THE DISTRICT COURT
OF THE CHEROKEE NATION

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

DEFENDANT WAL-MART STORES, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION

Today, Defendants filed a Motion to Stay this action pending resolution of a Complaint in the United States District Court for the Northern District of Oklahoma, styled *McKesson Corporation, et al. v. Todd Hembree, et al.*, No. 4:17-cv-00323 (N.D. Okla.) (the "Federal Action"). To the extent that motion is denied, and to the extent any ordered stay is later lifted, Defendant Wal-Mart Stores, Inc. ("Walmart"), appearing specially by and through undersigned counsel and pursuant to Cherokee Nation District Court Rule ("District Rule") 123 and Federal Rule of Civil Procedure ("Federal Rule") 12(b), respectfully moves this Honorable Court for dismissal of all claims against it for lack of subject matter jurisdiction and lack of personal jurisdiction.[1]

[1] Walmart has reserved and continues to reserve its right to assert that this Court lacks the authority and jurisdiction to adjudicate the above-captioned litigation. Pursuant to District Rule 123 and the Federal Rules of Civil Procedure, Walmart reserves its right to present additional grounds for dismissal at a later time or hearing.

INTRODUCTION

Even though Walmart is not a member of The Cherokee Nation (the "Tribe") and never dispensed a single prescription on land owned or leased by the Tribe, the Petition purports to assert claims against Walmart. The Tribe's lawsuit alleges that Walmart violated the *federal* Controlled Substances Act (the "CSA"), 21 U.S.C. §§ 801–904, by selling FDA-approved prescription medications to Tribe members who presented prescriptions from licensed health care providers.[2]

The CSA—which does not create a private right of action—is enforceable only by federal authorities and only in a federal forum.[3] This lawsuit is a transparent attempt to bring a claim for violations of the CSA under the guise of violations of tribal common law and statutes. The Tribe has no authority to sue for enforcement of the CSA, and it certainly has no authority to seek such relief from this Honorable Court.

Moreover, because Walmart is not a member of the Tribe and the alleged conduct did not take place in Indian country as set forth in the Petition (the geographic area identified in the Petition is hereafter referred to as "Indian Country"), the Tribe has no jurisdiction for its lawsuit and the case should be dismissed pursuant to District Rule 123 and Federal Rule 12(b)(1).[4] United States Supreme Court cases uniformly recognize that tribal court jurisdiction is an outgrowth of tribal sovereignty and is presumptively limited to the conduct of tribal members in Indian country. The two limited exceptions to this presumptive rule recognized in *Montana v. United States*, 450 U.S.

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[2] Importantly, tribal health care services are provided by and paid for largely by the federal government, through Indian Health Service. *See e.g.*, 25 U.S.C. § 1601, et seq.; 25 U.S.C. § 13.

[3] The only exception to exclusive enforcement of the CSA by the federal government in federal court is a limited right of action, not applicable here, for states to assert claims against certain online pharmacies, and that provision expressly states that "[n]o private right of action is created under this subsection." 21 U.S.C. § 882(c)(1), (5). State courts are granted no other rights to enforce the CSA, and Indian tribes are not granted any at all.

[4] Pursuant to 12 CNCA § 5, "[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."

544, 565 (1981), are inapplicable because Walmart's alleged conduct did not occur in Indian Country. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329–330 (2008) (a tribe may exercise "civil authority over the conduct of non-tribal members 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" (emphasis added)).

Finally, even if the Court had subject matter jurisdiction to hear the Tribe's claims, it would still lack personal jurisdiction over Walmart, and the action should be dismissed for this independent reason under District Rule 123 and Federal Rule 12(b)(2). Walmart is not a tribal member and does not engage in continuous and systemic business in Indian Country.

