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**THE DISTRICT COURT
OF THE CHEROKEE NATION**

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THE CHEROKEE NATION,

Plaintiff,

No. CV-2017-203

vs.

MCKESSON CORPORATION; CARDINAL
HEALTH, INC.; AMERISOURCEBERGEN;
CVS HEALTH; WALGREENS BOOTS
ALLIANCE, INC.; and WAL-MART
STORES, INC.,

Defendants.

THE CHEROKEE NATION
DISTRICT COURT
KUNISTHUNCOOYEA
COURT CLERK

**DEFENDANT CVS HEALTH CORPORATION'S
SPECIAL ENTRY OF APPEARANCE, MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION AND SUBJECT MATTER
JURISDICTION, AND SUPPORTING MEMORANDUM OF LAW**

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MOTION TO DISMISS

Defendant CVS Health Corporation (improperly named as “CVS Health”),¹ appearing specially, moves this Court to dismiss the claims against it for lack of personal jurisdiction, pursuant to Cherokee District Court Rule 123(2), and for lack of subject matter jurisdiction, pursuant to Cherokee District Court Rule 123(1).²

As set forth in greater detail in the supporting memorandum of law, below, this Court lacks both personal and subject matter jurisdiction as to CVS Health. In support of this motion, CVS Health also incorporates by reference the briefs of the other Defendants to the extent applicable to CVS.³

A. Lack of Personal Jurisdiction

In this case, the Cherokee Nation (“Plaintiff” or the “Tribe”) has filed a Petition (“Pet.”) suing CVS Health, along with five other unrelated companies, based on allegations that Defendants improperly sold opioid drugs to citizens of the Cherokee Nation. (*See, e.g.*, Pet. ¶¶ 5, 15.) But the Petition’s allegations do not apply to CVS Health. *See* Ex. A, Decl. of Thomas Moffatt (“Moffatt Decl.”). CVS Health is merely a holding company. *See id.* ¶ 5. It does not sell prescription medications to anyone (*id.*); the Tribe’s allegations to the contrary are simply inaccurate. Because CVS Health lacks relevant contacts with the State of Oklahoma (*id.*

¹ CVS Health Corporation is misnamed in the Petition as “CVS Health.” The use of the term “CVS Health” in corporate branding does not indicate activity by CVS Health Corporation, a public holding company without operations unrelated to its status as a holding company. (*See* Moffat Decl. ¶ 5.)

² Defendants CVS Health is appearing specially to contest jurisdiction because it believes this Court’s lack of jurisdiction is clear. CVS Health reserves its right to challenge Plaintiff’s claims on the merits, by motion or otherwise. Should the Court deny this motion, CVS Health asks that it be afforded an opportunity, consistent with Cherokee District Court Rule 125, to move to dismiss the Plaintiff’s claims on the merits.

³ CVS Health also incorporates by reference Defendants’ Motion to Stay During Pendency of Federal Court Action, and all exhibits thereto.

¶ 6), it does not have the requisite contacts with any jurisdiction within Oklahoma, including the 14-county area identified in the Petition. Accordingly, because CVS Health has *no* contacts with the “jurisdictional area” identified in the Petition, let alone contacts with Indian country within that area which could support the exercise of personal jurisdiction,⁴ the Court should dismiss the claims against CVS Health for lack of personal jurisdiction, as other courts have done. *See Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970, 984 (N.D. Cal. 2016); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 836-37, 863 (D.S.C. 2015).

Personal jurisdiction may be general or specific. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014); *Goodyear v. Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011). Both types are lacking here. Under *Goodyear* and *Daimler*, a court may exercise general, or “all-purpose,” jurisdiction over a corporate defendant only where it is “at home.” *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919). In all but an “exceptional case,” a corporation is only “at home” where it has its principal place of business or where it is incorporated. *See Daimler*, 134 S. Ct. at 760-61 & n.19. CVS Health is neither incorporated nor headquartered anywhere in the State of Oklahoma – let alone in an area of Indian country⁵ or the

⁴ For purposes of personal jurisdiction, the proper touchstone is not contacts with the 14-county “jurisdictional area” identified in the Petition (Pet. ¶ 28), but rather contacts with areas of “Indian country” (as defined in 18 U.S.C. § 1151) located within that 14-county area. The scope of the tribal court’s territorial jurisdiction is limited to Indian country as a matter of federal Indian law – a fact that is recognized in the Cherokee Nation’s tribal code, which states that “[t]he territorial jurisdiction of Cherokee Nation District Court shall extend to include all ‘Indian country’ ... within the fourteen-(14) county area...” 20 C.N.C.A. § 25 (“Jurisdiction—Territorial”) (emphasis added). Accordingly, any relevant contacts must be with Indian country (*see infra* note 3) within this 14-county area.

⁵ The U.S. Code defines “Indian country” as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

alleged jurisdictional area – and does not conduct activities that are so exceptional or extraordinary as to render it “at home” here. Thus, the Court lacks general jurisdiction over CVS Health.

