THE DISTRICT COURT
OF THE CHEROKEE NATION

THE CHEROKEE NATION, Plaintiff, v. MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN; CVS HEALTH; WALGREENS BOOTS ALLIANCE, INC.; WAL-MART STORES, INC., Defendants.	)	Case No. CV-2017-203

MOTION TO DISMISS FOR LACK OF JURISDICTION BY DEFENDANT AMERISOURCEBERGEN DRUG CORPORATION AND BRIEF IN SUPPORT

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MOTION TO DISMISS FOR LACK OF JURISDICTION BY DEFENDANT AMERISOURCEBERGEN DRUG CORPORATION AND BRIEF IN SUPPORT

Pursuant to Dist. Ct. R. 123, Defendant AmerisourceBergen Drug Corporation ("ABDC")[1] respectfully moves the Court to dismiss the above-captioned action against it for lack of jurisdiction under federal law, as well as lack of subject-matter and personal jurisdiction under tribal law.

RESERVATION OF RIGHTS

ABDC has reserved and continues to reserve its right to assert that the Cherokee Nation lacks the authority and jurisdiction to regulate its conduct or to prosecute or hear the above-captioned litigation. As set forth in Defendants' motion to stay, filed contemporaneously herewith, Defendants have filed an action in federal court seeking a declaration that jurisdiction is lacking herein and that tribal exhaustion is not required. However, pending a ruling from the federal court on that request or from this Court on the motion to stay, ABDC respectfully presents this motion to dismiss for lack of jurisdiction. Pursuant to the Nation's laws, including District Court Rule 123 and the Federal Rules of Civil Procedure, ABDC may present additional grounds for dismissal at a later time or hearing.

INTRODUCTION AND BACKGROUND

ABDC is a wholesale distributor of pharmaceutical products. It does not manufacture drugs, and it does not sell them directly to the public. Rather, ABDC is a "logistics company" – an entity responsible for getting FDA-approved drugs from the pharmaceutical companies who manufacture them to the DEA-registered pharmacies who dispense them. As a result, much of

[1] ABDC is listed merely as "AmerisourceBergen" in the caption and body of the Petition. However, the summons was issued "To the Above Named Defendant: AMERISOURCE BERGEN DRUG CORPORATION," care of ABDC's registered service agent with the State of Oklahoma, so ABDC understands that it is the intended defendant herein.

ABDC's distribution activities and business necessarily occurs at its facilities – none of which are in Oklahoma. ABDC picks, packs, and ships products from its distribution centers (the nearest of which is in Kansas City, Missouri) and then delivers the product to its customers, whether in Oklahoma or elsewhere, using third-party transportation partners.

Without any evidence, basis, or detail, the Nation has named ABDC as a defendant in this lawsuit apparently due to its national market share and name recognition. ABDC does not supply drugs to the Nation's pharmacies. ABDC has not entered into any contracts with the Nation. The Nation has offered no basis for asserting that ABDC's conduct in any way is subject to the Nation's jurisdiction. Even if the Nation could point to any ABDC conduct of any kind that was relevant to this case, such conduct would not have occurred on tribal land. There is no basis for the assertion of jurisdiction over ABDC here.

ARGUMENT AND AUTHORITIES

I. There is No Jurisdiction under Federal Law

Under federal law, which governs the scope of the Nation's jurisdiction, the Cherokee Nation has no authority to regulate (and has not regulated) the conduct allegedly at issue in the above-captioned action. The Nation further lacks the jurisdiction to prosecute or hear the above-captioned action for the following reasons: (1) any conduct of ABDC that could conceivably be relevant to the Nation's claims occurred, if at all, outside of Indian country and, indeed, outside the 14-county "jurisdictional area"; (2) even if that conduct had occurred in Indian country, the Nation presumptively lacks jurisdiction over ABDC, a nonmember, and the Nation cannot meet its burden of showing otherwise; and (3) any inherent jurisdiction of the Cherokee Nation has been foreclosed by the Federal Controlled Substances Act, which provides for exclusive federal court jurisdiction. Much of the briefing and support for this issue is being provided to this Court in the federal filings attached to the motion to stay, and ABDC incorporates those facts and

arguments by reference. ABDC also joins the motions to dismiss of the other Defendants to this action, to the extent those arguments are applicable to it.

