3d 88)) (emphasis added). And, "The movant bears the substantial burden of demonstrating any insufficiency." Id. (citations omitted).

In Fanning v. Brown, 85 P.3d 841, 848 (Okl.2004), the Oklahoma Supreme Court discussed the stringent standard required in order to grant a motion to dismiss: "[w]hen reviewing a motion to dismiss, the court must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them. (citation omitted). '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 him to relief.'" Frazier v. Bryan Mem. Hosp., 1989 OK 73, ¶ 13, 775 P.2d 281, 287.' (emphasis in original). Furthermore, the burden to show the legal insufficiency of the petition is on the party moving for dismissal and a motion made under 12 O.S.2001, § 2012(B)(6) must separately state each omission or defect in the petition; if it does not, the motion shall be denied without a hearing. (citation omitted). Motions to dismiss are usually viewed with disfavor under this liberal standard. The burden of demonstrating a petition's insufficiency is not a light one." Id. at 844, 845.

In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007), the U.S. Supreme Court set forth a new standard for a 12(b)(6) motion to dismiss. The Tenth Circuit, in Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008), instructed that the standard is a middle ground between "heightened fact pleading" (which is expressly rejected) and

complaints that are no more than "labels and conclusions" which courts should not permit. As set forth in Robbins, accepting the allegations, in the Petition, as true they must establish that the plaintiff plausibly, and just not speculatively has a claim for relief. Id. at 1247. It is abundantly clear that the allegations, in the Petition, more than adequately establish, under the prevailing applicable law of Twombly, that Plaintiffs, in this case, plausibly have alleged a claim for relief under the DDLA against Defendant Bain-Holloway.

Plaintiffs' Claims Are Clearly Filed Within The Statute Of Limitations

The DDLA 12 O.S. §2-433 provides for a two (2) year statue of limitations:

> Except as otherwise provided in this section, a claim under the Drug Dealer Liability Act shall not be brought more than two (2) years after the cause of action accrues. A cause of action accrues under the Drug Dealer Liability Act when a person who may recover has reason to know of the harm from illegal drug use that is the basis for the cause of action and has reason to know that the illegal drug use is the cause of the harm.

Additionally, the DDLA, 12 O.S. §2-433(B) provides:

> For a plaintiff, the statute of limitations under this section is tolled when the individual potential plaintiff is incapacitated by the use of an illegal drug to the extent that the individual cannot reasonably be expected to seek recovery under this act ***or as otherwise provided for by law***. For a defendant, the statute of limitations under this section is tolled until six (6) months after the individual potential defendant is convicted of a criminal drug offense as otherwise provided for by law. (emphasis added)

Defendant Bain-Holloway misstates what the Plaintiffs alleged in their lawsuit. In ¶16 (for Plaintiff S.S.), ¶223 (for Plaintiff P.D.) and ¶430 (for Plaintiff A.M.) it is alleged the mothers of the respective plaintiffs have been individual users of various drugs since at least January 1 of 2011. 12 O.S. §2-433(A) provides:

> Except as otherwise provided in this section, a claim under the Drug Dealer Liability Act shall not be brought more than two (2) years after the cause of action accrues.

So under the DDLA (except as otherwise provided) the two (2) year time period does not begin until the action ***accrues***. The Plaintiffs in this matter are minors. As alleged in the Petition S.S. is 9 years old, P.D. is 2 years old and A.M. is 2 years old. (See Paragraph 12) As alleged in the Petition, and accepted as true, children of such tender years could not possibly be expected to have "reason to know of the harm from illegal drug use that is the basis for the cause of action and has reason to know that the illegal drug use is the cause of the harm." Since the minor children could not be expected to have "reason to know of the harm from illegal drug use" and could not be expected to "know that the illegal drug use is the cause of the harm" than the two year time period has not began to run. Therefore, the claims cannot be barred by the statute of limitations. Defendant's motion to dismiss should be summarily denied.

Furthermore, Oklahoma statutory law provides that if "a person entitled to bring an action...be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one (1) year after such disability has been removed." See Title 12 O.S. Section 96. In Hamilton By and Through Hamilton v. Vaden, 721 P2d 412, 416 (Okla. 1986) in construing 12 O.S. Section 96 the Supreme Court stated "[t]he general rule is that after a guardian ad litem has been appointed for a minor, the guardian has the right, but not the obligation, to sue within the prescribed period of limitation. The guardian's failure to bring suit, or the discontinuation of a suit within the statutory period does not prejudice the minor's rights. The action is not barred by the two-year limitation until one year after the disability of infancy has been removed." Hence, Defendant's motion to dismiss, on the basis of the statute of limitations, should be summarily denied.

The DDLA Specifically Authorizes
Loss Of Consortium Claims

The Motion to Dismiss, p.16, incorrectly asserts that claims for loss of consortium must be

dismissed as recovery can be made only upon the permanent lost of care, comfort and companionship. This argument is completely contrary to the express language of the DDLA statute itself which provides:

> A person entitled to bring an action under this section may recover all of the following damages: 1. Economic damages including, but not limited to, the cost of treatment and rehabilitation, medical expenses, loss of economic or educational potential, loss of productivity, absenteeism, support expenses, accidents or injury, and any other pecuniary loss proximately caused by the illegal drug use; 2. ***Non-economic damages, including, but not limited to***, physical and emotional pain, suffering, physical impairment, emotional distress, mental anguish, disfigurement, ***loss of enjoyment, loss of companionship, services and consortium, and other non-pecuniary losses proximately caused by an individual's use of an illegal drug***[.] (emphasis added).

(See Title 12 O.S. Section 4-424)(C)(2)

As in the case of the other ill-fated basis of Defendant Bain-Holloway's motion to dismiss, the DDLA statute itself, on its face, serves as a death knell for his argument concerning the loss of consortium claims. The motion to dismiss should be summarily denied.

CONCLUSION

For the foregoing reasons, Plaintiffs, through counsel, request that Defendant Chase Bain-Holloway's Motion to Dismiss With Prejudice be denied in its entirety.

Respectfully Submitted,

C. Robert Burton, OBA# 14195
The Burton Law Firm
1611 South Utica Ave, #335
Tulsa, OK 74104-4909
(918) 607-4891
RobtBurton@aol.com

AND

Kevin D Adams, OBA#18914
Attorney at Law
210 West 12th Street
Tulsa, OK 74119
918-582-1313
LawyerAdams@me.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 20, 2013, a true and correct copy of the above foregoing instrument was hand-delivered to:

Joel Wohlgemuth
Norman Wohlgemuth Chandler & Jeter
2900 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103

_____
Robert Burton