A court may only exercise specific, or “conduct-linked,” jurisdiction over a defendant where “the corporation’s in-state activities are not only ‘continuous and systematic, but also *give rise to the liabilities sued on.*’” *Daimler*, 134 S. Ct. at 751, 761 (emphasis added). CVS Health is a holding company that issues stock and files reports with the Securities and Exchange Commission (“SEC”). (Moffatt Decl. ¶ 5.) It has no relevant contacts with Indian country or the alleged jurisdictional area, let alone contacts that could have given rise to Plaintiff’s claims. (*Id.* ¶¶ 5-6.) Thus, the Court lacks specific jurisdiction over CVS Health.

Nor can Plaintiff establish jurisdiction over CVS Health based on its ownership interest in other CVS entities, as the *Corcoran* court found in rejecting personal jurisdiction over CVS Health in California based on a subsidiary’s contacts there. *Corcoran*, 169 F. Supp. 3d at 983-84. Here, Plaintiff does not even identify any subsidiaries of CVS Health that it claims are responsible for the injuries alleged. Moreover, Plaintiff fails to allege facts to support that any such subsidiaries are the alter egos of CVS Health, such that the subsidiary’s forum contacts should be imputed to CVS Health. Nor could they. For instance, while Oklahoma CVS Pharmacy, L.L.C. (“Oklahoma CVS”), one of CVS Health’s subsidiaries, operates CVS retail pharmacies in the state of Oklahoma (Moffatt Decl. ¶ 4), CVS Health does not direct, manage, or supervise the operations of Oklahoma CVS or CVS retail stores with respect to the conduct Plaintiff alleges (or otherwise) (*id.* ¶ 7). Even assuming for the sake of argument that the Court

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151.

could assert personal jurisdiction over Oklahoma CVS (which CVS Health does not admit), Plaintiff has not and cannot allege facts to support that any forum contacts by Oklahoma CVS can support personal jurisdiction over CVS Health.

B. Lack of Subject Matter Jurisdiction

As set forth in the motions and supporting memorandum filed by the other Defendants in this action, which are incorporated herein by reference, this Court lacks subject matter jurisdiction. CVS Health is neither a member nor a tribal corporation of the Cherokee Nation, and none of the alleged conduct on the part of CVS Health set forth in the Petition took place within Indian country, as defined in 18 U.S.C. § 1151. The Cherokee Nation's inherent sovereign power to adjudicate civil disputes does not extend to the conduct of non-Indians outside Indian country. Moreover, neither of the two narrow exceptions to the Cherokee Nation's limited authority over non-Indians who enter Indian country, which were recognized in *Montana v. United States*, 450 U.S. 544 (1981), apply here precisely because the alleged conduct by CVS Health did not occur in Indian country. In addition, even if the alleged contact had occurred in Indian country, neither of the two exceptions would be satisfied for reasons explained below. This Court lacks subject matter jurisdiction for the additional reason that Plaintiff's claims are predicated on alleged violations of the federal Controlled Substances Act ("CSA"). However, the CSA does not confer authority to enforce the act on tribal courts.

For these reasons, and as discussed more fully below, this Court should dismiss Plaintiff's claims against CVS Health for lack of personal and subject matter jurisdiction.⁶

⁶ Pursuant to Cherokee Nation District Court Rules 123 and 125, CVS Health does not waive and expressly reserves the right to raise any and all additional defenses to subject matter jurisdiction in the event that the action is not dismissed pursuant to this motion. Defendant CVS Health is appearing specially to contest jurisdiction because it believes this Court's lack of jurisdiction is clear. CVS Health also reserves its right to challenge Plaintiff's claims on the merits, by motion

MEMORANDUM OF LAW

I. This Court Lacks Personal Jurisdiction Over CVS Health

Personal jurisdiction is the authority of a court over the parties in a particular case. It is a due process requirement that limits the power of courts over litigants. As the Supreme Court explained in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), due process requires “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.* at 316. Courts may exercise either general (all-purpose) jurisdiction over a defendant or specific (conduct-linked) jurisdiction. *See Goodyear*, 564 U.S. at 923. General jurisdiction occurs where “the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” *Id.* at 924 (quoting *Int’l Shoe*, 326 U.S. at 318) (internal quotation marks omitted). Specific jurisdiction “could be asserted where the corporation’s in-state activity is ‘continuous and systematic’ and *that activity gave rise to the episode-in-suit.*” *Id.* at 923. As discussed below, Plaintiff cannot establish either form of personal jurisdiction over its claims.