A. ABDC's Conduct (if any) Occurred Outside of the Nation's Indian Country

ABDC has conducted no activity within the Nation's "jurisdictional area", much less in the more limited Indian country,[2] that would support Plaintiff's claims. Attached hereto as Exhibit "A" is the Declaration of AmerisourceBergen Drug Corporation, which has also been filed in the Federal Action (the "Potts Declaration"). As shown in the Potts Declaration, ABDC has no distribution centers and has conducted no activities relevant to jurisdiction in this lawsuit in Northeastern Oklahoma, much less within Indian country. For example,

- ABDC does not own or operate any facilities on
    - land owned by, or held in trust by the United States for the benefit of the Cherokee Nation or its members (Potts Decl. ¶ 10);
    - restricted allotments (*id.* ¶ 11);
    - land set aside by the federal government for the use of the Nation as Indian land under federal superintendence (*id.* ¶ 12); or even
    - any land within the Nation's "jurisdictional area", regardless of the status of the land (*id.* ¶ 13).
- To ABDC's knowledge, its pharmacy customers do not include the Cherokee Nation or its members (*id.* ¶ 14);
- For the ABDC pharmacy customers who fall within the 14 counties of Northeastern Oklahoma, ABDC does not even provide the drug shipments, that is done by third parties (*id.* ¶ 17).

There is simply no conduct by ABDC on Cherokee Nation Indian country[3] at issue in this case.

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[2] The Nation's tribal assets include about 66,000 acres of land and 96 miles of Arkansas river bed within the 7,000 square mile (4.48 million acre) "jurisdictional area." *See* "What is the Cherokee Nation Today?," Our History, Cherokee Nation, available at http://www.cherokee.org/About-The-Nation/History/Facts/Our-History (last visited June 12, 2017). To the extent that the tribal assets are all Cherokee Nation Indian country, it comprises approximately 1.47% of the total jurisdictional area.

[3] Indian country generally consists of (1) land within a reservation; (2) certain allotments; and (3) dependent Indian communities. *See, e.g.*, 25 U.S.C. § 1151; *DeCouteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 427

As a result, the Court's jurisdictional inquiry should end here. The Nation does not have the authority to regulate ABDC's conduct, and there can be no adjudicatory jurisdiction over the Nation's claims. "[T]he sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (citations and internal quotation marks omitted). As a result, "tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). For this reason, the Court cannot assert jurisdiction over claims concerning ABDC's conduct outside of Indian country. *Id.* at 935 (finding no colorable claim of tribal court jurisdiction over a nonmember's claims of trademark infringement on the Internet and beyond the tribe's reservation); *see also Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782 (7th Cir. 2014) (finding no jurisdiction where the activities at issue in the case – applying for, negotiating, and executing loans – did not occur inside the reservation); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091, 1093 (8th Cir. 1998) (finding jurisdiction plainly lacking where the activities at issue in the case – manufacture, sale, and distribution of Crazy Horse Malt Liquor – were not conducted by the defendant on the reservation); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court*, 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (finding no jurisdiction over off-reservation activities). The Nation cannot assert jurisdiction over the actions of ABDC, which did not occur on a reservation or otherwise within the Nation's Indian country.

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n.2 (1975) (noting that § 1151 "generally applies" to questions of civil jurisdiction). The Nation does not assert that the entirety of the "jurisdictional area" is a reservation, and there are no allegations of activities on allotments or within dependent Indian communities.

B. Even if Any Relevant Conduct Occurred in Indian Country, the Nation Cannot Meet Its Burden to Overcome the Presumption against Tribal Jurisdiction over Nonmembers

Given the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains,* 554 U.S. at 330 (citations and internal quotation marks omitted). As a result the "burden rests on the tribe," *id.*, to establish one of the exceptions set forth in *Montana v. United States* – (1) the regulation, through taxation, licensing, or other means, of the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements; or (2) the exercise of civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. 450 U.S. 544, 565-66 (1981). Before either exception may apply, the Nation must show that the attempted exercise of tribal power "is necessary to protect tribal self-government or to control internal relations," because any "exercise of tribal power beyond what is necessary" to do so "is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 565.