I. Procedural History

The Petition contains broad allegations about opioids and loosely describes historical developments related to opioids spanning a 14-year period from 2003 to the present. *See* Pet. ¶¶ 66–67. The Petition asserts claims under the Comprehensive Access to Justice Act (CAJA)—enacted less than a year ago, well after the vast majority of the conduct alleged to give rise to the Tribe's claims occurred.[5] The CAJA:

- creates the "Unfair & Deceptive Practices Act" under which the Tribe now brings the Cherokee Nation Action, *id.* (adopting 12 CNC §§ 21 et seq.);
- provides that "No . . . federal law, including any . . . federal regulations, shall be binding upon the courts" unless the Tribal Council incorporates it into a tribal statute or the court adopts it as tribal common law, *id.* (adopting 12 CNC § 3);
- retroactively eliminates the statute of limitations for any case brought by the Tribe as plaintiff, *id.* (amending 12 CNC § 11);
- allows other tribes to join in actions in tribal court without waiving their sovereign immunity, *id.* (adopting 12 CNC § 17);

[5] The same attorneys who filed the Petition authored the Legislative Act that made striking changes in Cherokee Nation law, and now seek to apply these new provisions to prior acts and dramatically increase potential damages. *See* CAJA §§ 11, 13 ("Author: Todd Hembree; John Young").

- creates the authority of the Cherokee Nation Attorney General to bring civil actions as "parens patriae" on behalf of tribal members, *id.* (amending 12 CNC § 13);
- allows for "[a]ggregate data and evidence" rather than specific evidence, *id.* § 13(A); and
- imposes threefold damages for the Tribe only, mandatory attorney's fees to the Tribe, and 20% interest "compounding continuously" if the defendant is dilatory in payment, *id.* § 13(B).

Count I of the Petition rests on the Cherokee Nation Unfair and Deceptive Practices Act, which also did not exist until the enactment of the new legislation last summer. *See* CAJA §§ 21–28. The other counts purport to assert allegedly common law claims for nuisance, negligence/gross negligence, unjust enrichment, and civil conspiracy. The Petition seeks not only compensatory damages and restitution, but also punitive damages and civil penalties. Pet. at 50 (Prayer for Relief).

II. Jurisdictional Facts

Walmart is not a member or corporation of the Tribe or any other tribe. Exhibit 1, Declaration of Chelsea Penn ("Penn Decl."). In addition, Walmart does not operate facilities on land that constitutes Indian Country under 18 U.S.C. §1151, because: (a) none of its facilities are located on a reservation; (b) none of its facilities are on Indian allotments subject to federal restrictions on alienation; and (c) none of its facilities are located on lands held in trust by the United States for the benefit of the Cherokee Nation or its members. 18 U.S.C. § 1151.

The DEA is the primary federal agency responsible for enforcing the CSA, which defines hydrocodone, oxycodone, and oxymorphone as Schedule II drugs. *Id.* § 812(b)(2); 21 C.F.R. §§ 1308.12(b)(1)(vi), (xiii), (xiv). For these and other Schedule II controlled substances, the DEA sets production quotas "to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks." 21 U.S.C. § 826(a). The DEA also enforces the CSA's detailed

reporting requirements for registrants, like Walmart. 21 U.S.C. § 827. Those requirements include maintaining "a complete and accurate record of each [controlled] substance manufactured, received, sold, delivered, or otherwise disposed of by [the registrant]" and making periodic reports of "every sale, delivery or other disposal . . . with respect to narcotic controlled substances [which includes opioids]." *Id.* § 827(a)(3), (d).

Of particular importance here, the DEA also requires registrants to "design and operate a system" to identify suspicious orders, and report those suspicious orders to the DEA. 21 C.F.R. § 1301.74(b).[6] Further, the DEA has broad discretion in determining compliance with the suspicious order regulation, as it may in *its* discretion deem "substantial compliance" with the regulation to be sufficient. *Id.* at §1301.71(b). DEA-registered manufacturers produce according to DEA-set quotas and distribute only to other DEA registrants. In sum, the DEA registers and inspects every level of the supply chain for controlled substances.

III. The Court lacks subject matter jurisdiction over the claims against Walmart.

Tribal courts are not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353 (2001). As domestic dependent quasi-sovereign nations, the jurisdiction of tribes over non-tribal members is strictly limited. A tribe's adjudicative jurisdiction over nonmembers cannot exceed its legislative jurisdiction and may not even go that far. *Hicks,* 533 U.S. at 357–58; *see also id.* at 358 n.2 ("we have never held that a tribal court had jurisdiction over a nonmember defendant").