As with all courts, tribal courts must have personal jurisdiction over a defendant to properly hear a case. *See Mullally v. Havasu Landing Casino*, 2011 WL 13174955, at *7 (C.D. Cal. May 4, 2011), *aff’d*, 673 F. App’x 684 (9th Cir. 2016); *In re C.T.*, 8 Am. Tribal Law 386, 391, 2010 WL 1783385 (Eastern Cherokee Ct. May 5, 2010). And the outer limits of a tribal court’s ability to assert personal jurisdiction over a party is defined, not by a tribe’s own tribal law, but by federal law principles of due process. “As the constitutional rules that define the

or otherwise. Should the Court deny this motion, CVS Health asks that it be afforded an opportunity, consistent with Cherokee District Court Rule 125, to move to dismiss Plaintiff’s claims on the merits.

boundaries of personal jurisdiction are premised on the due process clause, ... ‘tribal courts are obligated under federal law to determine whether they have personal jurisdiction over defendants haled into tribal court.’” *Mullally*, 2011 WL 13174955, at *7 (citing F. Cohen, Handbook of Federal Indian Law 604 (2005 ed.)).

A plaintiff bears the burden of establishing personal jurisdiction over the defendant. When personal jurisdiction is challenged by a defendant, the plaintiff must make a prima facie showing of personal jurisdiction, “by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant.” *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998).⁷ The plaintiff may not rely on the allegations in the complaint if they are controverted by the defendant’s affidavits. *Associated Elec. & Gas Ins. Serv. Ltd. v. Am. Int’l Grp., Inc.*, 2012 WL 256146, at *2 (D. Utah Jan. 27, 2012) (citing *Behagen v. Amateur Basketball Ass’n*, 744 F.2d 731, 733 (10th Cir. 1984)).

A. This Court Lacks General Jurisdiction Over CVS Health

As other courts have found under similar circumstances, under *Daimler*, this Court may not assert general jurisdiction over CVS Health. *See Corcoran*, 169 F. Supp. 3d at 981; *Callum*, 137 F. Supp. 3d at 836-37. General jurisdiction is the authority to “hear any and all claims” against a defendant. *Goodyear*, 564 U.S. at 919.⁸ In *Daimler*, the Supreme Court held that a

⁷ Pursuant to Cherokee Nation District Court Rule 102, whenever the District Court Rules “are incomplete in evidentiary and/or civil procedure issues then the Court may look to the Federal Rules of Evidence and/or Civil Procedure for guidance.” In addition, Cherokee Nation Title 12 (Civil Procedure), Chapter 1 (Adoption of Federal Rules of Civil Procedure—Federal Rules Of Evidence), provides that “[t]he Federal Rules of Civil Procedure shall be used in Cherokee Nation courts in all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation rule of civil procedure.” 12 C.N.C.A. ch. 1.

⁸ The Cherokee Nation has not enacted a general long-arm statute. It has done so as part of certain specific statutes (e.g., § 1040.24 of the Cherokee Nation Obscenity and Child Pornography Act and § 103 of the Cherokee Nation Environmental Act), but none that are

court may only exercise general jurisdiction over a corporation where the corporation's contacts with the forum are so extensive as to render it "essentially at home" there. 134 S. Ct. at 761 (citation omitted). Aside from an "exceptional case" not present here,⁹ a corporation is only "at home" in its formal place of incorporation and principal place of business. 134 S. Ct. at 760, 761 n.19. Merely doing business in a forum – even "continuous and systematic" business – is not enough to support general jurisdiction. *Id.* at 761. For instance, Daimler's subsidiary, MBUSA, generated billions of dollars in sales in California, and maintained multiple offices and facilities there, including a regional headquarters. *Id.* at 766-67 (Sotomayor, J., concurring). The Court held that even assuming MBUSA's California contacts could be imputed to Daimler, these business activities did not render it "at home" there, and so could not support general jurisdiction. *Id.* at 760.

Plaintiff has not alleged, and cannot demonstrate, that CVS Health is "essentially at home" anywhere in the State of Oklahoma, let alone in Indian country or the jurisdictional area alleged in the Petition. CVS Health is organized under the laws of Delaware and has its principal place of business in Rhode Island. (Moffatt Decl. ¶ 6.) Under *Daimler*, these facts alone permit

relevant here. Title 20 of the Cherokee Nation Code, governing jurisdiction and procedure in district courts, states only that District Courts have jurisdiction to hear civil actions "[b]etween all parties, Indian and non-Indian, who by their actions have submitted themselves to the jurisdiction of said Court." 20 C.N.C.A. ch. 2, § 24(2)(a).

⁹ While the *Daimler* Court noted that it was not "foreclos[ing] the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State," 134 S. Ct. at 761 n.19, it significantly constrained the scope of any exception. The only example the Court suggested of an "exceptional case" was *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437 (1952), a unique case in which the Court held that Ohio could assert general jurisdiction over a Philippines company because the company had temporarily relocated its principal place of business to Ohio during World War II. *See Daimler*, 134 S. Ct. at 756. "In the overwhelming majority of cases there will be no occasion to explore whether a *Perkins*-type exception might apply." *Corcoran*, 169 F. Supp. 3d at 980 n.34 (internal quotations and citation omitted).

this Court to determine that it lacks personal jurisdiction over CVS Health, but CVS Health's absence of contacts with the "jurisdictional area" identified in the Petition underscore that it is not "at home" here. CVS Health is merely a holding company with the primary function of issuing stock and filing reports with the SEC. (*Id.* ¶ 5.) It has no operations unrelated to its functions as a holding company. (*Id.*) CVS Health has no assets, income, employees, facilities, or offices in Oklahoma, and none of its limited business functions regularly occur there. (*Id.* ¶ 6.) CVS Health is not qualified as a foreign corporation under the laws of Oklahoma or the Cherokee Nation, it does not have a registered agent for service of process in Oklahoma or with respect to the Cherokee Nation, and it is not regulated by any Cherokee Nation agency. (*Id.*) The Tribe's allegations that CVS Health 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. ¶ 15) are thus simply incorrect.

