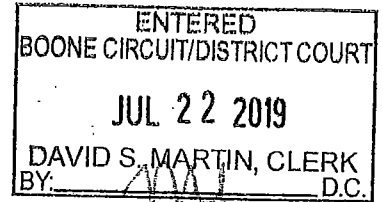


**COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION III
CASE NO. 18-CI-00846**



**COMMONWEALTH OF KENTUCKY,
Ex. rel. ANDY BESHEAR, ATTORNEY GENERAL**

PLAINTIFF

VS.

**WALGREENS BOOTS ALLIANCE, INC.,
WALGREEN CO., WALGREENS MAIL
SERVICE, LLC, WALGREENS SPECIALTY
PHARMACY, LLC, WALGREENS.COM
INC. d/b/a WALGREENS #05823**

DEFENDANT

ORDER

This matter comes before the Court on Defendants Walgreens Boots Alliance, Inc.; Walgreen Co.; Walgreens Mail Service, LLC; Walgreens Specialty Pharmacy, LLC; and Walgreens.com, Inc. d/b/a Walgreens #05823 ("Walgreens") Motion to Dismiss Plaintiff's Complaint pursuant to Civil Rule 12.02(f). Additionally, Defendant Walgreen Boots Alliance has filed a Motion to Dismiss the claims against it for lack of personal jurisdiction. The Court having reviewed the memoranda filed by the parties, the court file, heard argument from counsel, and being in all ways sufficiently advised, finds as follows:

The underlying Complaint was filed by Kentucky Attorney General Andy Beshear against Walgreens alleging that they perpetuated Kentucky's opioid crisis by abusing the closed distribution system created by Congress in an effort to exaggerate the need for opioid medications in Kentucky, then recklessly shipping and dispensing outrageous quantities of opioids into Kentucky. Plaintiff argues that Walgreens' actions violated Kentucky law and resulted in an opioid epidemic, devastating the Commonwealth's families and communities and

forcing the Commonwealth to fund the expenses associated with the epidemic and rehabilitation of its citizen victims.

Walgreens has now brought this Motion to Dismiss Pursuant to Civil Rule 12.02(f), requesting that this Court dismiss the Complaint against them in that it fails to adequately allege facts that would support its claims. Walgreens argues that although Attorney General Beshear has brought nine other lawsuits in eight different counties related to the opioid crisis, Walgreens occupies a much different place in the chain of distribution of opioids than the defendants in the other matters, in that they solely dispense opioid medications to patients who present prescriptions written by physicians. They do not manufacture opioid medications, nor do they advertise them to the public or promote them to doctors.

When considering a motion to dismiss, Civil Rule 12.02 requires the Court to construe the pleadings liberally “in a light most favorable to the plaintiff” and to take all factual allegations in the complaint to be true. *Gall v. Scroggy*, 725 S.W. 2d 867 (Ky. Ct. App. 1987) (citing *Ewell v. Central City*, 340 S.W. 2d 479 (Ky. 1960)). “The Court shall not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Mims v. W.S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) (quoting *James v. Wilson*, 95 S.W. 3d 875, 883-84 (Ky. Ct. App. 2002)). In reviewing a Motion to Dismiss, the trial court is not required to make any factual findings, and it may properly consider matters outside of the pleadings in making its decision. *D.F. Bailey, Inc. v. GRW Engineers, Inc.*, 350 S.W. 3d 818, 820 (Ky. Ct. App. 2011).

I. Public Nuisance

Walgreens argues the Commonwealth’s public nuisance claim fails on two fronts. The first is that the Complaint does not identify any public right allegedly infringed upon as there is

no public right to be free from the threat that a lawful product will be abused and thereby cause injury. They cite to *City of Chicago v. Beretta U.S.A., Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) in which the Illinois Court stated; “[w]e are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a matter that may create a risk of harm to another.” Defendants argue that adopting the Attorney General’s view that abuse by an individual who presents a valid prescription written by a physician, or abuse of a valid opioid prescription by someone subsequent, constitutes a “public right” would instantaneously convert into public nuisance virtually any societal ill that affects a substantial number of people—a floodgate which should not be opened.