For the following three reasons, the Court should dismiss the claims against Walmart pursuant to District Rule 123 and Federal Rule 12(b)(1). *First*, the tribal courts are without jurisdiction to enforce the federal CSA, because the CSA does not create a private right of action,

[6] The regulation defines suspicious orders as "orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." 21 C.F.R. § 1301.74(b). It does not, however, identify what is an "unusual[ly] size[d]" order, a "substantial" deviation from a "normal pattern," or an "unusual frequency."

but limits its enforcement only to federal authorities, and only to a federal forum.[7] *Second*, the Court does not have jurisdiction over non-tribal member activities that do not occur in Indian country, as defined by federal law. *Third*, even if the alleged conduct had taken place in Indian country, the Tribe could not overcome its presumptive lack of jurisdiction over non-tribal members by satisfying either of the two narrow *Montana* exceptions. Neither exception applies because regulation of the alleged conduct is not necessary to the Tribe's self-governance or internal relations. Moreover, Walmart did not enter into consensual relationships with the Tribe or its members related to the alleged diversion of prescription opioids. Nor does the alleged conduct have a direct effect on the political integrity, economic security, or the health or welfare of the Tribe.

A. The Court lacks jurisdiction to entertain private actions under the Controlled Substances Act.

The Tribe's jurisdiction fails for a fundamental reason: The Tribe has no authority to regulate conduct under the CSA, for which Congress committed enforcement exclusively to the federal courts. The underlying lawsuit is a transparent attempt to bring a claim for violations of the CSA under the guise of violations of tribal common law and statutes.[8] Indeed, the Tribe fails to allege any basis for liability other than Walmart's alleged violations of the CSA. Based on the regulatory structure of the CSA, "federal courts have uniformly held that the CSA does not create a private right of action." *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016)

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[7] As mentioned previously, the only exception the CSA provides to the exclusive enforcement of the CSA by the federal government in federal courts is a limited right of action, not applicable here, for states to assert claims against certain online pharmacies.

[8] Melissa Locker, Inside Cherokee Lawsuit to Fight Opioid Epidemic, ROLLING STONE (May 26, 2017), available at http://www.rollingstone.com/culture/features/inside-cherokee-lawsuit-to-fight-opioid-epidemic-w484396 (quoting Attorney General Hembree as saying "We want them to follow the federal law, the Controlled Substance Act and put in those practices that they're already supposed to do.").

aff'd, Safe Streets Alliance v. Hickenlooper, Nos. 16-1048, 16-1095, 16-1266, 2017 WL 245359 (10th Cir. June 7, 2017); *accord McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 (S.D. W. Va. 2001) (finding no private cause of action under CSA). Notably, while Congress delegated to tribes authority to regulate the sale of alcohol by non-tribal members within Indian reservations, *see* 18 U.S.C. § 1161; *United States v. Mazurie*, 419 U.S. 544 (1975), it has not acted similarly for the CSA.

The manufacture, distribution, and dispensing of opioids is comprehensively regulated by the CSA. The DEA is "the primary federal agency responsible for the enforcement of the Controlled Substances Act." DRUG ENFORCEMENT ADMINISTRATION, *Practitioner's Manual* 4. DEA regulations are designed to strike a balance. It acts "to prevent diversion and abuse of [controlled substances] while ensuring an adequate and uninterrupted supply is available to meet the country's legitimate medical, scientific, and research needs." *Id.*

A key part of the regulatory scheme created by the CSA is the express grant of the power of enforcement of federal drug policy regarding prescription opioids to the federal government in federal court. "[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*, 164 F. Supp. 3d at 1290 (quoting *Schneller*, 387 F. App'x 289 at 293). Only federal district courts (and courts of general jurisdiction in U.S. territories and possessions) were granted authority by Congress to enjoin violations of the CSA. 21 U.S.C. § 882(a).

Recognizing this exclusive authority conferred on federal government regulators, "federal courts have uniformly held that the CSA does not create a private right of action." *Smith*, 164 F. Supp. 3d at 1290; *accord McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 (S.D. W. Va. 2001) (finding no private cause of action under the CSA). Nothing in the text or structure of

the CSA suggests Congress intended to confer legal rights—much less an enforceable private remedy—on other parties, much less on domestic dependent sovereigns such as the Tribe. *See* 21 U.S.C. § 882(c)(5) (no private right of action); *Smith*, 164 F. Supp. 3d at 1290; *McAllister*, 164 F. Supp. 2d at 793 n.16 (finding no such "legislative intent"); *Ringo v. Lombardi*, 2010 WL 3310240, at *2 (W.D. Mo. Aug. 19, 2010) ("The CSA does not specify a private remedy for those aggrieved by violations of the CSA.").