1. The Nation Cannot Show that this Exercise of Power is Necessary to Protect Tribal Self-Government or Control Internal Relations

There is nothing about the alleged conduct of ABDC that would make it impossible for the Cherokee Nation to govern itself or control internal Cherokee Nation relations. The Cherokee Nation has a strong self-government, functioning elections, and an active tribal council. Whether and how ABDC distributes products from drug manufacturers to non-Indian pharmacies does not affect this and certainly is not necessary to it. The Cherokee Nation cannot

claim jurisdiction where the "right at issue in this case" is the Cherokee Nation's "claimed right to make its own laws and have *others* be governed by them," not itself. *MacArthur v. San Juan County*, 497 F.3d 1057, 1075 (10th Cir. 2007) (emphasis in original).

The Court's analysis should end here, if it has not done so already. There is no jurisdiction.

2. This Case is Not the Regulation of the Activities of a Nonmember Who Has Entered into Consensual Relationships with the Nation or its Citizens

In any event, ABDC has not entered into contractual or other consensual relationships with the Nation or its citizens, and the Nation's action is not regulation of such activities through taxation, licensing, or other means. ABDC does not manufacture or market opioids. (Potts Decl. ¶ 6.) Rather, ABDC purchases opioids from DEA-registered manufacturers and sells to DEA-registered dispensers, like pharmacies, who must be registered with the State in which they do business (here, Oklahoma). (*Id.*) ABDC is unaware of any efforts by the Nation to register, license, or otherwise seek to regulate wholesale distributors of controlled substances, and ABDC is not licensed by or registered to do business with the Nation. (*Id.* ¶¶ 8-9, 18.) ABDC is further not a Cherokee Nation corporation, nor is it formed under the laws of any other tribe; rather ABDC is formed under the laws of the State of Delaware and headquartered in the State of Pennsylvania. (*Id.* ¶¶ 2, 8.) Indeed, after a good faith investigation and inquiries, ABDC is not aware of <u>any</u> business relationship that is identified as being with the Cherokee Nation or any of its members. (*Id.* ¶ 14.) ABDC is not aware of any consensual relationship it has entered into with any entity identified or represented to it to be acting in the capacity of the Cherokee Nation or one of its citizens. (*Id.* ¶ 16.)

Even if it had such a relationship, ABDC cannot be deemed to have consented to the *post hoc* application of tort laws,[4] particularly laws that have not yet been formed by the common law or statutes that were not enacted until last summer, like the Comprehensive Access to Justice Act of 2016, LA-16-16 (July 13, 2016) (codified at 12 CNCA §§ 1-30).

Finally, even if there could be regulation based on a consensual relationship, there still must be a nexus, a direct relationship, between the two. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

There is no consensual relationship, and no direct connection to the case here.

3. The Nation Cannot Show that ABDC's Conduct Threatens the Cherokee Nation's Political Integrity, Economic Security, or Health or Welfare

Finally, the Nation cannot meet its burden of showing the sort of egregious threat necessary to meet *Montana's* second exception. To determine "when non-Indians' conduct menaces the political integrity, the economic security, or the health or welfare of the tribe," the Court must find that the conduct does "more than injure the tribe, it must imperil the subsistence of the tribal community." *Plains*, 554 U.S. at 341 (citations and internal quotations omitted). The Nation cannot do so here.

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[4] ABDC questions whether tort suits could ever properly constitute consensual regulation under *Montana*. While some federal courts have recognized tort claims against nonmembers, they have arisen in far different circumstances. *See, e.g., Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1228 (D.N.M. 2013) (tortious interference with the very contractual relationship that formed the basis of the consensual relationship with the tribe). The United State Supreme Court has not yet held that a tort claim can be a form of regulation through "other means" of nonmembers, having failed to reach a majority in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, --- U.S. ---, 136 S. Ct. 2159 (Mem) (2016) (per curiam). *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987) (an affirmance by an equally divided court has no precedential weight). Indeed, the Supreme Court has, with one minor exception "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land" and has, without exception, "never held that a tribal court had jurisdiction over a nonmember defendant" under any circumstances. *Nevada v. Hicks*, 533 U.S. 353, 358 n.2, 360 (2001). In any event, there is no consensual relationship here, and the *post hoc* application of previously non-existent laws cannot have been consented to.