The Commonwealth refutes this, arguing that the public nuisance claim is sufficiently pled and satisfies not one, but all, of the circumstances identified in the Restatement (Second) of Torts § 821B that may “sustain a holding that an interference with a public right is unreasonable.” The Restatement asserts that an unreasonable violation of a public right can occur in the following circumstances:

- (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B. The Commonwealth contends that Walgreens interfered with the public health and safety of the citizens of Kentucky by saturating Kentucky

with addictive medications while ignoring applicable laws and regulations pertaining to the safe distribution of addictive drugs.

“A common or public nuisance is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency or morals of the citizens at large, resulting either (a) from an act not warranted by law, or (b) from neglect of a duty imposed by law.” *Nuchols v. Commonwealth*, 226 S.W. 2d 796, 798 (Ky. App.1950). The Court finds that the Commonwealth has properly alleged a public right that Walgreens has violated.

Secondly, Walgreens argues the public nuisance claim fails in that the Complaint does not allege that Walgreens had control of the opioid medications at the time of the alleged harm. Defendants argue that the alleged public nuisance “increases in illicit drug use, crime, and overdoses,” did not arise until after the prescription opioids were in the hands of third parties.

Conversely, the Commonwealth argues that the public harm occurred when Walgreens ignored applicable laws, regulations, and its own internal protocols in furtherance of flooding Kentucky’s communities with addictive medications. They contend that Defendants controlled the products at the time of dispensation and distribution and, by virtue of its role as a licensed distributor, promised to control the supply of opioids into the Commonwealth.

The Court agrees with the Commonwealth that it has sufficiently pled the control element of the public nuisance claim, alleging the cause of the nuisance was the dispensation and distribution of the opioids at a time in which Walgreens had control of them.

II. Negligence

Walgreens argues that the Commonwealth’s negligence claim fails because Walgreens does not owe a common law duty to the Commonwealth to protect it from the economic injuries alleged in the Complaint. They claim that even if the allegations against them are true, and they

did dispense an excessive number opioids medications without adequately investigating or reporting potential diversion, those acts alone could not have caused the harms alleged in the Complaint as those harms could only have occurred once third parties illicitly diverted the prescription opioid medications for improper use. They argue they cannot therefore be held liable for failing to prevent the criminal misconduct of third parties with whom they have no relationship and over whom they have no control. Thus, they claim they owed the Commonwealth no duty to protect it from the economic consequences of such third-party actions. They cite to *Briscoe v. Amazing Products, Inc.*, 23 S.W.3d 228, 230 (Ky. App. 2000) as instructive. In *Briscoe*, a suit was brought against the distributor of “Liquid Fire,” a drain-cleaning product, after it was used to assault a third party. The Court looked to the analysis found in *Sturm, Ruger & Co., v. Bloyd*, 586 S.W. 2d 19 (Ky. 1979) which held that the manufacturer of a firearm could not be held liable for the gun’s accidental discharge because the manufacturer had no duty to anticipate the unreasonable use of the firearm by its owner. The *Briscoe* Court then opined that the “principles at work in *Sturm* would apply with even greater force where, as here, the intervening cause was an intentional criminal act.” *Id.* at 230. Walgreens contends that *Sturm* and *Briscoe* are controlling, and the application of such requires the Commonwealth’s claim of negligence to fail as a matter of law.

The Commonwealth argues that Walgreens’ reliance on *Sturm* and *Briscoe* is misplaced as the diversion and abuse of opioids is not an extraordinary or unforeseeable result of Walgreens’ unabated, excessive distribution and dispensation of opioids in Kentucky, but rather the obvious result of supplying quantities of drugs that exceed the population and are not necessitated by legitimate medical needs. They contend that Walgreens is mischaracterizing the claims against them as the Commonwealth is not arguing Walgreens’ duty arises from the

intentional acts of third parties pursuant to *Norris v. Corr. Corp. of Am.*, 521 F. Supp. 2d 586, 590 (W.D. Ky. 2007), but that its duty arises based on its own actions of negligently failing to protect against theft and diversion and for saturating Kentucky with opioids.