Congress did not overlook tribes or tribal courts, but instead carved out such enforcement rights through the express terms of the CSA. The CSA, for various other limited purposes, addresses "Indian tribes," "tribal law enforcement agen[cies]," "tribal organizations," "tribal . . . regulatory agencies," "tribal . . . governmental authorities," and even "tribal proceedings." *See* 21 U.S.C. §§ 802(52)(B)(iv), 822a(a)(1), 822a(b), 831(g), 862, 872(c), 872a, 873, 878, 882(c). Nowhere is a tribe or tribal entity provided enforcement power or authority under the terms of the CSA.

Tribal courts, which "cannot be courts of general jurisdiction," lack jurisdiction to enforce the CSA. *Nevada*, 533 U.S. at 367–68. In *Nevada*, the Supreme Court rejected tribal jurisdiction over section 1983 claims, noting that 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." *Id.* (emphasis added). The lack of jurisdiction is clear-cut: Congress has not only not authorized tribal jurisdiction over CSA violations, but has specifically committed such claims to the federal courts.

The federal agency's oversight of the sale or distribution of a federally-regulated controlled substance is to "prevent diversion and abuse of [controlled substances] while ensuring an adequate and uninterrupted supply is available to meet the country's legitimate medical, scientific, and

research needs." DRUG ENFORCEMENT ADMINISTRATION, *Practitioner's Manual* 4. Exercise of tribal jurisdiction over the Tribe's claims, all of which allege violations of the CSA, would conflict with this "superior federal interest." *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1052 (D. Ariz. 1981).

Courts routinely block attempts to enforce statutory duties under the guise of consumer protection and common law claims. In such cases, "plaintiffs cannot bootstrap their arguments regarding" an alleged violation of the statute into common-law tort liability. *Webster v. Pacesetter, Inc.*, 259 F. Supp. 2d 27, 36 (D.D.C. 2003) (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001)); *see also, e.g., Conboy v. AT & T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001) (rejecting claim where underlying statute did not provide a private cause of action as "contrary to the New York Legislature's intent and inconsistent with the statutory scheme. The Legislature, by creating a private right of action to enforce Section 349, clearly did not intend to authorize private enforcement of Section 601, especially where Section 601 contains its own enforcement provision which explicitly dictates who can enforce that section."); *Coffman v. Bank of Am., NA*, 2010 WL 3069905, at *8 (S.D. W. Va. Aug. 4, 2010) ("Plaintiff may not circumvent the [federal Office of Thrift Supervision]'s exclusive authority to implement disclosure requirements for federal savings banks through a state law claim of unconscionable inducement."). Nor may the Tribe seek injunctive relief that creates a private right of action and circumvents the exclusive authority to enforce and jurisdiction of the federal courts. *See Jones v. Hobbs*, 745 F. Supp. 2d 886, 890–894 (E.D. Ark. 2010) ("The Declaratory Judgment Act does not authorize a bypass of [the CSA's] enforcement scheme."), *aff'd*, 658 F.3d 842 (8th Cir. 2011).

The Tribe alleges Walmart violated the CSA in the following ways:

- Filling suspicious or invalid orders for prescription opioids at both the wholesale and retail level;

- Failing to maintain effective controls against opioid diversion;
- Failing to operate an effective system to disclose suspicious orders of controlled substances;
- Failing to report suspicious orders of controlled substances;
- Failing to reasonably maintain necessary records of opioid transactions;
- Deliberately ignoring questionable and/or obviously invalid prescriptions and filling them anyway.

Pet. ¶ 174.

The Tribe alleges CSA violations under the guise of five causes of action: (1) violation of the newly enacted Cherokee Nation Unfair and Deceptive Trade Practices Act (CNUDTPA); (2) nuisance; (3) negligence; (4) unjust enrichment; and (5) civil conspiracy. Again, each cause of action is rooted in an alleged CSA violation by Walmart with regard to the distribution and dispensing of prescription opioids.[9]

Here, the allegations are silent as to any alleged wrongful conduct by Walmart other than the alleged violations of the CSA. As such, the Tribe fails to identify any basis of liability outside of its reliance on federal law. Simply, this action is an improper attempt to ignore congressional direction related to committed federal enforcement by the federal government, in federal court.