First, the application of this second exception must be based on the conduct of ABDC, the nonmember. "*Montana's* second exception 'can be misperceived.' The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government." *Atkinson Trading*, 532 U.S. at 657, n.12 (emphasis in original).

Second, the second exception does not relate to just any threatening conduct, it must imperil the subsistence of the Nation as a sovereign entity. To be sure – although not based on any conduct of ABDC – the Nation paints a picture of the threat posed to all of the United States by the illegal theft, diversion, and misuse of opioids by a multitude of persons (none of whom are defendants here). However, this is a threat that such actions "pose for any society," which is "not what the second *Montana* exception is intended to capture." *Philip Morris*, 569 F.3d at 943. "Rather, the second exception envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty." *Id.*

In effect, the Nation is attempting to assert jurisdiction over ABDC for its conduct on non-Indian lands and its relationships with non-Indian pharmacies on the mere speculation that some other person may have subsequently conducted some illegal activity at some later point with drugs legally dispensed from those non-Indian pharmacies (who, again, are not ABDC). This is not something that is necessary to the Nation's sovereignty and is not within its jurisdiction.

C. The Federal Controlled Substances Act Prohibits the Attempted Suit by the Cherokee Nation in this Court

As set forth in Defendant's Motion to Stay and the attached federal briefing, the effect of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, is a matter that should be left to the federal court. ABDC merely outlines the issues here to further demonstrate the Nation's

lack of jurisdiction should the Court not stay this action or should tribal exhaustion of this issue be required.

All of the claims brought by the Nation, however denominated, are nothing more than an attempt to enforce the obligations allegedly imposed on ABDC and the other Defendants by the federal CSA. In the Petition, the Nation extensively references duties of the Distributor Defendants under the CSA, including the efforts of the federal Drug Enforcement Administration ("DEA") to prevent improper distribution and use of opioids. (Pet. ¶¶ 83-99.) Indeed, the Nation asserts, "The Distributor Defendants' violation of [the statutory] requirements [of the federal CSA] shows that they failed to meet the relevant standard of conduct that society expects from them." (Pet. ¶ 81.) All five causes of action asserted by the Nation are based on the distribution practices of the Distributor Defendants, which are purportedly improper, negligent, or otherwise actionable due to their alleged failure to comply with the CSA. (*See, e.g.*, Pet. ¶ 174 (CNUDTPA); *id.* ¶ 181 (nuisance); *id.* ¶ 194-95, 198 (negligence/gross negligence); *id.* 210, 214 (unjust enrichment); *id.* 218 (civil conspiracy).)

The Nation cannot enforce the federal CSA in tribal court. Instead, "according to its plain terms, the CSA is a statute enforceable only by the [United States] Attorney General and, by delegation, the Department of Justice." *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016) (internal quotation marks and alterations omitted), *aff'd sub nom. Safe Streets Alliance v. Hickenlooper*, --- F.3d ---, 2017 WL 2454359 (10th Cir. June 7, 2017). This is a key part of the comprehensive regulatory framework enacted by Congress. Only federal district courts (or certain other courts in United States territories and possessions, which do not include the Nation) have authority to enforce the CSA. 21 U.S.C. § 882(a). Congress specifically addressed tribes in other provisions of the CSA. *See, e.g.*, 21 U.S.C. § 802(52)(B)(iv) (excluding

"a health care facility owned or operated by an Indian tribe or tribal organization" from the term "online pharmacy"); § 822a(a)(1) & (b) (including "tribal law enforcement agency" as a "covered entity" with which the U.S. Attorney General will coordinate in expanding prescription disposal sites); § 831(g) (providing for certain notifications relating to "Indian tribes or tribal organizations with which the Secretary has contracted or compacted under the Indian Self-Determination and Education Assistance Act . . . to provide pharmacy services"); § 872(c) (providing that the U.S. Attorney General may authorize persons engaged in research to withhold identities of their subjects, who then may not be compelled in any "tribal . . . proceeding" to provide those identities); § 872a (including representatives of tribal law enforcement on the U.S. Attorney General's advisory panel); § 873 (providing for the U.S. Attorney General's cooperation with tribal agencies concerning the traffic in controlled substances and grants to tribal governments to analyze, investigate, control, and prevent diversions of controlled substances); § 878 (allowing the U.S. Attorney General to designate tribal law enforcement officers to perform certain law enforcement duties).

