FILED

2017 JUN 12 PM 2:46

CHEROKEE NATION
DISTRICT COURT
CHRISTI CHCOOYEA
COURT CLERK

IN THE DISTRICT COURT
OF THE CHEROKEE NATION

THE CHEROKEE NATION,

Plaintiff,

v.

Case No. CV-2017-203
Judge T. Luke Barteaux

MCKESSON CORPORATION;
CARDINAL HEALTH, INC.;
AMERISOURCEBERGEN;
CVS HEALTH; WALGREENS BOOTS
ALLIANCE, INC.; WALMART STORES, INC.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT McKESSON CORPORATION'S SPECIAL ENTRY OF APPEARANCE AND MOTION TO DISMISS PETITION

I. INTRODUCTION

McKesson Corporation ("McKesson"), appearing specially,[1] moves to dismiss the Petition because this Court lacks subject matter jurisdiction over the claims of the Cherokee Nation (the "Nation") and lacks personal jurisdiction over McKesson.

Distribution of prescription drugs, including controlled substances, by licensed distributors into Oklahoma, including the fourteen-county area identified in the Petition in this matter, is undeniably lawful and of vital importance to the health and well-being of the citizens of the Cherokee Nation who fill legitimate prescriptions at licensed pharmacies. Prescription drug abuse also is undeniably a problem for the Cherokee Nation.

The Nation seeks to hold McKesson liable for McKesson's distribution of opioids to licensed pharmacies pursuant to the federal Controlled Substances Act ("the CSA"), 21 U.S.C. §§ 801–904. The federal CSA and its implementing regulations create restrictions on the distribution of controlled substances. (Pet. ¶ 81-85.) The Nation alleges that the Cherokee Nation Unfair and Deceptive Practices Act ("CNUDPA")[2] incorporates the federal CSA into Cherokee law and creates a private cause of action for CSA violations. The Nation's Petition is flawed from inception, however, because the District Court of the Cherokee Nation lacks both subject matter jurisdiction over the Nation's claims and personal jurisdiction over McKesson.

The claims against McKesson are beyond the Court's subject matter jurisdiction, because (1) the alleged conduct by McKesson, a non-Indian corporation, did not occur on Indian land, so tribal jurisdiction is lacking; (2) this case does not fit within either of the *Montana* exceptions to the rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of

[1] By filing this and any other motion, McKesson does not waive and specifically reserves its right to assert the Nation's lack of jurisdiction, including the Court's lack of subject matter and personal jurisdiction.

[2] Codified at 12 Cherokee Nation Code Ann. ("C.N.C.A.") § 25.

nonmembers," *Montana v. United States*, 450 U.S. 544, 365 (1981); and (3) the CSA is enforceable only by federal authorities in federal court.[3] This Court also lacks personal jurisdiction over McKesson, because McKesson has no contacts with the Nation or its lands sufficient to provide either general or specific personal jurisdiction.

II. BACKGROUND

The route of a prescription opioid from manufacture to patient involves several parties, each with its own separate legal obligation. (*See, e.g.*, Pet. ¶¶ 54-55, 84.) Manufacturers must be registered with the Drug Enforcement Administration ("DEA") and must follow DEA quotas.[4] (*See id.* ¶ 84.) Prescribing physicians must be registered with the DEA and licensed by a State medical board.[5] Pharmacists, who must be DEA-registered and licensed by the Board of Pharmacy, have a "corresponding responsibility" to not fill a prescription that the pharmacist knows was written for other than a medically necessary purpose.[6] No federal or other relevant

---

[3] As described in the pending Motion to Stay, questions of subject matter jurisdiction are pending before the United States District Court for the Northern District of Oklahoma. *McKesson Corp., et al. v. Hembree, et al.*, Case No. 4:17-cv-00323 (Complaint, June 8, 2017). McKesson thus respectfully requests that this Court stay this action in its entirety until the federal court resolves the preliminary injunction motion pending in that matter.

[4] Each year, the DEA sets Aggregate Production Quotas ("APQs") for Schedule I and II controlled substances, including oxycodone and hydrocodone. *See* 21 U.S.C. § 826(a). In 2017, the DEA is allowing 108,510 kilograms (nearly 120 U.S. tons) of oxycodone to be produced for sale and 58,410 kilograms (more than 64 U.S. tons) of hydrocodone to be produced for sale. DEA, Final Order, *Established Aggregate Production Quotas for Schedule I and II Controlled Substances for 2017*, 81 Fed. Reg. 69079, 69080 (Oct. 5, 2016).

[5] Federal and state regulations require that prescriptions for controlled substances "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a).

[6] Although the primary "responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner," DEA regulations place a "corresponding responsibility" on the "pharmacist who fills the prescription." 21 C.F.R. § 1306.04(a). The DEA requires "pharmacists [to] use common sense and professional judgment," which includes paying attention to the "number of prescriptions issued, the number of dosage units prescribed, the duration and pattern of the alleged treatment," the number of doctors writing prescriptions, and whether the drugs prescribed have a high rate of abuse. *Ralph J. Bertolino Pharmacy, Inc.*, 55 Fed. Reg. 4,729, 4,730 (DEA Feb. 9, 1990). DEA

law, however, imposes such responsibilities on wholesale drug distributors, who make no judgments about the medical necessity of prescriptions. Distributors, such as McKesson, merely distribute prescription medications from various manufacturers to pharmacies. Distributors have no role in manufacturing or promoting opioids to physicians; they have no role in determining how opioids should be or are prescribed; and they have no role in how pharmacists dispense opioids. Distributors do not set and enforce quotas that limit the amounts of opioids shipped to licensed pharmacies. And, further, distributors have no law enforcement duty or authority over opioids after a licensed pharmacy receives its bulk shipments.