The Court agrees that the Commonwealth has adequately pled their claim for negligence. Kentucky recognizes a general “universal” duty to exercise ordinary care to prevent foreseeable injury. “The examination of which must be focused so as to determine whether a duty is owed, and consideration must be given to public policy, statutory and common law theories in order to determine whether a duty existed in a particular situation.” *T& M Jewelry, Inc., v. Hicks*, 189 S.W.3d 526, 530-531 (Ky. 2006) (citing *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 849)). Here the Commonwealth has alleged harm - higher addiction and overdose rates, increased heroin usage, associated injuries like increased crime, more children placed in foster care, skyrocketing healthcare expenses, and a declining quality of life for its citizens, as a not unforeseeable result of Walgreens’ actions - excessive distribution and dispensation of opioids.

III. Unjust Enrichment

Walgreens next argues that the Commonwealth has not adequately pled or established the elements of their unjust enrichment claim. A claim for unjust enrichment has three elements: “(1) a benefit conferred upon defendant at the plaintiff’s expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value.” *Collins v. Ky. Lottery Corp.*, 399 S.W.3d 449, 455 (Ky. App. 2012) (quoting *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky.App.2009)). Walgreens argues that although the Complaint alleges the Commonwealth “paid direct reimbursement to pharmacies or insurance programs, which were pass through entities in order to allow financial benefits to be received by Walgreens,” it then

jumps to the legal conclusion that Walgreens “received an inequitable financial benefit” as a result of the Commonwealth’s payment for opioid medicines. The Complaint, they argue, does not allege that the Commonwealth did not receive the opioid medication it paid for and, therefore, they cannot claim unjust enrichment, as “(t)he doctrine of unjust enrichment is an equitable and restitutionary tool designed to prevent one person from keeping money or benefits belonging to another.” *Noble Royalties Access Fund V LP v. Elk Horn Coal Co., LLC*, 2015 WL 7352587, at 5 (Ky. App. Nov. 20, 2015) (quoting *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky.App.1989)).

The Commonwealth contends that it has adequately alleged all the elements of their unjust enrichment claim, asserting that: (1) Walgreens benefited from improperly distributed and dispensed opioids, which were purchased in the Commonwealth as an intended result of its conscious wrongdoing; (2) that due to, and as intended by, its deceptive acts, Walgreens has made millions of dollars at the expense of the Commonwealth, and; (3) it would be inequitable for Walgreens to retain profits and benefits reaped from its oversight failures and unlawful activity.

The Court finds that the Commonwealth has adequately pled facts to support its unjust enrichment claim.

IV. Medicaid Claims

Walgreens argues that the Commonwealth’s Medicaid claims should be dismissed as they fail to allege any false statements or concealments in connection with Medicaid or medical assistance. They further argue that these claims must be pled “with particularity” and the Commonwealth has failed to do so.

The Kentucky Medicaid Fraud Statute, KRS 205.8463, prohibits any person from “intentionally, knowingly, or wantonly...cause to be made or presented to an employee or officer of the Cabinet for Health and Family Services any false fictitious, or fraudulent statement, representation, or entry in any application, claim, report, or document used in determining rights to any benefit or payment.” KRS 205.8463(2). It further prohibits any person from intentionally engaging in conduct to advance a scheme to receive or aid others to receive payments. KRS 205.8463(4). The Commonwealth argues that Walgreens, acting as a distributor, caused false Medicaid claims to be filled by virtue of their failure to report and halt suspicious orders, as well as through their failure to inform the Commonwealth of continuing violations when it renewed its licenses, constituting violations of Kentucky law and Kentucky Administrative Regulations. The Court finds that by alleging Walgreens failed to identify, report and halt suspicious prescriptions and inform the Commonwealth of specific violations in its license renewals, the Commonwealth has adequately pled its claim under the Kentucky Medicaid Fraud Statute.

As to the Kentucky Assistance Program Fraud Statute, Ky. Rev. Stat. § 194A.505(6) which precludes “...intent to defraud or deceive, devise a scheme or plan a scheme or artifice to obtain benefits from any assistance program by means of false or fraudulent representations or intentionally engage in conduct that advances the scheme or artifice,” the Court finds the Commonwealth’s allegations that Walgreens perpetuated the filing of allegedly false claims constitutes a valid claim under this statute as well.

V. Kentucky’s Consumer Protection Act

Walgreens argues that the Commonwealth’s claims under Kentucky’s Consumer Protection Act should be dismissed because the purpose of the Act is to protect customers from misleading practices in the marketplace and the Complaint does not allege that Walgreens did

anything “unfair, false, misleading, or deceptive” in its interactions with individual Kentucky consumers. They contend that they do not, and did not, engage in consumer-based conduct and, as the Commonwealth failed to allege that they defrauded consumers, the claim is not appropriate.