The CSA did not, however, provide for tribal enforcement of its terms by a tribe's Attorney General. The Nation cannot enforce the CSA. *Cf. Nevada v. Hicks*, 533 U.S. 353, 367-68 (2001) (finding "no provision in federal law [that] provides for tribal-court jurisdiction over [42 U.S.C.] § 1983 actions" when other statutes "proclaim tribal-court jurisdiction over certain questions of federal law"); *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1052 (D. Ariz. 1981) (finding tribal claims would conflict with a superior federal interest).

D. The Nation's Inherent Lack of Jurisdiction Here Remains Unchanged by Treaty or Statute

As noted above, the Nation lacks jurisdiction, under federal law, to pursue the above-captioned action. References to other federal laws or treaties do not alter this.

For example, Plaintiff asserts that the Treaty of 1866 "recognizes the inherent jurisdiction of the courts of the Cherokee Nation." (Pet. ¶ 20.) However, the United States Supreme Court has made it clear that a tribe's inherent jurisdiction has been strictly curtailed. "[T]he tribes have, by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves." *Plains*, 554 U.S. at 328 (internal quotation marks and alternations omitted). As such, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

In any event, even if the Treaty of 1866 could be construed as providing any additional basis for tribal court jurisdiction, such basis was lost by the limitation of that treaty jurisdiction in the Act of 1890 and the elimination of the courts referenced in that treaty in 1898. *See Alberty v. United States*, 162 U.S. 499, 502-03 (1896); Act of May 2, 1890 (Oklahoma Organic Act), ch. 182, § 30, 26 Stat. 81, 94; Act of June 28, 1898 (Curtis Act), ch. 517, § 28, 30 Stat. 495, 504.

The other federal statutes and regulations cited by Plaintiff have no relation to this case and provide no basis for asserting a delegation of federal power here. (Pet. ¶¶ 31-34.) *See, e.g.*, 25 U.S.C. §§ 5384-5385 (allowing for tribes to enter into self-governance compacts and funding agreements); 25 U.S.C. § 2020(d)(1) (allowing, *inter alia*, tribes to receive grants "relating to the education of Indian children on reservations (and on former reservations in Oklahoma)"); 25 U.S.C. § 3653(3) (including "former Indian reservations in Oklahoma" in the chapter on Indian tribal justice technical and legal assistance); 25 U.S.C. § 4302 (defining "former Indian reservations in Oklahoma" as including lands "within the jurisdictional areas of an Oklahoma Indian tribe" for purposes of the chapter on Native American business development, trade promotion, and tourism); 25 U.S.C. § 3202(9) (including "former Indian reservation in Oklahoma" for treatment as a reservation for purposes of the chapter on Indian child protection

and family violence prevention grant programs); 25 U.S.C. § 3103(12) (including "former Indian reservations in Oklahoma" for treatment as reservations in the chapter on national Indian forest resources management); 40 U.S.C. § 523(b)(2) (allowing the Secretary of the Interior to place land into trust if located "within the boundaries of former reservations in Oklahoma"). None of these statutes delegates any federal authority to expand the jurisdiction of the Nation or its courts regarding the distribution of controlled substances at issue here.

II. The Court Additionally Lacks Subject-Matter Jurisdiction under Tribal Law

Even if the Nation had the authority, under federal law, to regulate ABDC's conduct and this case were an appropriate form of that regulation, this Court would still lack subject-matter jurisdiction under tribal law.[5] By statute, the territorial jurisdiction of this court extends only to "all '**Indian country**' also known as '**Cherokee country**' within the fourteen- (14) county area of northeastern Oklahoma as defined by the Treaties of 1828, 1833 and 1835 and the Patent of 1838 between the United States of America and Cherokee Nation, and at such other locations within the United States which qualify as 'Cherokee country.'" 20 CNCA § 25. As this and other sections of the Cherokee Nation Code recognize, the boundaries of Indian country are a smaller subset of the outer boundaries of the Nation's 14-county "jurisdictional area", and the presence of Indian country is necessary for the Nation's jurisdiction. *See also, e.g.*, 26 CNCA § 61 (as amended by LA-12-16 (5/16/16)) ("In considering the location of precincts the Election Commission shall, whenever practicable, locate precincts on Indian Country as defined under Federal Law, thereby allowing Cherokee Nation legal jurisdiction over said areas."). As shown above, the conduct of ABDC on which the Nation brings suit did not occur, and could not have

[5] ABDC further notes that Plaintiff failed to include with its Petition "a certification by the attorney which demonstrates the subject matter jurisdiction of the Court." Dist. Ct. R. 1.

occurred, within the Nation's Indian country and is, therefore, outside the territorial and subject-matter jurisdiction of this Court.