McKesson is a publicly-traded Delaware corporation headquartered in California. (Declaration of Peter Stoy ("Stoy Dec.") ¶ 2, attached as **Exhibit A.**) McKesson is registered with the DEA to distribute controlled substances.[7] (*Id.* ¶ 5(a).) McKesson does not manufacture opioids. Rather, McKesson 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. McKesson does not dispense controlled substances to the general public or patients. (*Id.* ¶ 5(b).) The Nation does not allege, nor could it allege, that any of McKesson's shipments of opioids to Oklahoma, including the fourteen-county area identified in the Petition, were to pharmacies other that those registered with the DEA and the Oklahoma Board of Pharmacies to receive controlled substances. Indeed, all McKesson's distributions of controlled substances have been made only to duly licensed and registered pharmacies. (*Id.* ¶ 5(m).)

As a publicly held corporation, McKesson is not a member or corporation of the Cherokee Nation or any other Indian tribe. (*Id.* ¶ 5(d).) Also, McKesson is not licensed by or

requires that a pharmacist refuse to dispense when a prescription raises suspicion and its propriety cannot be verified. *Id.*

[7] McKesson also is registered with the Oklahoma Bureau of Narcotics and Dangerous Drugs and the Oklahoma Board of Pharmacy to distribute controlled substances.

registered to do business with the Cherokee Nation. (*Id.* ¶ 5(e).) McKesson does not operate facilities on land owned by, or held in trust by the United States for the benefit of, the Cherokee Nation or its members. (*Id.* ¶ 5(f).) McKesson also does not operate facilities lands allotted to Cherokee Nation citizens, the Indian titles to which have not been extinguished or on land set aside for Indian use by the Cherokee Nation and that is superintended by the federal government. (*Id.* ¶¶ 5(g)-(h).) And McKesson does not operate facilities located within the so-called "Cherokee Nation Jurisdictional Area," as shown on a map attached as Exhibit A to the Petition. (*Id.* ¶ 5(i).)

To its knowledge, McKesson has not directly sought to enter a business relationship with the Cherokee Nation relating to the distribution of prescription medications, including opioids. McKesson's pharmaceutical account managers have not solicited business from the Cherokee Nation. McKesson does have a contract with the U.S. Department of Veterans Affairs through which the Indian Health Services ("IHS") can choose to participate to obtain prescription medications. Under this Veterans Affairs Pharmaceutical Prime Vendor Program ("VA PPV"), McKesson, through the IHS, provides prescription medications to, *inter alia*, Indian clinics and hospitals, including clinics and hospitals affiliated with the Cherokee Nation. McKesson's contract is with the federal government, and McKesson did not solicit the Cherokee Nation's participation in the IHS program. (*Id.* ¶ 5(j).) The Cherokee Nation clinics and hospitals that receive prescription medications from McKesson through the IHS under the VA PPV are responsible for properly dispensing the medication to their patients. To its knowledge, McKesson does not dispense controlled substances directly to the Cherokee Nation or its citizens. (*Id.* ¶ 5(k).) Accordingly, to its knowledge, other than through the IHS, McKesson does not distribute controlled substances to any business located on (i) land owned by, or held in

trust by the United States for the benefit of, the Cherokee Nation or its citizens; (ii) restricted allotments of Cherokee Nation citizens; or (iii) land set aside for Indian use by the Cherokee Nation that is superintended by the federal government. (*Id.* ¶ 5(l).)

III. ARGUMENTS AND AUTHORITIES

Legal Standards. The "sovereignty that the Indian tribes" enjoy "is of a unique and limited character . . . center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. 316, 327 (2008)(quotations omitted). "By their terms, the exceptions concern regulation of "the *activities* of nonmembers" or "the *conduct* of non-Indians on fee land." *Id.* (citations omitted). Pursuant to the Rules for the District Court of the Cherokee Nation Nos. 123(1) and 123(2), which are analogs of Fed. R. Civ. P. 12(b)(1) and 12(b)(2),[8] McKesson moves to be dismissed from this action on the independently sufficient bases that (1) the Court lacks subject matter jurisdiction and (2) the Court lacks personal jurisdiction over McKesson.[9]

Motions to dismiss for lack of subject matter jurisdiction are considered factual challenges, as they attack the subject matter jurisdiction of the Court apart from the pleadings. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) based on lack of subject matter jurisdiction, the pleadings must allege facts essential to show jurisdiction. *Penteco Corp. v. Union Gas Sys. Inc.*, 929 F.2d 1519, 1521 (10th Cir 1991)(citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). The plaintiff bears the burden of persuading the court that subject matter

---

[8] The Federal Rules of Civil Procedure shall be used in Cherokee Nation courts unless superseded. *See* 12 C.N.C.A. § 5.

[9] Pursuant to the Rules for the District Court of the Cherokee Nation Nos. 123 and 125, McKesson makes this motion without prejudice to or waiver of its arguments that the Nation has failed to state a claim upon which relief can be granted. *See also* Fed. R. Civ. P. 12(b)(6) and 12(c).

jurisdiction exists, and the Court "may not presume the truthfulness of the complaint's factual allegations." *Holt*, 46 F.3d at 1003.