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[9] **CNUDTPA**: The Tribe alleges "[e]ach act by [Walmart] that violated federal law under the CSA constitutes a violation of the [CNUDTPA]." Pet. ¶ 174.

Nuisance: The Tribe alleges Walmart's alleged nuisance-causing activities "include failing to implement effective controls and procedures in their supply chains to guard against theft, diversion and misuse of controlled substances, and their failure to adequately design and operate a system to detect, halt and report suspicious orders of controlled substances," that is, failure to comply with the DEA's regulations. *Id.* ¶ 181.

Negligence/Gross Negligence: The Tribe alleges Walmart's "challenged behavior . . . is against the law, i.e., facilitating the diversion of opioids to the illicit black market," and that the distributors' allegedly negligent conduct includes "unsafe distribution practices," "disregarding precautionary measures built into the CSA," and failing to report suspicious orders or refuse to fill them; again, a failure to comply with the DEA's regulations. *Id.* ¶¶ 194–95, 198.

Unjust Enrichment: The Tribe alleges a right to recover in unjust enrichment for "the costs of the harm caused by Defendants' negligent distribution and sales practices," which it alleges were "illegal." *Id.* ¶¶ 210, 214.

Civil Conspiracy: The Tribe alleges "Distributor Defendants continuously supplied prescription opioids to the Pharmacy Defendants despite having actual or constructive knowledge that said pharmacies were habitually breaching their common law duties and violating the CSA." *Id.* ¶ 218.

By attempting to lift an alleged federal statutory violation into a tribal consumer protection claim, the allegations conflict with Congress's intended superior federal interest for federal enforcement of the CSA.

B. Walmart is not a Tribal member and the Court lacks authority to regulate non-member conduct outside Indian country.

This Honorable Court also lacks jurisdiction because Walmart is not a member or corporation of the Tribe or any other tribe, Penn Decl., and the conduct alleged in the Petition did not take place in Indian Country. The definition of Indian country 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. Indeed, tribes are powerless to regulate non-tribal members 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]

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[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); *Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("Indian tribes are not permitted to exercise jurisdiction over the activities or conduct of non-Indians occurring outside the reservation."); *Yankton Sioux Tribe Head Start Concerned Parents v. Longview Farms, LLP*, No. CIV. 08–4058, 2009 WL 891866, at *3 (D.S.D. Mar. 31, 2009) ("The Tribe does not

Here, the alleged conduct is plainly non-tribal member conduct outside of Indian Country. The conduct of Walmart allegedly consists of "filling" and "dispensing" prescriptions, "reviewing" prescriptions, "hiring" tribal employees to work as pharmacists and pharmacy technicians, and failing to adequately train or supervise employees. *E.g.*, Pet. ¶¶ 44, 128, 131, 142, 143, 144, 148, 150. All of these activities would have occurred, if at all, at Walmart's pharmacies, which are located on non-tribal member owned fee lands outside of Indian Country. There can be no tribal jurisdiction over such conduct. *See, e.g., Jackson v. Payday Fin., LLC*, 764 F.3d 765, 786 (7th Cir. 2014) ("There simply is no colorable claim that the courts of the [tribe] can exercise jurisdiction over the Plaintiffs" where "the Plaintiffs have not engaged in any activities inside the reservation.").

The Tribe admits in its Petition that it can only exercise jurisdiction over non-tribal members "where the cause of action arises in land that constitutes Indian country within the Cherokee Nation." Pet. ¶ 22. While the Tribe references the "Cherokee Nation Jurisdictional Area" encompassing the whole or part of 14 Oklahoma counties, as shown on a map attached as Exhibit A to the Petition, Pet. ¶¶ 26–28, the Tribe does not allege that the "Cherokee Nation Jurisdictional Area" is Indian country, nor could it. *See also* 20 Cherokee Nation Code Ann. [CNCA] § 25 ("[T]erritorial jurisdiction of the Cherokee Nation District Court shall extend to include all "Indian Country" . . . ***within*** the fourteen- (14) county area.") (emphasis added).