Even if the Tribe's allegations were true (and they are not), the Court still could not exercise general jurisdiction over CVS Health. *Daimler* and cases following it make clear that merely doing business – even significant business – within a particular forum will not confer general jurisdiction. *See Daimler*, 134 S. Ct. at 761-62.¹⁰ For this reason, after *Daimler*, it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014).

¹⁰ *See also, e.g., BNSF Ry. Co. v. Tyrrell*, 2017 WL 2322834, at *10 (U.S. May 30, 2017) (no general jurisdiction over railroad company even though it had "over 2,000 miles of railroad track and more than 2,000 employees in Montana"); *Aclin v. PD-RX Pharm. Inc.*, 189 F. Supp. 3d 1294, 1303-04 (W.D. Okla. 2016) (pharmaceutical manufacturer not subject to general jurisdiction in Oklahoma despite extensive commercial activity there); *Cashland Inc. v. Cashland Inc.*, 2016 WL 6916776, at *10 (W.D. Okla. Jan. 14, 2016) (defendant's "brick-and-mortar presence" in Oklahoma was insufficient for general jurisdiction post-*Daimler*).

Courts have declined to find general jurisdiction over CVS Health based on allegations that it does business in a forum. In *Corcoran*, the plaintiffs alleged that CVS Health did business in California by maintaining “a substantial number of pharmacies,” two distribution centers, and soliciting employees there. 169 F. Supp. 3d at 980. While CVS Health explained that these allegations were simply inaccurate, the Court concluded that, even if they were true, they still could not support general jurisdiction under *Daimler*. *Id.* at 980 n.4. “In *Daimler*, the Supreme Court rejected plaintiffs’ arguments that a foreign manufacturer was at home in California due to its ‘multiple offices, continuous operations, and billions of dollars’ worth of sales’ in the forum.” *Id.* at 981. Thus, “[e]ven taking all of Plaintiffs’ jurisdictional allegations as true, CVS Health’s contacts do not rise to the level that it is ‘essentially at home in the forum state.’” *Id.* (quoting *Daimler*, 134 S. Ct. at 761).

The court found no personal jurisdiction over CVS Health in *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. 2015), for similar reasons. Although the plaintiff claimed that CVS Health “transacts business in South Carolina, has an interest in real property in this state, contracts to insure people and property located within this state, and derives substantial revenue from goods used or consumed or services rendered in this state,” the Court still found no general jurisdiction. *Id.* at 836-37. “Plaintiff has not offered sufficient evidence showing CVS Health has an enduring relationship with South Carolina, as indicated by contacts that are substantial, continuous and systematic, so as to render it essentially at home in this forum.” *Id.* at 837 (citing *Daimler*, 134 S. Ct. at 761).

The Tribe’s generic allegations that CVS Health has done business within the Cherokee Nation are both factually incorrect and legally insufficient to confer general jurisdiction. Accordingly, this Court lacks general jurisdiction over CVS Health as to all of Plaintiff’s claims.

B. This Court Lacks Specific Jurisdiction Over the Tribe's Claims

Specific jurisdiction is the authority to adjudicate “issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Goodyear*, 564 U.S. at 919 (internal quotation marks omitted). The doctrine of specific jurisdiction provides that jurisdiction may be “asserted where a corporation’s in-state activities are not only ‘continuous and systematic, *but also give rise to the liabilities sued on.*’” *Daimler*, 134 S. Ct. at 761 (quoting *Int’l Shoe*, 326 U.S. at 317) (emphasis added). And, as with general jurisdiction, the exercise of specific jurisdiction requires that the contacts at issue be significant enough so as not to “offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe*, 326 U.S. at 316 (citation omitted). In a tort-based action, a court can exercise specific jurisdiction over a defendant only if (1) “‘the defendant purposefully directed its activities at residents of the forum state’” and (2) “‘the plaintiff’s injury arose from *those* purposefully directed activities.’” *Aclin*, 189 F. Supp. 3d at 1300 (quoting *Newsome v. Gallacher*, 722 F.3d 1257, 1264 (10th Cir. 2013)); accord *Allen v. IM Sols., LLC*, 83 F. Supp. 3d 1196, 1205 (E.D. Okla. 2015).