Further, the Nation bears the burden of establishing personal jurisdiction over McKesson. *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999). Federal Rule of Civil Procedure 12(b)(2) provides that, to defeat a motion for dismissal based on lack of personal jurisdiction, the Plaintiff must make a "prima facie showing of personal jurisdiction." Soma, 196 F.3d at 1295. In other words, the Plaintiff must demonstrate specific facts which, if true, would support the exercise of jurisdiction over McKesson. *See TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.*, 488 F.3d 1282, 1286 (10th Cir. 2007). Even though a plaintiff's burden at this stage is only to make a prima facie showing, that prima facie showing is not made by conclusory allegations. *See, e.g.*, *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp 525 (S.D. Tex. 1994); *Richard v. Bell Atlantic Corp.*, 946 F.Supp 54 (D.D.C. 1996). Finally, for a tribe to exercise jurisdiction over a non-Indian, they must meet the *Montana v. United States*, 450 U.S. 544, 563–65 (1981), exceptions.

B. This Court Lacks Subject Matter Jurisdiction.

The District Court of the Cherokee Nation have general and original jurisdiction to hear and resolve disputes arising under the laws or Constitution of the Cherokee Nation. Article VIII, Section 6 of the Cherokee Nation CONST. For civil causes of action, the District Court has jurisdiction to hear "[a]ll causes of action **which arise within the territorial jurisdiction of Cherokee Nation**" that are "[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. § 24 (emphasis added). The causes of action herein did not occur within the territorial jurisdiction of the Cherokee Nation and McKesson has not submitted itself to the jurisdiction of the Court.

Moreover, only the U.S. Department of Justice may enforce the CSA in federal court.

1. The alleged conduct did not occur in Indian Country.

This Court lacks jurisdiction because the conduct that the Nation alleges did not take place in "Indian country," the definition of which has been codified 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 (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. This court lacks the power to regulate non-Indian conduct that occurs on land privately held in fee outside of an Indian reservation or other area of Indian country. The "sovereignty that the Indian tribes" enjoy "is of a unique and limited character ... center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327 (quotations omitted). Thus, "tribal jurisdiction is ... 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, 937-38 (9th Cir. 2009)(citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n. 12 (2001)).[10]

Here, the alleged conduct is plainly non-Indian conduct outside of Indian country. McKesson is a non-Indian with no relevant connection to Indian country. McKesson does not maintain distribution facilities within the "tribal jurisdictions" identified in the Nation's Petition, and does not sell opioid medications directly to consumers in the "tribal jurisdictions" claimed in

---

[10] *See also, e.g., DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 427, n. 2 (1975) (recognizing that Section 1151 generally applies to questions of civil jurisdiction); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court,* 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (holding tribal court plainly had no jurisdiction where alleged conduct did not occur within reservation).

the Nation's Petition. *See* Ex. A, Stoy Dec. The Nation admits that it can only exercise jurisdiction over non-Indians "where the cause of action arises in land that constitutes Indian country within the Cherokee Nation." Pet. ¶ 22. The Nation does not allege that the area at issue is a reservation under § 1151(a) meeting the definition of "Indian country" under federal law. *See* 18 U.S.C. § 1151(a). Nor could it, as it has acknowledged elsewhere that its geographical area "is *not* a reservation."[11] *See* 20 C.N.C.A. § 25 ("territorial jurisdiction of the Cherokee Nation District Court shall extend to include all "Indian Country" ... *within* the fourteen- (14) county area," emphasis added); Article II of the Cherokee Nation CONST.

The land within the Cherokee Nation Jurisdictional Area also does not belong to a "dependent Indian communit[y]" as defined by § 1151(b). *See United States v. Adair*, 913 F. Supp. 1503, 1516-17 (E.D. Okla. 1995), *aff'd*, 111 F.3d 770 (10th Cir. 1997). As the Supreme Court of the United States has explained, in enacting § 1151(b), "Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community'—just as those requirements had to be met for a finding of Indian country before 18 U. S. C. § 1151 was enacted." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998). The Nation cannot meet either requirement. Not only is the "Cherokee Jurisdictional Area" not a federal set-aside, it is not under federal superintendence.

To the extent any of the land in the Cherokee Nation Jurisdictional Area may qualify as Indian country as defined in § 1151(c), it is not the land on which the alleged tortious conduct

---

[11] Our History, Cherokee Nation, *available at* http://www.cherokee.org/About-The-Nation/History/Facts/Our-History (last visited June 6, 2017). Although the Nation asserts that certain federal statutes, regulations, and compacts recognize jurisdiction for certain matters in its "jurisdictional area" in a manner equivalent to a reservation, none of these authorities purports to recognize an actual Indian reservation. Pet. ¶¶ 30-36. Rather, these authorities merely permit the Nation to implement certain government programs and functions for the benefit of tribal members within that 14-county area, but do not grant the Nation general regulatory or adjudicatory jurisdiction over the conduct of non-Indians on non-Indian owned fee lands in that area.

took place. Indian country under § 1151(c) is allotted land held by the citizens of the Nation. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999)(lands allotted to tribal citizens under the Dawes Act and subsequently sold to non-Indians are not Indian country). The alleged conduct would have taken place on private, non-Indian fee land. Even if the Nation were able to show that a small fraction of the alleged conduct took place on an "Indian allotment[]" within the scope of § 1151(c), such a showing would not carry the Nation's burden of demonstrating that the conduct took part on *tribal* land. "When land is allotted in trust or in fee, any tribal property interest in the land is eliminated." Cohen's Handbook of Federal Indian Law § 3.04([2][c], at 197 (2012 ed.). The very purpose of allotment was "to end tribal land ownership and to substitute private ownership." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 651 n.1 (1976). To show that tribal land is involved, the Nation would need to establish a tribal property interest in the land where conduct occurred, not simply a property interest held by individual Nation citizens.