The Nation's law further envisions civil actions between Indians and non-Indians as involving those non-Indians "who by their actions have submitted themselves to the jurisdiction" of this Court. 20 CNCA § 24. Again, as noted above, ABDC has taken no actions that could reasonably be seen as having submitted itself to the jurisdiction of this Court.

The Court lacks subject-matter jurisdiction under tribal law to hear the claims against ABDC.

III. The Court Further Lacks Personal Jurisdiction under Tribal Law

The Court cannot exercise personal jurisdiction over ABDC and remain consistent with the due process guarantees promised by the Indian Civil Rights Act or the Cherokee Nation Constitution. Article III, Section 3, of the Constitution of the Cherokee Nation provides that "the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law . . . ." Further, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(8) provides, "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . ." A court's personal jurisdiction is cabined by due process, unless further limited by statute. ABDC is unaware of any Cherokee Nation decisions relating to the nature and extent of the due process guaranteed by the Constitution in these circumstances, but the Indian Civil Rights Act, as a matter of federal law, should be construed in the manner set forth by federal decisions. So, ABDC will rely on federal decisions addressing the due process necessary for personal jurisdiction herein.

As with the other matters of jurisdiction, the Nation bears the burden of showing that ABDC is subject to the personal jurisdiction of the courts of the Cherokee Nation. *See, e.g.,*

Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733 (10th Cir. 1984) ("The plaintiff bears the burden of establishing personal jurisdiction over the defendant.").

Due process permits the exercise of personal jurisdiction over a nonresident defendant only so long as there are minimum contacts between that defendant and the forum and maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). This requirement may be met in one of two ways – (1) general jurisdiction based on the defendant's continuous and systematic contacts with the forum, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984); or (2) specific jurisdiction based on the defendant's activities related to the case at hand, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985). The critical issue to the due process analysis is whether the defendant's conduct and connection with the forum are such that it should reasonably anticipate being sued there. *Burger King*, 471 U.S. at 474. As the Supreme Court has long noted,

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958).

A. The Court Lacks General Personal Jurisdiction over ABDC.

Because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's continuous and systematic general business contacts in the forum. *Benton v. Cameco Corp.*, 375 F.3d 1070, 1080 (10th Cir. 2004). Here, there has been no "continuous and systematic general business" conducted by ABDC on Cherokee Nation lands. ABDC is not

licensed by or registered to do business in the Cherokee Nation. (Potts Decl. ¶ 9.) ABDC does not own or operate facilities within the Cherokee Nation's Indian country, or even within its broader "jurisdictional area". (*Id.* ¶¶ 11-13.) Although not indicative of continuous and systematic business, ABDC is not even aware of any business relationships it has with the Cherokee Nation or anyone identified as a Cherokee Nation citizen. (*Id.* ¶ 14.)

The Nation cannot show that the courts of the Cherokee Nation have general personal jurisdiction over ABDC. ABDC is not "at home" in the Cherokee Nation. *Goodyear*, 564 U.S. at 929. The exercise of such jurisdiction would "offend traditional notions of fair play and substantial justice," *Helicopteros*, 466 U.S. at 414, violating ABDC's due process rights.

B. The Court Lacks Specific Personal Jurisdiction over ABDC

The Court further lacks specific jurisdiction in this case. Specific jurisdiction requires that the plaintiff's claim arise out of or be related to the defendant's contact with the forum. *Helicopteros*, 466 U.S. at 414 n.8. To find specific jurisdiction, the Court must determine whether ABDC purposefully directed its activities at citizens of the Nation and whether the plaintiff's claims "result from actions by the defendant [*it*]*self* that create a 'substantial connection' with" the forum. *Burger King*, 471 U.S. at 472, 475 (emphasis in original).