Here, the Court cannot assert specific jurisdiction over CVS Health because Plaintiff has alleged no facts connecting CVS Health to the claims alleged in the Petition. The Petition alleges broadly that “Defendants created conditions in which vast amounts of opioids have flowed freely from manufacturers to abusers and drug dealers – with distributors regularly fulfilling suspicious orders from pharmacies, and pharmacies regularly ignoring ‘red flags’ in prescription presentation that would require further investigation and resolution before dispensing the pills.” (Pet. ¶ 5.) As to CVS Health, Plaintiff alleges that it “has sold and continues to sell prescription opioids at locations within the Cherokee Nation.” (*Id.* ¶ 15.) However, CVS Health has no operations unrelated to its limited functions as a holding company (*e.g.*, issuing stock and filing SEC reports); sells no opioids, and operates no retail pharmacies

within the Cherokee Nation, or elsewhere. (Moffatt Decl. ¶¶ 5-6.) As such, CVS Health did not have any part in the distribution and sale of medicines that Plaintiff alleges occurred.

Thus, the Tribe cannot establish either requirement of specific jurisdiction. Because CVS Health has no relevant contacts with Indian country or the alleged jurisdictional area, it has not “purposefully directed its activities at residents of” the relevant forum. *Aclin*, 189 F. Supp. 3d at 1300 (citation omitted). And because CVS Health did not direct any business activities towards residents of the relevant forum, it cannot have engaged in activities in this forum which gave rise to Plaintiff’s claims.

Other courts have declined to find specific jurisdiction over CVS Health for similar reasons. In *Corcoran*, the court explained that “Plaintiffs’ conclusory statement that CVS Health ‘itself ... purposefully directs its business activities, including the pricing and sale of generic prescription drugs, to customers in California’” did not suffice to establish specific personal jurisdiction. 169 F. Supp. 3d at 981. In addition, the plaintiffs “provide no allegations or evidence to support an assertion that CVS Health had any ‘direct involvement in the scheme alleged’” in the complaint, “as would be required for a finding that CVS Health is subject to the specific jurisdiction of this Court.” *Id.* In *Callum*, the court rejected the plaintiff’s argument that it could assert specific jurisdiction over CVS Health based on its “(a) guaranty of certain leases on property in South Carolina[,] (b) payment of settlement proceeds to the State of South Carolina,” and a corporate integrity agreement in which it agreed to monitor day-to-day compliance activities engaged in by CVS. 137 F. Supp. 3d at 836. It found that CVS Health’s alleged contacts with South Carolina were “sporadic and do not amount to purposeful availment of the privilege of conducting activities within South Carolina.” *Id.* at 837.

Here too, Plaintiff cannot establish any facts to support CVS Health’s “direct

involvement in the scheme alleged” in the Petition. *Corcoran*, 169 F. Supp. 3d at 981 (citation omitted). Thus, this Court lacks specific jurisdiction over CVS Health.

C. Plaintiff Cannot Establish Personal Jurisdiction Over CVS Health Based On Its Ownership Interest in Other CVS Entities

Nor can Plaintiff manufacture personal jurisdiction based on CVS Health’s ownership interest in other CVS entities. The law is well-established that a corporation’s mere ownership of a subsidiary allegedly subject to personal jurisdiction in the forum is not sufficient to create personal jurisdiction over the parent. “A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). “Thus a holding or parent company has a separate corporate existence and is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity.” *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974).

To establish jurisdiction over a parent company based on its subsidiary’s forum contacts, “there must be proof of pervasive control by the parent over the subsidiary more than what is ordinarily exercised by a parent corporation.” *Harris v. Am. Int’l Grp., Inc.*, 923 F. Supp. 2d 1299, 1305 (W.D. Okla. 2013) (citation omitted); *see also Associated Elec. & Gas Ins. Serv. Ltd. v. Am. Int’l Grp., Inc.*, 2012 WL 256146, at *2 (D. Utah Jan. 27, 2012) (holding that “unity of interest” was insufficient to exercise personal jurisdiction over parent corporation).¹¹ For

¹¹ Any attempt to predicate personal jurisdiction on some lesser standard than alter ego liability would run afoul of *Daimler*. Noting that it had not yet addressed whether a parent corporation could be subjected to personal jurisdiction based on the activity of a subsidiary, the Supreme Court noted that “several Courts of Appeals have held ... that a subsidiary’s jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego.” *Daimler*, 134 S. Ct. at 759. Without specifically endorsing this theory, the Court rejected a lesser “agency” approach taken by the Ninth Circuit. As the Court explained, “[a]nything that a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do ‘by other means’ if the independent contractor, subsidiary, or distributor did not exist.” *Id.* (citation omitted). Any theory that

instance, in *Quarles*, the Tenth Circuit found the following factors *insufficient* to treat the parent and subsidiaries as alter egos for purposes of personal jurisdiction:

- The parent’s request for reports, consultation with corporate officers, offering of advice and objection to proposals, as these were inherent aspects of the stockholder-corporation relationship;
- Parent financing of the subsidiary;
- Identity of officers and directors;
- The existence of an employees stock purchase plan.