Thus, because the alleged conduct did not occur in Indian Country, the Court plainly lacks jurisdiction over Walmart.[11] *See Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d

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have regulatory authority over the construction of the farrowing facility by Defendant, a non-Indian entity, because such facility is located on land which is not within reservation boundaries."); *but see Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 597 F. Supp. 2d 1250, 1261–62 (N.D. Okla., 2009) (questioning the applicability of Section 1151 to a tribal member's claimed immunity from state income taxation).

[11] The Tribe 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

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*").

C. Even if some of the alleged non-tribal member conduct had occurred in Indian country, the Court would still lack jurisdiction.

Even had the alleged conduct occurred within Indian country (it did not), 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 Tribe can overcome the general rule only if it can establish the applicability of one of the two narrow *Montana* exceptions:

> [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 burden rests on the Tribe to establish one of the exceptions to *Montana*'s general rule. "These exceptions are 'limited' ones and cannot be

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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.

construed in a manner that would 'swallow the rule' or 'severely shrink' it." *Plains Commerce Bank*, 554 U.S. at 330 (quoting *Atkinson Trading Co.*, 532 U.S. at 654–55, 57, and *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)). Here, the Tribe cannot carry its burden as to either exception.

1. Since the Tribe's allegations do not involve tribal governance or internal relations of the Tribe, neither *Montana* exception applies.

At the outset, neither exception applies because both are limited to regulation of tribal governance or internal relations. *See Plains Commerce Bank*, 554 U.S. at 335 (explaining first *Montana* exception as reflecting tribes' authority to "regulate nonmember behavior that implicates tribal governance and internal relations"); *see Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (explaining that "[k]ey" to second *Montana* exception is Court's recognition that "'[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations'" (quoting *Montana*, 450 U.S. at 564) (alteration in original)).

Exercise of tribal jurisdiction over the claims against Walmart is not necessary to protect tribal governance or internal relations. This case has nothing to do with determinations of tribal membership, intrusions on the privacy of communications among tribal leaders, voting by tribe members in tribal elections, inheritance by tribe members, or other matters central to tribal governance or internal relations.

With respect to *Montana*'s "consensual relationship" exception, the only alleged conduct is Walmart's filling of prescriptions for medication for members of the Tribe and hiring members of the Tribe to work in Walmart's pharmacies. *E.g.*, Pet. ¶¶ 44, 128, 131, 142, 143, 144, 148, 150. These allegations do not satisfy the first *Montana* exception. The term "consensual relationships" as used in *Montana* refers to "commercial dealing, contracts, leases, and other arrangements," 450

U.S. at 565, and does not apply to discrete sales of federally-regulated prescription drugs distributed at Oklahoma-licensed pharmacy locations.

Moreover, even when there is a consensual relationship, there must be a nexus, a direct connection, between that relationship and the conduct the tribe seeks to regulate or adjudicate. *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1223 (10th Cir. 2002); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011). No such connection exists here.

There are no alleged consensual activities with a nexus or a direct connection between Walmart and the Tribe or its members related to Walmart's regulatory compliance with federal law, CSA. Moreover, the Tribe's claims arise out of alleged relationships that are by definition non-consensual—the use of fraud and theft to unlawfully obtain prescription opioids.

Nor can the Tribe satisfy the second *Montana* exception because it has not alleged facts that suggest the alleged conduct imperils the subsistence or survival of the tribe or that the exercise of jurisdiction "is needed to preserve the [tribe's] right to make their own laws and be governed by them." *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1075 (10th Cir. 2007); *Plains*, 554 U.S. at 341 ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."). The activities alleged in the Petition do not threaten the political integrity, economic security, or health or welfare of the Tribe in a way that permits the assertion of jurisdiction over activities of non-tribal members or non-tribal member land.

The Tribe has not, and cannot, show that the individual tribal members' use of FDA-approved prescription medications jeopardizes the entire Tribe's "health and welfare," as required for application of the second *Montana* exception. Tort injuries to individual tribal members do not have a "direct effect on the health or welfare of the tribe," even where the safety of other tribe members could be jeopardized. *Strate*, 520 U.S. at 457. In *Strate*, the United States Supreme

Court rejected such a broad interpretation of the *Montana* exception, despite acknowledging that "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity and surely jeopardize the safety of [other] tribal members." *Id.* at 457–58. The Court refused the plaintiff's broad construction of tribal "health and safety," concluding that the interests of an individual tort plaintiff did not qualify as "tribal interest" to be protected by the second *Montana* exception. *Id.* Not only does the second *Montana* exception not apply, but no court has applied the second *Montana* exception to an action alleging activities similar to those alleged by the Tribe here.