Thus, because the alleged conduct did not occur in Indian country, this court lacks jurisdiction over McKesson.[12] *See Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998)(where the alleged conduct occurred outside of Indian country, jurisdiction cannot be conferred under *Montana*, which does not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*."); *MacArthur v. San Juan Cty.*, 2000 WL 35439199, at *3 (D. Utah 2000)("It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the

[12] The Nation also purports to assert broad jurisdiction under the Cherokee Treaty of 1866 as a case arising in the Cherokee Nation. (Pet. ¶¶ 20-21.) However, the grant of jurisdiction in the Cherokee Treaty of 1866 was superseded by federal law by congressional enactments in the 1890s. *See Alberty v. United States*, 162 U.S. 499, 502-03 (1896); Act of May 2, 1890, ch. 182, §§ 1-28, 26 Stat. 81-93; 1898 Curtis Act, § 28, ch. 517, 30 Stat. 495 (abolishing the Cherokee tribal courts referenced in the 1866 Treaty). The 1866 Treaty has no bearing on this case.

reservation's borders.")(citation omitted). This Court need proceed no further with its analysis and should decline to exercise jurisdiction over this case.

2. Had the alleged conduct occurred in Indian Country, the *Montana* exceptions still are not applicable to give this Court jurisdiction over McKesson.

Even if the alleged wrongful conduct occurred within Indian Country, tribal jurisdiction over non-member conduct is strictly limited. "In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court laid down [the] general rule that '*the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.*'" *MacArthur v. San Juan County*, 497 F.3d 1057, 1068 (10th Cir. 2007)(emphasis added). The general rule is rooted in the fact that "the tribes have, by virtue of their incorporation into the American republic, lost the right of governing ... person[s] within their limits *except themselves*." *Plains Commerce Bank*, 554 U.S. at 328 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)).

The Nation can overcome the general rule only if it can establish the applicability of one of the two narrow *Montana* exceptions, as to which it bears the burden of proof:

> [1] A tribe may 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. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.

Montana, 450 U.S. at 565–66 (citations omitted). The Nation cannot carry its burden as to either exception.

a. The first *Montana* exception does not apply.

The first *Montana* exception, in some circumstances, allows a tribe 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." *Plains Commerce Bank*, 554 U.S. at 329–30. The exception generally does not extend to tort claims against nonmembers. Adjudication of tort claims is not "regulat[ion] through taxation [or] licensing," and in general, tort litigation does not qualify as "other means" to regulate a consensual relationship anticipated by *Montana*. *Montana*, 450 U.S. at 565. Taxes and licenses are reasonably narrow impositions on a nonmember's rights. Neither involves anything close to the power tribal courts would exercise over nonmembers if they had broad authority to hear tort claims.[13] In discussing the kind of regulation permitted by the first *Montana* exception, the Supreme Court cited to cases involving laws or binding obligations whose application and meaning could be discerned in advance with reasonable certainty.[14]

The rationale for disallowing tribal jurisdiction over tort claims against nonmembers is clear. "[T]he actor's duty in tort is often to conduct himself in a manner *the propriety of which is to be determined ex post facto*." Restatement (Second) of Torts § 4 cmt. c (Am. Law Inst. 1965)(emphasis added). Tort-law obligations are less predictable as a general matter, but especially so in tribal courts, where they will be "influenced by the unique customs, languages, and usages of the tribes they serve." *Duro v. Reina*, 495 U.S. 676, 693 (1990), superseded by statute as recognized in *U.S. v. Lara*, 541 U.S. 193 (2004)(quoting Felix S. Cohen, *Handbook of Federal Indian Law* 334–35 (1982 ed.)).

---

[13] In those rare instances where tort claims against nonmembers proceed in tribal court, they must arise directly from a type of consensual relationship not present here. For example, in *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1228 (D.N.M. 2013), the court held the first *Montana* exception applied to claims by nonmembers against officers of tribal corporations for tortious interference *with a contractual relationship* that established a consensual relationship with the tribe. *Id.* at 1227-28 (citing Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1234 (2010)).

[14] *Montana*, 450 U.S. at 565–66 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)(contract dispute); *Morris v. Hitchcock*, 194 U.S. 384 (1904)(tax on grazing livestock on tribal land); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905)(business permit tax); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–54 (1980)(tax on cigarette sales)).

> A tort defendant is much more [than a contract defendant] at the mercy of chance regarding the nature and extent of the liability to which he may be exposed. It is doubtful whether [movant] could ever be said to have consented to Navajo Tribal Court jurisdiction as a tort defendant, regardless of how extensively it might have done business with the tribe.

UNC Res., Inc. v. Benally, 514 F. Supp. 358, 363 (D.N.M. 1981).[15] Extending the first *Montana* exception to include tort law would dramatically expand tribes' authority over nonmembers. It would contravene the Supreme Court's admonition that the *Montana* exceptions cannot be permitted to "swallow the rule" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank*, 554 U.S. at 330.

Second, McKesson did not enter commercial "consensual relationships with the [T]ribe or its members" with a nexus to the alleged conduct. *Montana*, 450 U.S. at 565. There can be no tribal jurisdiction without a direct connection between the conduct and the relationship. *Crowe & Dunlevy P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011)("the dispute before the tribal court must arise directly out of that consensual relationship")(citation omitted). The Petition does not even *attempt* to demonstrate a nexus between McKesson's 'relationship' with the citizens and the regulation sought to be imposed as alleged within the Petition. *See, e.g. Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). McKesson does not have a consensual relationship with the Nation related to opioids. *See* Ex. 1. McKesson, moreover, does not sell ***to any members of the general public or to citizens of the Nation***. McKesson is a ***wholesale*** distributor. Even if this were considered consensual, "[a] nonmember's consensual relationship in one area ... does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound." *King Mountain Tobacco Co.*, 569 F.3d at 941–42 (9th Cir. 2009)(quoting *Atkinson*, 532

---

[15] Concerns about lack of notice are particularly acute here, where the Nation's claims depend on provisions of the Cherokee Nation Code that were not enacted until last July. *See* CAJA §§ 11(B), 13, 17, 19.