504 F.2d at 1363-64. Holding that the court lacked personal jurisdiction over the parent company, the Tenth Circuit noted that the level of participation by the parent in the affairs of its subsidiary did not amount to a “domination of the day to day business decisions” of the subsidiary so as to warrant “disregard of the corporate entity of” the subsidiary. 504 F.2d at 1364.

In this case, Plaintiff does not even identify any subsidiaries of CVS Health that it claims are responsible for the injuries alleged, let alone allege facts that could plausibly establish that any such subsidiaries are the alter egos of CVS Health. While a subsidiary of CVS Health – Oklahoma CVS – operates the CVS retail pharmacies in the state of Oklahoma (Moffatt Decl. ¶ 4), CVS Health has no direct involvement in directing, managing, or supervising the operations or the employees of Oklahoma CVS or any CVS retail store with respect to the conduct Plaintiff alleges (or otherwise). (*Id.* ¶ 7.) Oklahoma CVS is not a reporting division of CVS Health;

would subject a parent corporation to general jurisdiction “whenever they have an in-state subsidiary or affiliate,” would result in a sprawling view of general jurisdiction rejected by the Court. *Id.* at 760. And, although the Court was concerned with general jurisdiction, its reasoning applies to specific jurisdiction. Recognizing that the Supreme Court rejected the agency test, the Ninth Circuit reverted to the alter ego test after *Daimler*. See *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 915 (2016).

rather, it is a separate limited liability company, organized under the laws of the state of Oklahoma. (*Id.* ¶ 8.) It has its own governing documents, including articles of organization and operating agreement; maintains its own corporate records and bank accounts; where applicable, files its own federal, state, and local tax returns; and has its own employees. (*Id.*)

Corcoran rejected “alter ego” personal jurisdiction over CVS Health based on its subsidiary’s contacts with the forum. The plaintiffs there argued that CVS Health was the alter ego of another named defendant, CVS Pharmacy, Inc. (“CVS Pharmacy”), and so CVS Pharmacy’s forum contacts should be imputed to CVS Health, based on the following allegations:

(i) members of CVS Pharmacy’s senior management team all also hold titles and senior positions with CVS Health; (ii) CVS Health and CVS Pharmacy ‘share’ certain executives, including the head of human resources and chief legal officer; (iii) the lone two members of CVS Pharmacy’s board are also senior executives for CVS Health; (iv) CVS Health’s public filings show that CVS Health provides management and administrative services to support the overall operations of all segments of CVS Health; (v) CVS Health’s website presents itself as one integrated company, including its pharmacy division; (vi) CVS Health selected CVS Pharmacy’s new president in 2013; (vii) CVS Pharmacy identified persons associated with CVS Health as having discoverable information in its Rule 26 initial disclosures; and (viii) persons who allegedly identify themselves as ‘employees’ of CVS Health exchanged emails about the [] program at issue in the litigation.

169 F. Supp. 3d at 982-83. The court found these allegations insufficient to demonstrate that CVS Health was the alter ego of CVS Pharmacy because, even if true, they did not show “a unity of interest and ownership between the corporations such that their separate personalities do not actually exist,” or that “treating the corporations separately would result in injustice.” *Id.* at 983. Accordingly, it declined to impute CVS Pharmacy’s California contacts to CVS Health, and dismissed CVS Health for lack of personal jurisdiction.

For the same reasons, allegations of any contacts which other CVS corporate entities may have with Indian country or the jurisdictional area alleged in the Petition cannot support personal

jurisdiction over CVS Health.¹²

II. This Court Lacks Subject Matter Jurisdiction Over the Action

A. This Court Lacks Jurisdiction over the Conduct of Non-Members of the Tribe that Do Not Occur on Indian Country

As set forth in the motions and supporting memorandum filed by Defendants McKesson Corporation; Cardinal Health, Inc.; AmerisourceBergen; Walgreens Boots Alliance, Inc.; and Wal-Mart Stores, Inc., which are incorporated herein by reference, this Court lacks subject matter jurisdiction over this action. It is beyond dispute that CVS Health is not a member or tribal corporation of the Cherokee Nation. This Court does not have subject matter jurisdiction over the activities of non-Indians, such as Defendants here, that do not take place in “Indian country,” as defined by federal law. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333 (2008). Moreover, none of the conduct alleged in the Petition against CVS Health – which if they occurred at all, cannot be attributed to the holding company CVS Health – occurred on land that qualifies as Indian country. The sovereign power of an Indian tribe simply does not extend to the activities of non-members of the tribe outside Indian country. *See Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937-38 (9th Cir. 2009).

¹² Even if the contacts of individual CVS retail pharmacies could somehow be imputed to the legally separate entity CVS Health (which they cannot), the Petition does not allege that any CVS pharmacies are located on land that constitutes Indian country. In fact, available evidence indicates that they are not. As described in the Declaration of Brenna B. Jordan, only 4 CVS pharmacies operate within the 14-County “jurisdictional area” alleged in the Petition. Another 2 pharmacies operate in proximity to that area, but outside the boundary. All 6 operate on land owned in fee simple by unrelated third-party corporate entities. A review of property records revealed no connection with the Cherokee Nation or any Indian tribe, including approval by the Bureau of Indian Affairs of the lease or purchase of the land on which the pharmacies operate. (Jordan Decl. ¶¶ 4-7 (attached as Exhibit 6 to Defendants’ Motion for Preliminary Injunction in the Federal Action, which is attached as Exhibit B to Defendant’s Motion to Stay).