The Commonwealth argues that Walgreens’ argument is meritless as the Kentucky Consumer Protection Act prohibits all acts “in trade or commerce” that are “unfair, false, misleading, or deceptive.” KRS 367.170. Further, the Attorney General has broad authority to bring suit “in the public interest” and has the authority to ensure the compliance of all participants in the marketplace. KRS 367.190.

The Court agrees with the Commonwealth, and finds they have appropriately pled their claim under the Kentucky Consumer Protection Act. The Court also finds that the Kentucky Consumer Protection Act is not limited to “only those selected types of illegal business acts or practices which are used in the merchandising of goods or services intended for personal, family, or household use.” *North American Van Line*, 600 S.W.2d 459, 462 (Ky. App. 1979).

VI. Fraud by Omission

Walgreens further argues that there is no basis for a claim of fraud by omission. They contend that the Complaint never identifies any provision of Kentucky statutory or common law that creates a duty to disclose “suspicious orders” to the Commonwealth and, absent such a duty, the claim must fail. They further argue that the claim must fail on the basis of proximate cause in that even if such a duty existed, the Complaint does not allege how increased reporting of suspicious orders to Kentucky regulators would have changed the Commonwealth’s behavior and avoided or reduced the damages allegedly incurred.

A fraud by omission claim requires the following elements: (1) a duty to disclose a material fact at issue; (2) the defendant failed to disclose such fact, (3) the failure to disclose induced the plaintiff to act; and (4) the plaintiff suffered actual damages therefrom. *Giddings v. Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011) (quoting *Rivermont Inn, Inc. v. Bass Hotels Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App.2003)). In its Complaint, the Commonwealth alleges Walgreens had a duty to disclose suspicious orders of prescription opioids and to prevent theft and diversion, and that by failing to report on these matters, providing inaccurate reporting and/or providing partial reporting with critical information omitted, Walgreens breached its duties.

Kentucky law requires all pharmacies to apply for and receive a license from the Kentucky Board of Pharmacy. KRS 315.035. They must also apply for and receive a license from the Kentucky Cabinet for Health and Human Services. KRS 218A.150, repealed by 2018 Kentucky Laws Chapter 112. Continuing licensure is dependent upon compliance with laws and regulations relating to controlled substances. KRS 218A.160(1) (repealed), 902 KAR 55.010, KRS 218A.240 and 21 U.S.C. § 823. The Commonwealth also argues Walgreens' omissions constituted a failure to comply with state and federal regulations when applying for and using its Kentucky licensure to distribute drugs in the Commonwealth, and further that the Commonwealth relied on the untruthful and/or incomplete information that Walgreens provided in its license applications to the detriment of the citizens of Kentucky.

The Court finds that the Commonwealth has adequately pled their claim for fraud by omission in that they have alleged Walgreens' failed to disclose suspicious orders of prescription opioids and to prevent theft and diversion, and that by failing to report on these matters, providing inaccurate reporting and/or providing partial reporting with critical information

omitted, Walgreens breached statutory duties, and the Commonwealth has adequately alleged with particularity facts to support its theory regarding each element of the claim.

VII. Negligence Per Se

As Walgreens argues, to bring a negligence *per se* claim, a plaintiff must show that (1) the plaintiff “comes within the class of person intended to be protected by the statute;” (2) the statute “must have been specifically intended to prevent the type of occurrence that took place;” and (3) the violation of the statute “must have been a substantial factor in causing the result.” *McCarty v. Covol Fuel No. 2, LLC*, 476 S.W. 3d 224, 227-28 (Ky. 2015). Additionally, to bring a claim of negligence *per se* based on a violation of a regulation, the plaintiff must meet the same three requirements and, additionally, must aim at the safety of the citizenry and be specifically authorized by an enabling statute. *Id.* at 233. Walgreens argues that as the Commonwealth has not adequately alleged a violation of any statute or regulation, because there are no enumerated duties that they have violated, the Commonwealth’s claim must fail as a matter of law. The Defendants further argue that 201 KAR 2:105§ 2(4)(d); 201 KAR 2:105§ 5(4); 201 KAR 2:105§ 7; 902 KAR 55:010 (repealed); KRS 205.5634; KRS 218A.160(10)(a) (repealed); KRS 218A.170, KRS 218A.200 and KRS 218A.180(3) do not create any obligation on Walgreens to “monitor, detect, investigate, refuse to fill, and report suspicious orders of prescription opioids” as alleged in the Complaint. Further, they argue, none of these provisions meet the basic requirements for a negligence *per se* claim because as the Commonwealth is not “within the class of person intended to be protected” and the statute was not “specifically intended to prevent the type of occurrence that took place.” They contend that these statutes and regulations were intended to protect patients and consumers from physical harm, not against the economic injuries alleged by the Commonwealth.