U.S. at 656).

Likewise, to the extent that any of the unidentified individuals who allegedly diverted opioids may have been citizens of the Nation, their relationship with McKesson would be non-consensual by definition. Indeed, any such relationship—purchasing opioids from pharmacies to divert them to improper or illegal use—would be inherently deceptive and fraudulent. The Nation's only allegation against McKesson is not that they *consented* to opioid diversion, but that they erred in failing to detect the suspicious orders caused by the fraudulent acts of citizens of the Nation. The Nation thus fails to allege any facts showing that its claims arise out of a consensual relationship necessary to protect the Nation's self-governance. The first *Montana* exception is therefore inapplicable.

b. The second *Montana* exception does not apply.

In some circumstances, the second exception allows a tribe to exercise "civil authority over [1] the conduct of non-Indians on fee lands within the reservation [2] 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 Bank*, 554 U.S. at 329–30. This exception is also inapplicable.

Indirect effects of the conduct alleged in the Nation's lawsuit are insufficient to support jurisdiction. The Nation's argument is that if an alleged tort impacts enough citizens of the Nation, jurisdiction should be granted to tribal courts. But, if that principle were followed, tribal courts would hear a wide range of tort cases against non-Indian defendants. Even where Indian land on Indian reservations is involved, tribal jurisdiction to hear tort claims against nonmembers, if it exists at all, is severely limited.

> To some extent, it can be argued that torts committed by or against Indians on Indian land always "threaten[] or ha[ve] some direct effect on the political integrity, the economic security, or the health

> or welfare of the tribe." But ***this generalized threat that torts by or against its members pose for any society, is not what the second Montana exception is intended to capture.*** Rather, the second exception envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty.

King Mountain Tobacco Co., 569 F.3d 943 (9th Cir. 2009)(brackets in original, emphasis added, quoting *Montana*, 450 U.S. at 566). No direct threat to sovereignty is at issue; therefore, the second exception does not apply.

3. The U.S. Attorney General and Department of Justice have exclusive authority to enforce the federal CSA in federal court.

The Nation claims that McKesson is liable to it for violating the federal CSA (*see, e.g.*, Pet. ¶¶ 53, 81–97, 127–32), but the Nation lacks any authority to enforce the CSA. "[T]he CSA provides that the district courts of the United States have jurisdiction to enjoin violations of that statute, 21 U.S.C. § 882(a), but Congress provided no private right of action to enforce its provisions." *Jones v. Hobbs*, 745 F. Supp. 2d 886, 890 (E.D. Ark. 2010), *aff'd*, 658 F.3d 842 (8th Cir. 2011), *cert. dismissed*, 133 S.Ct. 97 (2012)(citing *McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 n. 16 (S.D. W. Va. 2001)). For this additional reason, this Court lacks subject matter jurisdiction.

"[A]ccording to its plain terms, '[t]he [CSA] is a statute enforceable only by the Attorney General and, by delegation, the Department of Justice.'" *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016) (quoting *Schneller v. Crozer Chester Med. Ctr.*, 387 Fed. Appx. 289, 293 (3d Cir. 2010)). Federal courts thus uniformly hold that private parties cannot enforce the CSA through private lawsuits. *See, e.g.*, *Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir. 2010), *cert. denied*, 130 S.Ct. 2147 (2010); *Schneller v. Crozer Chester Med'l Ctr.*, 387 Fed. Appx. 289, 293 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 1684 (2011); *Felmlee v. Okla.*, 2014 WL 4597724 at *6 (N.D. Okla. Sept. 15, 2014), *aff'd*, 620 Fed. Appx. 648 (10th Cir. July 14, 2015); *U.S. v. Real*

Prop. & Improvements Located at 1840 Embarcadero, Oakland, Calif., 932 F. Supp. 2d 1064, 1072 (N.D. Cal. 2013); *Jones*, 745 F. Supp. 2d at 893; *Bowling v. Haas*, 2010 WL 3825467 at *3 (E.D. Ky. Sept. 23, 2010); *West v. Ray*, 2010 WL 3825672 at *3 (M.D. Tenn. Sept. 24, 2010), *aff'd*, 401 Fed. Appx. 72 (6th Cir. Nov. 4, 2010), *cert. denied*, 131 S.Ct. 941 (2011); *Ringo v. Lombardi*, 2010 WL 3310240 at *2 (W.D. Mo. Aug. 19, 2010); *McCallister*, 164 F. Supp. 2d at 793 & n.16. The right to enforce the CSA rests exclusively with the U.S. Attorney General, who may delegate his authority "to any officer or employee of the Department of Justice." 21 U.S.C. § 871; *see also* Pet. ¶ 31 ("The CSA provides for control by the Justice Department of problems related to drug abuse . . . .").