The Nation has not alleged any specific facts tying ABDC to any of its claims. However, even the conclusory assertions in the Petition demonstrate that any relevant actions by ABDC – even had they actually occurred – would have occurred outside of Cherokee Nation Indian country (and, indeed, outside of Oklahoma). For example, the Nation states that the Distributor Defendants should have stopped or investigated shipments as suspicious orders (Pet. ¶ 112) or that they failed to control their supply lines (*id.* ¶ 114). All of this would necessarily occur at ABDC's out-of-state facilities. Indeed, while attempting to couch it as an allegation of lack of

due care, the Nation admits that the Distributor Defendants may not have visited the vaguely described "pharmacies servicing the Cherokee Nation". (*Id.* ¶ 115.)

Most importantly, however, the evidence shows that ABDC has no contacts with tribal lands or the Cherokee Nation.[6] The Nation's claims cannot arise out of nonexistent contacts.[7]

The Court has no personal jurisdiction over the Nation's claims against ABDC.

CONCLUSION

In the end, ABDC has been drawn into this speculative litigation by the Attorney General without any apparent connection between ABDC and the Cherokee Nation or its pharmacies. ABDC had no reason to suspect that its activities would subject it to the jurisdiction of the Nation or this Court. And, up until now, in a suit where the Nation reportedly hopes to obtain "hundreds of millions of dollars" in damages,[8] no one – including the Nation – had ever claimed otherwise. The Nation lacks jurisdiction over ABDC under federal law, and the Court further lacks jurisdiction to hear the Nation's claims. The Court should dismiss the above-captioned litigation.

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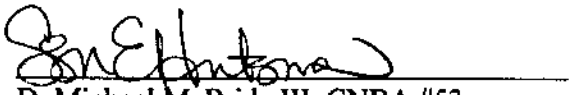
[6] As it does with all the defendants in this action, the Nation provides the rote conclusory recitation that ABDC "has engaged in consensual commercial dealings with the Cherokee Nation and its citizens, and has purposefully availed itself of the advantages of conducting business with and within the Cherokee Nation." (Pet. ¶ 14; *see also id.* ¶¶ 12-13, 15-17 (making an identical rote recitation as to the other defendants).) As shown above, this conclusory statement – which is completely unsupported by any allegations of fact – is wrong. In any event, the Nation must now provide evidence meeting its burden to show jurisdiction, and it cannot.

[7] As noted above, the Nation's claims are not akin to a products liability or tort claim, where a defective product was placed into the "stream of commerce" eventually harming a consumer. Rather, the Nation claims that legal and efficacious drugs are being stolen, diverted, or misused and claims that Defendants activities have somehow made such illegal actions by others easier. However, even if this were a products liability case, personal jurisdiction would be lacking where ABDC neither purposefully directed its actions at the Cherokee Nation forum, nor could it be aware that the products – sold to non-Indian pharmacies resale outside of Indian country – were being sold in Indian country. *Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 619 (10th Cir. 2012).

[8] Michael Nedelman, *Cherokee Nation sues pharmacies, drug distributors over opioid epidemic*, CNN (Apr. 24, 2017), *available at* http://www.cnn.com/2017/04/24/health/cherokee-nation-opioid-lawsuit/index.html (last visited June 12, 2017) (quoting "Richard Fields, special counsel to the attorney general of the Cherokee Nation").

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion to Dismiss was mailed, postage prepaid, this 12th day of June, 2017 to:

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; CVS HEALTH CORPORATION; WALGREENS BOOTS ALLIANCE, INC.; and WAL-MART STORES, INC., Plaintiffs, vs. TODD HEMBREE, ATTORNEY GENERAL OF THE CHEROKEE NATION, in his official capacity; JUDGE CRYSTAL R. JACKSON, in her official capacity; and DOE JUDICIAL OFFICERS 1-5; Defendants.	No. _____

DECLARATION OF AMERISOURCEBERGEN DRUG CORPORATION IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Kyle Potts, declare as follows:

1. My name is Kyle Potts. I am a District Director for AmerisourceBergen Drug Corporation ("ABDC") with responsibility for, *inter alia*, the eastern portion of Oklahoma and, in that capacity, with the assistance of counsel and various employees of ABDC, have performed or reviewed the results of good faith investigation and inquiries made to determine the accuracy of the factual statements set forth in this declaration, which are true and correct to the best of ABDC's current information, knowledge, and belief.