Conversely, the Commonwealth argues that as a wholesale distributor, Walgreens has a duty to comply with all state laws and regulations relating to controlled substances. KRS 218.160(1)(a). Pursuant to this same statute, Walgreens is required to develop internal security policies to reasonably protect against theft and diversion, 201 KAR 2:105 § 5(2)(c). They must also:

establish, maintain, and adhere to written policies and procedures, which shall be followed for the receipt, security, storage, inventory, and distribution of prescription drugs, including policies and procedures for identifying, recording, and reporting losses or thefts and to assure that the wholesale distributor prepares for, protects against, and handles crisis situation that affect the security or operation of the facility. These crises shall include fires, floods, or other natural disasters, and situations of local, state, or national emergency.

201 KAR 2:105 § 5(4)(a). They further argue that Kentucky statutes clearly require compliance with federal law and to the extent that Walgreens' conduct violated the Federal Controlled Substance Act, it, therefore, also violated state law. KRS 218A.170(8) (2018), 201 KAR 1:105 § 2(4)(d), KRS 218A.160(1)(a). They contend that Walgreens' breach of its duty to report and refuse to ship "suspicious orders" to the DEA caused devastating harm to the Commonwealth.

The Court finds that the Commonwealth has adequately pled its claims for relief for negligence *per se* as statutory duties of care exist for wholesale distributors of opioids in the Commonwealth. The Court also finds the Commonwealth to be a member of the protected class of the enumerated statutes as they create a way to safeguard wholesale distributors from acting in a way that violates public health and safety concerns.

VIII. Proximate Cause

Walgreens argues that the Commonwealth's Complaint does not adequately establish that Walgreens' actions are the proximate cause of the alleged injury. They claim that the asserted causal chain between the alleged conduct and the alleged injuries is too attenuated to sustain a

finding of proximate cause in that, in order for the alleged damages to have occurred, there had to have been an intervening cause: a third party must have either abused the drug or illegally provided it to others who then abused it. They cite to *Liberty Mut. Fire Ins. V. JM Smith Corp.*, 602 F. Appx 115 (4th Cir. 2015), which found in favor of a wholesale pharmaceutical distributor, opining the chain of causation was hardly direct between the wholesaler and drugs ending up in an abuser's hands. The Commonwealth argues an intervening cause only supersedes proximity where the injury was not reasonably foreseeable. *NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564, 568 (Ky. Ct. App. 1993). The criteria for determining whether an intervening act is superseding includes the requirement that the act be: (1) of independent origin, unassociated with the original act; (2) capable of bringing about the injury; (3) not reasonably foreseeable by the original actor, and (4) involved the unforeseen negligence of a third party or a natural force. *Id.* See also, *Briscoe v. Amazing Products, Inc.*, 23 S.W.3d 228, 229.

Walgreens also argues the Commonwealth cannot recover as their claimed injuries were suffered indirectly as a result of an injury to another. Walgreens relies on *Kentucky Laborers District Council v. Hill & Knowlton, Inc.*, 24 F. Supp. 2d 755, 761-64 (W.D. Ky. 1998), a case in which third-party payors attempted to sue tobacco companies to recover medical costs they expended to treat people with smoking related ailments. The Western District Court dismissed the action, finding that the payor's claims were too "remote" and "entirely "derivative" of members injuries. *Id.* at 762-763. The Commonwealth argues that the instant matter is distinguishable as this is not a case of a company misrepresenting the health risks, smoking, but that it involves Walgreens causing countless unnecessary prescriptions to be written and fraudulently inducing the Commonwealth to pay for them.

