

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION**

This document relates to:

THE MUSCOGEE (CREEK) NATION,

PLAINTIFF,

v.

PURDUE PHARMA L.P., *et al.*,

DEFENDANTS.

MDL No. 2804

**Master Docket No.:
1:17-MD-02804-DAP**

Hon. Judge Dan A. Polster

JURY TRIAL DEMANDED

**THE MUSCOGEE (CREEK) NATION'S
CONSOLIDATED OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS THE NATION'S FIRST AMENDED COMPLAINT**

TABLE OF CONTENTS

INTRODUCTION 1

NATURE OF THE CASE 3

PROCEDURAL HISTORY 7

DENIALS OF MOTIONS TO DISMISS IN RELATED OPIOID CASES..... 9

LEGAL STANDARD..... 13

ARGUMENT 13

I. THE NATION HAS STANDING..... 14

A. The Nation Has *Parens Patriae* Standing..... 14

B. The Nation Has Standing Even Apart From the *Parens Patriae* Doctrine..... 16

II. THE NATION’S CLAIMS ARE NOT PREEMPTED. 17

A. The Nation’s Misrepresentation Claims Are Not Preempted. 17

1. The Nation’s Claims Against Brand-Name Manufacturers Are Not Preempted. 18

2. The Nation’s Misrepresentation Claims Against Generic Manufacturers Are Not Preempted. 21

B. The Nation’s Diversion Claims Are Not Preempted. 23

III. THE COMPLAINT ADEQUATELY ALLEGES CAUSATION. 24

A. Under Oklahoma Law, Causation Is Typically a Fact Question and Is Not Resolved on a Motion to Dismiss. 25

B. The Nation Has Adequately Alleged a Casual Connection Between Defendants’ Actions and Omissions and the Resulting Injuries. 26

C. Intervening Events Do Not Break the Causal Chain. 30

IV. THE NATION HAS ADEQUATELY PLED COGNIZABLE INJURY..... 35

A. Section 1621e of the Indian Health Care Improvement Act Does Not Bar Recovery. 36

1. The Nation Seeks to Recover for Care the Nation Itself Provided. 37

2. Section 1621e Does Not Bar Recovery for Care the Nation Provided. 38

B. The Nation’s Injuries Are Not Derivative. 45

C. The Municipal Cost Recovery Rule Does Not Apply to the Nation..... 48

D. The Economic Loss Doctrine Does Not Apply to the Nation’s Claims. 50

V. THE NATION HAS ADEQUATELY PLED WITH PARTICULARITY. 52

A. Rule 9(b) is Designed to Give Defendants Notice of the Claims Against Them, Not Painstaking Details of All Possible Facts. 53

B.	The Nation’s Allegations Give Defendants the Necessary Notice.	55
C.	Defendants’ Objections to “Group Pleading” Lack Merit.	59
VI.	STATUTES OF LIMITATIONS ARE NOT A BAR TO RECOVERY.	60
A.	Statutes of Limitation Do Not Apply to Suits Brought by Tribal Governments. .	61
B.	Adjudication of Statutes of Limitation is Premature.	62
C.	The Nation Has Adequately Pled Facts to Toll and Delay Accrual of All Applicable Statutes.	63
1.	The Nation’s Claims Did Not Accrue Until the Nation Discovered That It Was Injured Due to Defendants’ Misconduct.	64
2.	Marketing Defendants’ Fraudulent Concealment Tolls the Statute of Limitations.	68
3.	The Continuing Violations Doctrine Tolls the Statute of Limitations.	70
VII.	THE NATION’S CLAIMS DO NOT FAIL FOR LACK OF SERVICE AND/OR PERSONAL JURISDICTION.	72
VIII.	DEFENDANTS’ ASSERTIONS THAT THE NATION HAS FAILED TO ALLEGE ACTIONABLE MISCONDUCT ARE WITHOUT MERIT.	74
A.	The Nation States a Claim for Public Nuisance.	74
1.	Oklahoma Statutory and Case Law Recognize that Public Nuisance Claims Can Be Products-Based.	75
a.	Oklahoma’s Nuisance Statute Does Not Prohibit Products-Based Nuisance Claims.	75
b.	Case Law from Oklahoma and Other Jurisdictions Supports the Concept of Products-Based Public Nuisance Claims.	76
c.	The Nation Separately Alleges Property-Based Public Nuisance.	81
2.	The Nation Adequately Alleges Interference with a Public Right.	82
3.	The Nation Adequately Alleges That Defendants Exerted Sufficient Control Over Opioids to Establish Liability.	84
B.	The Nation States a Negligence Claim Against All Defendants.	87
1.	Legal Standards.	88
2.	Defendants Owe Duties to the Nation.	88
3.	The Complaint Alleges Defendants Breached Their Duties.	94
4.	Defendants’ Conduct Constitutes Negligence Per Se.	95
5.	Oklahoma’s “Innocent Seller” Statute Does Not Apply.	98
C.	The Nation States a Claim for Unjust Enrichment.	98

1.	An Oklahoma Court Has Held That Oklahoma Stated an Unjust Enrichment Claim Under Oklahoma Law In an Opioids Case Similar to This Case.....	99
2.	The Complaint Sufficiently Alleges a Benefit to Defendants.	100
3.	The Nation’s Unjust Enrichment Claims Are Not Derivative or Duplicative of Its Other Claims.	103
4.	The Availability of Remedies at Law If the Nation Succeeds on Its Other Claims Does Not Support Dismissal.....	104
D.	The Nation States a Claim for Civil Conspiracy.	105
1.	The Nation’s Civil Conspiracy Claim Is Not Defeated by Distributors’ Denial of the Nation’s Allegations.	105
2.	The Nation Sufficiently Pleads Civil Conspiracy.	107
3.	The Nation Pleads Civil Conspiracy with the Requisite Level of Particularity.....	109
4.	It Is Immaterial That the Nation’s Civil Conspiracy Claim Cannot be Based on Negligence.....	110
5.	The Nation’s Civil Conspiracy Claims Should Not Be Dismissed Based on the Purported Insufficiency of the Nation’s Other Claims.	110
E.	The Nation Has Properly Alleged RICO Violations.....	111
1.	The Complaint Adequately Alleges Direct Injury.	114
2.	The Complaint Alleges an Injury to “Business or Property.”.....	121
3.	The Complaint Adequately Alleges Predicate Acts.....	126
a.	The Nation Alleges Mail and Wire Fraud.....	126
b.	The Nation Alleges Controlled Substance Violations.	130
c.	The Nation Alleges Travel Act Violations.	131
4.	The Complaint Alleges Participation in an Enterprise.	134
a.	The Complaint States That Marketing Defendants Formed the Opioid Marketing Enterprise.	135
b.	The Complaint States That Defendants Formed the Opioid Supply Enterprise.	136
F.	The Nation States Claims for Violations of the Lanham Act Against All Defendants.	139
1.	The Heightened Pleading Standard Does Not Apply to the Nation’s Lanham Act Claims.	140
2.	The Nation Has Stated a Claim Against Distributors.	141

3.	The Nation Has Stated a Claim Against Marketing Defendants.	144
4.	The Nation Has Stated A Claim Against Pharmacies.....	145
5.	The Nation Has Stated a Claim Against Generic Manufacturers.	148

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.