Here, any conduct for which Plaintiff seeks to hold CVS Health liable did not occur in Indian country, as defined by federal law. *See* 18 U.S.C. § 1151. The Cherokee Nation Jurisdictional Area, as described in the Petition, is not an “Indian reservation.” *See id.* § 1151 (a).¹³ Nor does it satisfy the criteria for “a dependent Indian community” because it is not land federally set-aside under continued federal superintendence. *See id.* § 1151(b).¹⁴ Subsection (c) of § 1151 is also inapplicable, as restrictions that accompanied allotments of land to Tribe members in eastern Oklahoma “have been removed over time and now protect only a small fraction of the land,”¹⁵ and Plaintiffs have alleged no facts indicating that any of the CVS retail pharmacies where the alleged conduct took place are located on trust lands or Indian allotments.¹⁶ Accordingly, because the Petition seeks to challenge nonmember conduct that did not occur on Indian country, subject matter jurisdiction does not exist. *See, e.g., Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091-93 (8th Cir. 1998).

The limited *Montana* exceptions simply do not apply to non-member conduct outside Indian country.¹⁷ There is, therefore, no need to assess whether those exceptions are satisfied in this case.

Moreover, even if the alleged activities in this case had taken place in Indian country (which they did not), in *Montana*, the U.S. Supreme Court recognized the general presumption

¹³ Our History, Cherokee Nation, <http://www.cherokee.org/About-The-Nation/History/Facts/Our-History> (last visited June 9, 2017).

¹⁴ *United States v. Adair*, 913 F. Supp. 1503, 1516-17 (E.D. Okla. 1995), *aff'd*, 111 F.3d 770 (10th Cir. 1997).

¹⁵ *United States v. Adair*, 111 F.3d 770, 773 (10th Cir. 1997).

¹⁶ *See supra* note 12.

¹⁷ *See, e.g., Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782, 786 (7th Cir. 2014); *Hornell Brewing Co.*, 133 F.3d at 1092; *Progressive Specialty Ins. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007).

that “the inherent sovereign powers of an Indian tribe do not extend to the [on reservation] activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1981). Although the *Montana* Court recognized two exceptions, both exceptions are limited to regulation protecting *tribal governance or internal relations* and, therefore, are inapplicable here. *Plains Commerce*, 554 U.S. at 334-35; *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

The first *Montana* exception, which sometimes allows tribes, with respect to on reservation activities, to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,”¹⁸ is inapplicable for additional reasons. First, CVS Health, a holding company, did not enter into a consensual relation with the Tribe or its members. Moreover, the exception does not encompass adjudication of tort claims that do not have a direct connection to the consensual relationship. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). Otherwise, the first *Montana* exception would completely undermine the overarching principle that the sovereign powers of an Indian tribe presumptively do not extend to the activities of nonmembers. *See Plains Commerce*, 554 U.S. at 330; *MacArthur v. San Juan County*, 2000 WL 35439199, at *3 (D. Utah 2000).

The second *Montana* exception sometimes allows a tribe to exercise “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.” *Plains Commerce*, 554 U.S. at 329-30 (internal quotation marks omitted). It is also inapplicable. First, it is limited to extreme conduct, conduct that could be “catastrophic” for

¹⁸ *Plains Commerce*, 554 U.S. at 329 (internal quotation marks omitted).

tribal self-government.¹⁹ Second, the “generalized threat that torts by or against its members pose for any society, is not what the second Montana exception is intended to capture.” *King Mountain Tobacco Co.*, 569 F.3d at 943. The second exception is limited to situations involving “a direct threat to tribal sovereignty.” *Id.* Plaintiff alleges no facts supporting application of this exception.

B. This Court Lacks Jurisdiction to Enforce the Controlled Substances Act

Plaintiff seeks to hold Defendants liable for allegedly failing to prevent diversion of opioid medicines. However, the Tribe has no jurisdiction to enforce violations of the federal Controlled Substances Act (“CSA”). The CSA is enforceable only by the U.S. Attorney General or, by delegation, the Department of Justice. *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016), *aff’d sub nom. Safe Streets Alliance v. Hickenlooper*, --- F.3d ---, 2017 WL 2454359 (10th Cir. June 7, 2017). The CSA does not create a private right of action. *See Smith*, 164 F. Supp. 3d at 1290. Significantly, while Congress delegated to Indian tribes authority to regulate the sale of alcohol by non-Indians within Indian reservations, *see* 18 U.S.C. § 1161, it did not confer them with comparable authority over controlled substances. Thus, Tribal courts lack jurisdiction to enforce the CSA. *Cf. Nevada v. Hicks*, 533 U.S. 353, 367-68 (2001). Further, a key goal of the CSA is balancing the risk of diversion with the need to assure an adequate supply of needed medicines. As a result, exercise of tribal jurisdiction also would conflict with a “superior federal interest.” *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1052 (D. Ariz. 1981).