Accordingly, even if this case involved conduct in Indian country, the *Montana* exceptions would not apply here and would not permit the Tribe's assertion of jurisdiction.

2. The first *Montana* exception does not apply for additional reasons.

There are at least two other reasons that this case does fit within the first *Montana* exception, which 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.

First, the exception does not extend to tort claims against non-members.[12] Adjudication of tort claims is not "regulat[ion] through taxation [or] licensing," nor does tort litigation qualify among the "other means" to regulate a consensual relationship anticipated by *Montana*. 450 U.S. at 565.

[12] 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. *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)).

Second, Walmart 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*, 640 F.3d at 1152 ("[T]he 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 to the allegations in the Petition.

As the Supreme Court explained: "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). But the Tribe's claims do not arise out of any consensual relationship with Walmart—rather, they arise from the alleged non-consensual diversion of opioids to the black market. Even if this were 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.'" *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 941–42 (9th Cir. 2009) (quoting *Atkinson*, 532 U.S. at 656).

Likewise, to the extent that any of the unidentified individuals who allegedly diverted opioids may have been members of the Tribe, their relationship with Walmart 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 Tribe's allegations against Walmart are not that it consented to opioid diversion, but that it allegedly erred in failing to detect the "red flags" of this fraud by members of the Tribe. *See e.g.*, Pet. ¶¶ 5, 141, 144, 198. The Tribe thus fails to allege any facts showing that its claims arise out of a consensual relationship necessary to protect the Tribe's self-governance. The first *Montana* exception is therefore inapplicable.

3. The second *Montana* exception does not apply for additional reasons.

The second exception in some circumstances 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.

First, under the second exception, "the challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F. 3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce Bank*, 554 U.S. at 341) (citation omitted); *accord Strate*, 520 U.S. at 458 (even alleged conduct that "endanger[s] all in the vicinity, and surely jeopardize[s] the safety of tribal members" does not fall under *Montana*'s second exception because "if *Montana*'s second exception requires no more, the exception would severely shrink the rule"). The conduct alleged in the Tribe's lawsuit does not rise to that level.

Second, indirect effects of the conduct alleged in the Tribe's lawsuit are insufficient to support jurisdiction. Here, the Petition suggests that if an alleged tort impacts enough members of the Tribe, jurisdiction should be granted to tribal courts. But, this theory is not grounded in decisional law or allegations related to non-federally-regulated conduct. Even where tribal 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.

Philip Morris USA, Inc., 569 F.3d at 943 (brackets in original) (*quoting Montana*, 450 U.S. at 566) (emphasis added); *accord Strate*, 520 U.S. at 457–58. No direct threat to sovereignty is at issue; the second exception does not apply.

D. The Court lacks jurisdiction to seek civil penalties or punitive damages.

The Court also lacks jurisdiction to impose punishment in the form of civil penalties and punitive damages because "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians," *Oliphant*, 435 U.S. at 212, and Congress has not authorized tribes to impose civil penalties or punitive damages on non-tribal members.

The principle that tribes lack inherent power to try and to punish non-tribal members should extend to civil penalties and punitive damages as well as criminal sanctions because civil penalties and punitive damages are predominantly punitive in nature. *See, e.g.*, *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (explaining that punitive damages "have been described as 'quasi-criminal,' [and] operate as 'private fines' intended to punish the defendant and to deter future wrongdoing" (citation omitted)); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) (explaining that "the remedy of civil penalties . . . exacts punishment"). Indeed, this Honorable Court has been asked to ignore such longstanding principles limiting jurisdiction and is instead asked to push forward a Petition with hopes of "hundreds of millions of dollars" [13] in damages, which are seemingly punitive in nature. [14]

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[13] Michael Nedelman, Cherokee Nation Sues Pharmacies, Drug Distributors Over Opioid Epidemic, CNN (Apr. 24, 2017), available at http://www.cnn.com/2017/04/24/health/cherokee-nation-opioid-lawsuit/index.html (last visited June 9, 2017) (quoting "Richard Fields, special counsel to the attorney general of the Cherokee Nation").