Additionally, the Commonwealth contends that proximate cause falls within the purview of the jury, becoming a matter of law only where “there is no dispute about the essential facts” and “reasonable minds cannot differ as to the existence of causation.” *McCoy v. Carter*, 323 S.W. 2d 210, 215 (Ky. Ct. App. 1959). They argue that they must only show that Walgreens’ conduct was a “substantial factor” in bringing about the harm alleged to establish legal causation. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 91-92 (Ky. 2003) (adopting the substantial factor test from Restatement (Second) of Torts, § 431).

The Court finds that the Commonwealth has sufficiently pled proximate cause in its Complaint.

IX. Public Service Doctrine

Walgreens asserts that the Commonwealth’s claims to recover response costs are barred under the Free Public Services Doctrine. Arguing that “absent authorizing legislation,” the cost of public services, “is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.” *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984). They claim that numerous jurisdictions apply the doctrine to preclude the government from seeking reimbursement of police, medical, and other costs incurred in the performance of public duties and, therefore, there is no reason to think that Kentucky would differ from other states in this regard.

Conversely, the Commonwealth argues that the Free Public Services Doctrine does not apply as it has not been adopted by Kentucky. In the alternative, they argue that even if the Free Public Services Doctrine does apply, it does not preclude recovery as the doctrine permits recovery in a tort suit “where the acts of a private party create a public nuisance which the government seeks to abate.” *Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1145 (Ill. 2004).

The Court finds that it would not be appropriate to apply (and Adopt) the Free Public Services Doctrine under current Kentucky law.

X. Personal Jurisdiction over Walgreens Boots Alliance, Inc.

Defendant, Walgreens Boots Alliance, Inc. (“WBA”) has filed an additional Motion to Dismiss which applies to them specifically. They argue that the Court has no personal jurisdiction over them under KRS 454.210 as WBA is a Delaware Company that conducts no activities in Kentucky. WBA was incorporated in September 2014 and, on December 31, 2014, became the parent company of Walgreen Co. pursuant to a merger and corporate reorganization into a holding company structure. WBA is incorporated under Delaware law and has its principal place of business in Deerfield, Illinois. They argue they are a legally distinct entity that does not conduct business in the name of Walgreen Co. or any of the other Walgreens Defendants. They are simply a parent holding company with no employees or operations outside of Illinois and have never distributed opioid medications and do not own or operate pharmacies. They further argue that even if personal jurisdiction were permissible through the Kentucky Long-Arm Statute, it would be barred by federal due process standards. The Commonwealth cites to WBA’s public website to argue that WBA conducts activities including operating pharmacies and distributing and dispensing medications.

“The proper analysis of long-arm jurisdiction over a nonresident defendant consists of a two-step process. First, review must proceed under KRS 454.210 to determine if the cause of action arises from conduct or activity of the defendant that fits into one of the statute's enumerated categories. If not, then *in personam* jurisdiction may not be exercised. When that initial step results in a determination that the statute is applicable, a second step of analysis must be taken to determine if exercising personal jurisdiction over the non-resident defendant offends

his federal due process rights.” *Caesars Riverboat Casino, LLC v. Beach*, Ky., 336 S.W.3d 51, 57 (2011).

KRS 454.210(2)(a) states in pertinent part:

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth; ...

The Commonwealth argues that KRS 454.210(2)(a) provides for agency as a basis for personal jurisdiction, and that the above 4 prongs of KRS 454.210(2)(a) apply to WBA's conduct as the parent company of all Walgreens entities, which are being operated and controlled by WBA. Therefore, they argue, this Court has personal jurisdiction over WBA pursuant to Kentucky's Long-Arm Statute.

The Commonwealth also argues Walgreens is the alter-ego of WBA, and Kentucky has jurisdiction over WBA as they dominate the Walgreens enterprise. See *Audiovox Corp. v. Moody*, 737 S.W.2d 468, 470 (Ky. App. 1987).