Accordingly, for the reasons set forth above, the Petition should be dismissed for lack of

¹⁹ *Evans v. Shoshone-Bannock Land Use Policy Comm’n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce*, 554 U.S. at 341).

subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, CVS Health respectfully requests that the Court dismiss the claims against it for lack of personal jurisdiction, pursuant to Cherokee Nation District Court Rule 123(2), and for lack of subject matter jurisdiction, pursuant to Cherokee Nation District Court Rule 123(1).

June 12, 2017

Respectfully submitted,

s/ G. Calvin Sharpe

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CERTIFICATE OF SERVICE

This document was filed by email. I hereby certify the a true and correct copy of the above was emailed and mailed to counsel for Plaintiff, as listed below, by First Class Mail, postage prepaid, on this the 12th day of June, 2017.

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**THE DISTRICT COURT
OF THE CHEROKEE NATION**

THE CHEROKEE NATION,

Plaintiff,

No. CV-2017-203

vs.

MCKESSON CORPORATION; CARDINAL
HEALTH, INC.; AMERISOURCEBERGEN;
CVS HEALTH; WALGREENS BOOTS
ALLIANCE, INC.; and WAL-MART
STORES, INC.,

Defendants.

**DECLARATION OF THOMAS S. MOFFATT IN SUPPORT OF
DEFENDANT CVS HEALTH'S MOTION TO DISMISS**

1. I, Thomas S. Moffatt, hereby affirm, under penalty of perjury, that I am over 18 years of age and am competent to make the following Declaration:

2. I have personal knowledge of the matters stated herein, and they are true and correct to the best of my knowledge. I am authorized to make this Declaration on behalf of Defendant CVS Health Corporation (named in this suit as "CVS Health"). I authorize the use of this Declaration in connection with the above-captioned lawsuit.

3. I have been employed with CVS Pharmacy, Inc. since 1997, and currently hold the position of Vice President, Corporate Secretary and Assistant General Counsel – Corporate Services of CVS Pharmacy, Inc.

4. In that capacity, I am familiar with the corporate structure of CVS Health Corporation and its indirectly wholly-owned subsidiary, Oklahoma CVS Pharmacy, L.L.C., the entity that operates the CVS retail pharmacies in the State of Oklahoma. Over the past nineteen-plus years in my role at CVS Pharmacy, Inc., I have become familiar with the nature of the

Exhibit A

primary business functions of CVS Health Corporation and certain of its subsidiaries, including Oklahoma CVS Pharmacy, L.L.C.

5. CVS Health Corporation is a holding company, and its primary functions are to issue stock that is traded on the New York Stock Exchange and to file reports with the Securities and Exchange Commission. CVS Health Corporation also performs certain other functions related to those primary functions. However, CVS Health Corporation has no operations unrelated to its status as a holding company. In particular, it does not directly operate retail pharmacies and it does not sell prescription medications.

6. CVS Health Corporation is organized under the laws of the State of Delaware and its principal place of business is located in the State of Rhode Island. It has no offices or facilities in Oklahoma, and none of its limited business functions regularly occur there. CVS Health Corporation has no assets, income, employees, or operations within the State of Oklahoma. CVS Health Corporation is not qualified as a foreign corporation under the laws of Oklahoma or the Cherokee Nation, it does not have a registered agent for service of process in Oklahoma or with respect to the Cherokee Nation, and it is not regulated by any Oklahoma or Cherokee Nation agency.

7. CVS Health Corporation has agreements with a limited number of senior executives who are officers of CVS Health Corporation and who are employed by and provide services to various subsidiaries of CVS Health Corporation. None of these officers is located in Oklahoma. CVS Health Corporation has no direct involvement in directing, managing, or supervising the operations or the employees of any of its subsidiary companies, including Oklahoma CVS Pharmacy, L.L.C. CVS Health Corporation does not direct, manage, or

supervise the operations of Oklahoma CVS Pharmacy, L.L.C., including Oklahoma CVS Pharmacy, L.L.C.'s retail stores.

8. CVS Health Corporation is a separate and distinct entity from Oklahoma CVS Pharmacy, L.L.C. Both entities observe and enforce corporate formalities. Oklahoma CVS Pharmacy, L.L.C. is not a reporting division of CVS Health Corporation; rather, it is a separate limited liability company, organized under the laws of the State of Oklahoma. Its sole member is CVS Pharmacy, Inc. Oklahoma CVS Pharmacy, L.L.C. has its own governing documents, including articles of organization and operating agreement; maintains its own corporate records and bank accounts; where applicable, files its own federal, state, and local tax returns; and has its own employees.

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

Executed this 9th day of June, 2017, in Woonsocket, Rhode Island.



THOMAS S. MOFFATT