[14] *See* Suzette Brewer, Cherokee Nation Sues Walmart, Drug Companies Over Opioids, INDIAN COUNTRY TODAY (Apr. 21, 2017), available at https://indiancountrymedianetwork.com/news/native-news/cherokee-nation-sues-walmart-drug-companies-opioid/ (quoting Attorney General as saying "We can't put them in jail, but we can hit them where it hurts the most, which is their wallet."); Melissa Locker, Inside Cherokee Lawsuit to Fight Opioid Epidemic, ROLLING STONE (May 26, 2017), available at http://www.rollingstone.com/culture/features/inside-cherokee-lawsuit-to-fight-opioid-epidemic-w484396 (quoting Attorney General Hembree as saying "I've been Attorney General for six years and there's usually two ways that you can change someone's behavior. Number one

IV. The Court lacks personal jurisdiction over the claims against Walmart.

Further, this Court lacks personal jurisdiction over Walmart. District Rule 123 provides for dismissal when the Court lacks "jurisdiction over persons." A party cannot be forced to litigate in a jurisdiction where it has insufficient contacts. This rule flows from the immutable principle that the maintenance of a suit must not "offend traditional conceptions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). Constitutional due process requires "certain minimum contacts with the forum such that maintenance of the suit does not offend traditional conceptions of fair play and substantial justice." *Id.*

Walmart is not a member or corporation of the Tribe or any other tribe, and it does not operate facilities on land that constitutes Indian Country. Penn Decl. The Petition is void of any allegation that Walmart has sufficient contact that would, within the bounds of due process, allow the Court to exercise general or specific personal jurisdiction over Walmart. Accordingly, the action should be dismissed for this independent reason under District Rule 123 and Federal Rules of Civil Procedure 12(b)(2).

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is to put them in jail. Number two is to hit them economically hard enough. Well, I don't have the authority to put them in jail, but we have calculated the damages as to these defendants that we will get their attention enough . . .").

Respectfully submitted,

/s/ Larry D. Ottaway

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COUNSEL FOR WAL-MART STORES, INC.

**pro hac vice* motions forthcoming
** application to Cherokee Bar forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on this, the 12th day of June, 2017, I served a true and correct copy of the foregoing document, which was filed by e-mail with the District Court of the Cherokee Nation, by regular first-class mail, postage pre-paid, to the following counsel of record:

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THE DISTRICT COURT
OF THE CHEROKEE NATION

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

DECLARATION OF CHELSEA PENN IN SUPPORT OF WAL- MART STORES, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION

I, Chelsea Penn, declare as follows:

1. I am Senior Manager, Real Estate & Portfolio Management for Wal- Mart Stores, Inc. ("Walmart"). Based on a good faith investigation and reasonable inquiries, I make this declaration in support of the Walmart's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Personal Jurisdiction.

2. Walmart is a Delaware corporation.

3. Walmart has ownership and leasehold interests in real property in Oklahoma that are subject to property tax.

4. Based on review of the 2017 real property tax obligations of Oklahoma properties within Walmart's portfolio of owned or leased real property, there appear to be seventy-four (74) sites where Walmart operates a facility or holds an interest in real property subject to tax liability within one or more of the 14 counties at issue in the Petition in *Cherokee Nation v. McKesson Corp. et al.*, CV-2017-203 (Cherokee Dist. Ct. April 20, 2017).

5. I have reviewed Walmart's Tax Department's current real property tax obligation list for the seventy-four (74) sites discussed above. Based on that review, it is my understanding and belief based on good faith investigation and inquiries that each of the Walmart sites is either:

(i) land owned in fee simple by Walmart or a Walmart affiliate; or

(ii) leased by Walmart or a Walmart affiliate from a third- party that is not identified as the Cherokee Nation.

6. Based on recent review of said real property tax obligation list discussed above, there is no indication of a lease between Walmart or Walmart affiliate and the Cherokee Nation where Walmart or a Walmart affiliate is a lessee for any of the seventy-four (74) sites referenced above.

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

Executed on June 12, 2017, in Bentonville, Arkansas.

Chelsea Penn
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