Additionally, the Court's exercise of jurisdiction must also be consistent with constitutional due process, which can be satisfied by a showing of general jurisdiction, requiring general systematic contacts with the forum or, specific jurisdiction, requiring contacts relating to the specific transactions at issue. To be subject to general personal jurisdiction a nonresident defendant's affiliations with Kentucky must be so "continuous and systematic as to render them essentially at home there." *Daimler AG v. Bauman*, 57 U.S. 117, 127 (2014) (quoting *Goodyear*

Dunlap Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)). Specific jurisdiction requires a showing of “minimum contacts” between the defendant and the forum and that the exercise of the Court’s jurisdiction would be “consistent with traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This does not require the defendant to be, or have been, physically present in the Commonwealth. Kentucky courts have long recognized the exercise of jurisdiction over a parent company if their subsidiary is doing business within the Commonwealth. See *Pro Tanks Leasing v. Midwest Propane & Refined Fuels, LLC*, 988 F.Supp. 2d (W.D.Ky. 2013); *Dare to be Great, Inc. v. Commonwealth ex rel. Hancock*, 511 S.W.2d 224, 227 (Ky. App. 1974).

WBA next argues that specific personal jurisdiction does not exist because federal due process requires a close nexus between the defendant’s activities, the forum state, and the plaintiff’s claims. *Intera Corp. v. Henderson*, 428 F.3d 605, 615 (6th Cir. 2005). The Court must find that: (1) the defendant “purposefully availed himself of the privilege of acting in the forum state;” (2) that the plaintiff’s cause of action “arises from the defendant’s activities” in the forum state; and (3) that the defendant’s conduct has a “substantial enough connection” with the forum state to make the exercise of jurisdiction reasonable. *Id.* (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). WBA argues that, based on this three-prong test, there is no conceivable basis for the Court to exercise specific personal jurisdiction over them.

Finally, WBA argues that potential jurisdiction over WBA subsidiaries does not create personal jurisdiction over WBA. They contend that specific jurisdiction over a parent company based on a subsidiary’s contacts with the forum state requires a showing that “the parent company exerts so much control over the subsidiary that the two do not exist as separate entities, but are one and the same for the purposes of jurisdiction.” *Estate of Thomson ex rel. Estate of*

Rakestraw v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362 (6th Cir. 2008). They claim that the Commonwealth has not alleged—and could not allege—any facts that would allow for specific jurisdiction over WBA.


The Commonwealth argues that WBA, as the parent company of all Walgreen entities, is subject to personal jurisdiction in Kentucky. They contend that, despite WBA's protestations to the contrary, they are intertwined with Walgreens so much as to be the same entity for purposes of jurisdiction. WBA manages and directs Walgreens' operations and, therefore, is involved in the distribution and dispensation of drugs in Kentucky.

The Court finds that WBA is the parent company of Walgreens and is directly involved in the management and directing of Walgreen's activities. They are therefore subject to the jurisdiction of this Court. Through Walgreens, WBA transacted business in Kentucky, contracted to supply services or goods in Kentucky, caused alleged tortious injury in Kentucky, and engaged in out-of-state conduct which allegedly caused tortious injury in Kentucky, while regularly soliciting and doing business in Kentucky and obtaining substantial revenue from these activities in Kentucky. These contacts satisfy both the requirements of Kentucky's Long Arm Statute, KRS 454.210, and the requirements of Constitutional due process.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

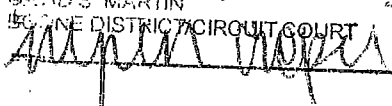
1. Defendants Walgreens Boots Alliance, Inc.; Walgreen Co.; Walgreens Mail Service, LLC; Walgreens Specialty Pharmacy, LLC; and Walgreens.com, Inc. d/b/a Walgreens #05823 ("Walgreens") Motion to Dismiss Plaintiff's Complaint pursuant to Civil Rule 12.02(f) is **DENIED**;
2. Defendant Walgreen Boots Alliance's Motion to Dismiss the claims against it for lack of personal jurisdiction is **DENIED**.

DATED this 18th day of July 2019.



JAMES R. SCHRAND, JUDGE
BOONE CIRCUIT COURT

COPIES TO: ALL ATTORNEYS AND PARTIES OF RECORD

CERTIFICATE
I, DAVID S. MARTIN, CLERK OF THE BOONE DISTRICT/CIRCUIT
COURT, THEREBY CERTIFY THAT I HAVE MAILED A COPY OF
THE FOREGOING ORDER AND NOTICE TO ALL PARTIES HERETO
AT THEIR LAST KNOWN ADDRESSES OR THEIR COUNSEL
OF RECORD. THIS 18th DAY OF July
DAVID S. MARTIN
BOONE DISTRICT/CIRCUIT COURT
 D.C.