The CSA also cannot be used to support a private cause of action labeled otherwise, such as a declaratory judgment action, an action for injunctive relief, or a wrongful termination action. *See Jones*, 745 F. Supp. 2d at 894 (concluding that the Declaratory Judgment Act "does not authorize a bypass" of the CSA's federal enforcement scheme); *Real Prop. & Improvements*, 932 F. Supp. 2d at 1072 (concluding that seeking an injunction under Fed. R. Civ. P. Supp. R. G "is tantamount to [acting as] the Government in a civil enforcement or criminal prosecution under the CSA," and "because Claimants have no right of action under the CSA to force [a drug dispensary] to cease its operations, they cannot take such action using Rule G(7)(a)."); *Hatfield v. Arbor Springs Health & Rehab Ctr.*, 2012 WL 4476612, at *3 (M.D. Ala. Sept. 4, 2012) ("The Controlled Substances Act does not create the wrongful termination claim that plaintiff asserts in this action. The provisions of the Act on which plaintiff relies do not provide expressly for a private civil cause of action, nor does the Act imply a private right of action.")(footnote omitted). "To entertain ... a cause of action brought by private parties seeking a declaration that the FDCA or the CSA has been violated would, in effect, evade the intent of Congress not to create private

rights of action ... and would circumvent the discretion entrusted to the executive branch in deciding how and when to enforce those statutes." *Jones*, 745 F. Supp. 2d at 893. Accordingly, the Nation has no basis to base its action on claimed violations of the CSA in the guise of CNUDPA violations.

"Congress committed complete discretion to the executive branch to decide when and how to enforce [the CSA] and authorized no private right of action for the enforcement of [the CSA]." *Jones*, 745 F. Supp. 2d at 893-94. Furthermore, only federal courts (and courts of general jurisdiction in U.S. territories and possessions) were granted authority to enjoin violations of the CSA. 21 U.S.C. § 882(a). Tribal courts, on the other hand, "cannot be courts of general jurisdiction." *Nevada v. Hicks*, 533 U.S. 353, 367–68 (2001) (rejecting tribal jurisdiction over § 1983 claims in part because, although "some statutes proclaim tribal-court jurisdiction over certain questions of federal law[,] . . . no provision in federal law provides for tribal-court jurisdiction over § 1983 actions"). Tribal courts, including this Court, thus lack jurisdiction to enforce the CSA.

C. This Court Lacks Personal Jurisdiction Over McKesson.

For similar reasons that this Court lacks subject matter jurisdiction—McKesson has not acted in Indian country or sought to enter a consensual relationship with the Nation—this Court also lacks personal jurisdiction over McKesson. Lack of personal jurisdiction provides an independent basis to dismiss McKesson from this action with prejudice.

"The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). "Generally, tribal law indicates the tribal court can exercise personal jurisdiction if the person has sufficient minimum contacts with the reservation in order to meet the due process requirements

of the Indian Civil Rights Act (ICRA)." *In re J.D.M.C.*, 2007 S.D. 97, 739 N.W.2d 796, 811 (citing 25 USC § 1302); *see also United States v. Wheeler*, 435 U.S. 313, 328 (1978)(ICRA made guarantee of due process applicable to Indian tribes, including citizens and non-citizens). "Accordingly, whether tribal courts have personal jurisdiction over a party is analyzed using the minimum contacts standard expressed in *International Shoe v. Washington*." *In re J.D.M.C.* at 811. (citing *International Shoe v. Washington,* 326 U.S. 310, 316 (1945), *inter alia*).

Thus, the test for determining whether to exercise personal jurisdiction over McKesson is the well-established *International Shoe* test, which requires McKesson to have sufficient minimum contacts with the forum so the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement*, 326 U.S. at 316 ("due process requires…that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice").

The minimum contacts prong of the Constitutional test can be satisfied through specific or general jurisdiction. *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000); *see also Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014)(citing *International Shoe*, 326 U.S. at 317). Specific jurisdiction exists if the defendant purposely "directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Intercon*, 205 F.3d at 1247 (citing *Burger King Corp. v. Rudzewics*, 471 U.S. 462, 272 (1985)). While there is no clear-cut test for determining when a defendant's minimum contacts with a state suffice to confer specific jurisdiction, the act or acts must "create a 'substantial connection' with the forum." *Burger King Corp.*, 471 U.S. at

473 n.18. General jurisdiction poses an even higher burden of proof, and does not arise unless the defendant's activities in the forum state prove "continuous and systematic." *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, 771 F.Supp.2d 1278, 1285 (E.D. Okla. 2011).

Although McKesson is a distributor of opioids, it does not have any "substantial connection" with the Nation that is in any manner "continuous and systematic." McKesson does not operate facilities on land owned by, or held in trust by the United States for the benefit of, the Cherokee Nation or its members. (Stoy Dec. ¶ 5(f).) McKesson also does not operate facilities lands allotted to Cherokee Nation citizens, the Indian titles to which have not been extinguished or on land set aside for Indian use by the Cherokee Nation and that is superintended by the federal government. (*Id.* ¶¶ 5(g)-(h).) And McKesson does not operate facilities located within the so-called "Cherokee Nation Jurisdictional Area," as shown on a map attached as Exhibit A to the Petition. (*Id.* ¶ 5(i).)