EXHIBIT A

2. ABDC is a wholly owned subsidiary of AmerisourceBergen Corporation, a publicly traded Delaware corporation. ABDC is incorporated in Delaware and headquartered in Pennsylvania.

3. ABDC has been named as a defendant in *The Cherokee Nation v. McKesson Corp., et al.*, CV-2017-203 (Cherokee Dist. Ct. April 20, 2017) (the "*Cherokee Nation* Action," Petition attached as Ex. A) (ABDC is referred to simply as "AmerisourceBergen" in the Petition) filed in the District Court of the Cherokee Nation. The *Cherokee Nation* Action alleges that ABDC has violated the federal Controlled Substances Act with regard to the distribution of prescription opioids.

4. ABDC is a wholesale distributor of pharmaceutical products, including all types of prescription medications, which include controlled substances, which in turn include various opioids.

5. ABDC is registered with the United States Drug Enforcement Administration ("DEA") and duly approved when and as required by the State of Oklahoma as a wholesaler authorized to distribute controlled substances, including opioids.

6. ABDC does not manufacture or market opioids. Rather, ABDC purchases opioids from DEA-registered manufacturers and sells to DEA-registered dispensers, including pharmacies, who are also licensed by the state in which they do business. ABDC does not dispense opioids or any controlled substances to the general public or patients.

7. Based upon the information available to ABDC, the Cherokee Nation does not register, license, or otherwise seek to regulate wholesaler distributors of controlled substances.

8. ABDC is not a member or corporation of the Cherokee Nation or any other Indian tribe.

9. ABDC is not licensed by or registered to do business with the Cherokee Nation.

10. ABDC does not own or operate any facilities on land owned by, or held in trust by the United States for the benefit of, the Cherokee Nation or any members of the Cherokee Nation.

11. ABDC does not own or operate any facilities on lands allotted to members of the Cherokee Nation that retain their restricted status.

12. ABDC does not own or operate any facilities on land set aside by the federal government for the use of Cherokee Nation Indians as Indian land under federal superintendence.

13. ABDC does not own or operate any facilities that are located within the so-called "Cherokee Nation Jurisdictional Area," as depicted on a map attached as Exhibit A to the Petition in the *Cherokee Nation* Action.

14. Upon knowledge, information, and belief based on good faith investigation and inquiries, ABDC has no business relationship that is identified as being with the Cherokee Nation or any of its members.

15. All distributions of controlled substances by ABDC into the Cherokee Nation Jurisdictional Area have at all times been made only to pharmacies and other entities that were duly registered by the DEA and duly licensed by the State of Oklahoma to dispense such substances, all as strictly controlled in accordance with applicable laws and regulations of the United States and the State of Oklahoma.

16. Upon knowledge, information, and belief based on good faith investigation and inquiries, ABDC has not entered into any consensual relationship through commercial dealing, contracts, leases, or other arrangements, with any entity identified as or otherwise represented to it to be acting in the capacity of the Cherokee Nation or a member of the Cherokee Nation.

ABDC has not entered into any such relationship with any entity located in the so-called Cherokee Nation Jurisdictional Area under an apprehension or reason to suspect that the relationship would in any way potentially be subject to oversight of any kind by the Cherokee Nation as opposed to the Constitutions and laws of the United States and the State of Oklahoma.

17. ABDC does not itself transport the controlled substances that it distributes to duly registered and licensed customers in the so-called Cherokee Nation Jurisdictional Area. That action is accomplished by third-parties contracted by ABDC for that purpose.

18. Prior to service of the *Cherokee Nation* Action, ABDC was not contacted by the Cherokee Nation or any representative of it regarding ABDC's distribution of controlled substances, nor has ABDC ever been notified that the Cherokee Nation sought to investigate, regulate, or otherwise affect ABDC's business decisions or actions.

19. ABDC estimates that defending the *Cherokee Nation* Action in the Cherokee Nation's tribal courts through an appeal will take several years, cost millions of dollars, and require the expenditure of hundreds of hours of ABDC management, employee, and consultant time. The value of these expenditures of time and money, once made, cannot be recovered from the Cherokee Nation and would constitute irreparable harm to ABDC.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 06/07/2017