To its knowledge, McKesson has not directly sought to enter a business relationship with the Cherokee Nation relating to the distribution of prescription medications, including opioids. McKesson's pharmaceutical account managers have not solicited business from the Cherokee Nation. McKesson does have a contract with the U.S. Department of Veterans Affairs through which IHS can choose to participate to obtain prescription medications. Under this VA PPV, McKesson, through the IHS, provides prescription medications to, *inter alia*, Indian clinics and hospitals, including clinics and hospitals affiliated with the Cherokee Nation. McKesson's contract is with the federal government, and McKesson did not solicit the Cherokee Nation's participation in the IHS program. (*Id.* ¶ 5(j).) The Cherokee Nation clinics and hospitals that receive prescription medications from McKesson through the IHS under the VA PPV are responsible for properly dispensing the medication to their patients. To its knowledge,

McKesson does not dispense controlled substances directly to the Cherokee Nation or its citizens. (*Id.* ¶ 5(k).) McKesson cannot in any way be said to be responsible if the Nation's clinics improperly dispense opioids. Accordingly, to its knowledge, other than through the IHS McKesson does not distribute controlled substances to any business located on (i) land owned by, or held in trust by the United States for the benefit of, the Cherokee Nation or its citizens; (ii) restricted allotments of Cherokee Nation members; or (iii) land set aside for Indian use by the Cherokee Nation that is superintended by the federal government. (*Id.* ¶ 5(l).) McKesson's contacts with the Nation thus are so minimal, it could not anticipate being haled into tribal court, and the Court cannot exercise general jurisdiction over it.

Although a court may not have general jurisdiction over a defendant, it still may have specific jurisdiction if there is a substantial connection between the forum and the non-resident defendant. The Court's specific jurisdiction inquiry is two-fold. "[F]irst, that the out-of-state defendant must have 'purposefully directed' its activities at residents of the forum state, and second, that the plaintiff's injuries must 'arise out of' defendant's forum-related activities." *Shrader v. Biddinger*, 633 F.3d 1235, 1239 (10th Cir. 2011). "Purposeful availment requires actions by the Defendant which 'create a substantial connection with the forum state.'" *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir.1998)(citing *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 109 (1987)). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum." *Rambo v. Amer. S. Ins. Co.*, 839 F.3d 1415, 1419 (10th Cir.1988)(citing *Burger King*, 471 U.S. at

474-75); *see also OMI*, 149 F.3d at 1092. "Aside from purposeful direction, the specific personal jurisdiction test requires "the plaintiff's injuries [to] arise out of defendant's forum-related activities." *Newsome v. Gallacher*, 722 F.3d 1257, 1269 (10th Cir. 2013)(quotations omitted).

As discussed above, McKesson did not purposefully avail itself of conducting business with the Nation or on the Nation's lands. Simply because McKesson distributes opioids to the Nation's clinics because *the Nation* has placed orders through the IHS, which are then filled by McKesson because it has a contract with the federal government's VA PPV program, does not mean that McKesson has "purposefully direct[] its activities at" the Nation or its citizens. *OMI*, 149 F.3d at 1091. Nor do the Nation's claims "arise[] out of or result[] from actions by [McKesson] [it]self that create a substantial connection with" the Nation's land. *Id.*

Finally, even if the Nation were to somehow establish minimum contacts of McKesson, such that McKesson should be haled here, which it cannot, the Court must then determine whether the exercise of personal jurisdiction over McKesson offends "traditional notions of fair play and substantial justice." *Shrader*, 633 F.3d at 1240. Forcing McKesson to litigate a in a forum which it has never entered certainly offends "traditional notions of fair play and substantial justice" and would be patently unreasonable.[16]

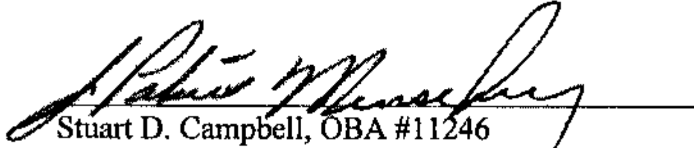
IV. CONCLUSION

Accordingly, McKesson should be dismissed with prejudice from this action, pursuant to the Rules for the District Court of the Cherokee Nation Nos. 123(1) and 123(2), for the independently sufficient reasons that (1) the Court lacks subject matter jurisdiction and (2) the Court lacks personal jurisdiction over McKesson.

---

[16] McKesson also incorporates by reference and adopts the Motion to Dismiss arguments of other Defendants to the extent that those arguments are applicable to McKesson.

Respectfully Submitted



Stuart D. Campbell, OBA #11246
(Cherokee Nation Bar application pending)
J. Patrick Mensching, CNBA #0602
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
700 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103-3522
Telephone 918-582-1211
Facsimile 918-591-5360
scampbell@dsda.com
pmensching@dsda.com

Attorneys for McKesson Corporation

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2017, a true and correct copy of the above and foregoing instrument was mailed, with sufficient postage prepaid thereon, to:

M. Todd Hembree
Chrissi Ross Nimmo
John Young
Chad Harsha
The Cherokee Nation
P.O. Box 948
Tahlequah, OK 74464
and
William S. Ohlemeyer
BOIES SCHILLER FLEXNER, LLP
333 Main Street
Armonk, NY 10504
and
Stephen N. Zack
Tyler Ulrich
Patricia A. Melville
BOIES SCHILLER FLEXNER, LLP
100 SE 2nd Street, Suite 2800
Miami, Florida 33131
and
Richard Fields
FIELDS LAW PLLC
2000 Massachusetts Ave.
Washignton, DC 20036
and
Curtis "Muskrat" Bruehl
THE BRUEHL FIRM
3216 NW 177th St.
Edmond, OK 73012
and
Lloyd B. Miller
Donald J. Simon
Frank S. Holleman
SONOSKY, CHAMBERS, SACHSE, ENDERSON & PERRY
1425 K. Street NW, Suite 600
Washington DC 20005

COUNSEL FOR THE CHEROKEE NATION

James L. Proszek
HALL ESTILL
320 S. Boston Ave., Suite 200
Tulsa, OK 74103-3706

COUNSEL FOR CARDINAL HEALTH, INC.

D. Michael McBride, III
Susan E. Huntman
CROWE & DUNLEVY
500 Kennedy Building
321 South Boston Avenue
Tulsa, OK 74103-3313

COUNSEL FOR DEFENDANT AMERISOURCEBERGEN DRUG CORPORATION

G. Calvin Sharpe, CNBA #225
Phillips Murrah P.C.
Corporate Tower, 13th Floor
101 North Robinson Ave.
Oklahoma City, OK 73102

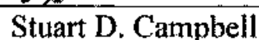
COUNSEL FOR CVS HEALTH, LLC

Stuart P. Ashworth
HOLDEN & CARR
15 East 5th Street, Suite 3900
Tulsa, OK 74103

COUNSEL FOR WALGREENS BOOTS ALLIANCE, INC.

Larry D. Ottwaay
FOLIART, HUFF, OTTAWAY, & OTTOM
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma Cty, OK 73102

COUNSEL FOR WAL-MART STORES



Stuart D. Campbell

IN THE DISTRICT COURT
OF THE CHEROKEE NATION

THE CHEROKEE NATION,

Plaintiff,

v.

Case No. CV-2017-203
Judge Crystal R. Jackson

MCKESSON CORPORATION;
CARDINAL HEALTH, INC.;
AMERISOURCEBERGEN;
CVS HEALTH; WALGREENS BOOTS
ALLIANCE, INC.; WALMART STORES, INC.,

Defendants.

DECLARATION OF PETER STOY IN SUPPORT OF
DEFENDANT McKESSON CORPORATION'S MOTION TO DISMISS PETITION

I, Peter Stoy, declare as follows:

1. I am employed by McKesson as SVP, McKesson Health Systems.

2. McKesson Corporation is a publicly-traded Delaware corporation headquartered in California.

3. McKesson Corporation has been named as a defendant in *Cherokee Nation v. McKesson Corp. et al.*, CV-2017-203 (Cherokee Dist. Ct. April 20, 2017) (the "*Cherokee Nation* Action") in the District Court of the Cherokee Nation. The *Cherokee Nation* Action alleges McKesson Corporation has violated the Controlled Substances Act ("CSA") with regard to the distribution and dispensing of prescription opioids.

4. McKesson Corporation, through various divisions, is a wholesale distributor of prescription medications, including opioids.

5. The following statements apply to McKesson Corporation ("McKesson"):

a. McKesson is registered with the United States Drug Enforcement Administration ("DEA") as a wholesaler to distribute opioids.

b. McKesson does not manufacture opioids. Rather, McKesson 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. McKesson does not dispense controlled substances to the general public or patients.

c. To McKesson's knowledge, the Cherokee Nation does not register or license wholesalers of controlled substances, like McKesson.

d. As a publicly held corporation, McKesson is not a member or corporation of the Cherokee Nation or any other Indian tribe.

e. McKesson is not licensed by or registered to do business with the Cherokee Nation.

f. McKesson does not operate facilities on land owned by, or held in trust by the United States for the benefit of, the Cherokee Nation or its members.

g. McKesson does not operate facilities lands allotted to Cherokee Nation members, the Indian titles to which have not been extinguished.

h. McKesson does not operate facilities on land set aside for Indian use by the Cherokee Nation and that is superintended by the federal government.

i. McKesson does not operate facilities located within the so-called "Cherokee Nation Jurisdictional Area," as shown on a map attached as Exhibit A to the Petition.

j. To its knowledge, McKesson has not directly sought to enter a business relationship with the Cherokee Nation relating to the distribution of prescription medications, including opioids. McKesson's pharmaceutical account managers have not solicited business from the Cherokee Nation. McKesson does have a contract with the U.S. Department of Veterans Affairs through which the Indian Health Services ("IHS") can choose to participate to obtain prescription medications. Under this Veterans Affairs Pharmaceutical Prime Vendor contract ("VA PPV"), McKesson, through the IHS, provides prescription medications to, *inter alia*, Indian clinics and hospitals, including clinics and hospitals affiliated with the Cherokee Nation. McKesson's contract is with the federal government, and McKesson did not solicit the Cherokee Nation's participation, through the IHS, in the VA PPV.

k. The Cherokee Nation clinics and hospitals that receive prescription medications from McKesson through the IHS, under the VA PPV, are responsible for properly dispensing the medication to their patients.

To its knowledge, McKesson does not dispense controlled substances directly to the Cherokee Nation or its members.

l. To its knowledge, other than through the IHS, McKesson does not distribute controlled substances to any business located on (i) land owned by, or held in trust by the United States for the benefit of, the Cherokee Nation or its members; (ii) restricted allotments of Cherokee Nation members; or (iii) land set aside for Indian use by the Cherokee Nation that is superintended by the federal government.

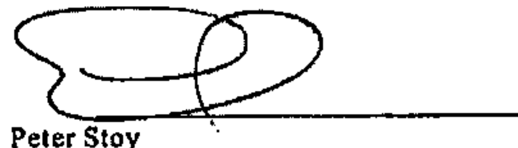
m. All distributions of controlled substances by McKesson have been made only to duly licensed and registered pharmacies.

6. Prior to service of the Cherokee Nation Action, McKesson was not contacted by the Cherokee Nation regarding its distribution of controlled substances, nor has the Cherokee Nation ever attempted to regulate or otherwise govern McKesson's actions.

7. McKesson has already expended significant funds in preparation to defend the Cherokee Nation Action and believes that it will spend even more funds should the Cherokee Nation Action continue.

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

Executed on: 6/6/17



Peter Stoy