UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GLAXOSMITHKLINE LLC,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 13-cv-130100-IT
v.	)	
	)	
THE CHEROKEE NATION and TODD HEMBREE,	)	
	)	
	)	
Defendants.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Cherokee Nation respectfully proposes this Court address the issues in this case as follows:

1. This Court has subject matter jurisdiction over the Settlement Agreement that it approved. (Settlement Agreement, attached hereto as Ex. "A"). Is the Cherokee Nation a party to the Settlement Agreement?

    a. Does 25 U.S.C. §450j(k) "deem" the Cherokee Nation an "executive agency" for purposes of litigating and settling healthcare fraud claims?

    b. If so, does the language of the Settlement Agreement define the Cherokee Nation as a "Government Health Care Program"?

2. If the Cherokee Nation is a party, does this Court have subject matter jurisdiction over a non-consenting Indian Nation asserting sovereign immunity?[1]

3. Did the scope of the Settlement Agreement include the release of claims of the Cherokee Nation or the Indian Health Services ("IHS") as "executive agencies"?

4. Did the "Covered Conduct" include conduct committed against the Cherokee Nation?

[1] This Court ruled that it has subject matter jurisdiction over the Settlement Agreement and can interpret and determine the parties to the Agreement; however, even if it is determined that the Cherokee Nation is a party, this Court lacks subject matter jurisdiction over a non-consenting, sovereign Indian Nation that has not expressly waived sovereign immunity.

5. Did the release include claims asserted by the Cherokee Nation in Cherokee Nation District Court brought exclusively under tribal law?

6. Did GlaxoSmithKline ("GSK") and the United States form a valid contract when all parties were mistaken as to the correct identity of the parties and the scope of the consideration and release?

The following undisputed facts correlate to the questions above and establish that the answers to these questions are all a resounding "No."

II. STATEMENT OF UNDISPUTED FACTS

1. The Cherokee Nation is not a named Party to the Settlement Agreement. (Ex. A, *passim*). Neither the Cherokee Nation nor the IHS are named as one of the "Government Health Care Programs" in the Settlement Agreement. (Ex. A, ¶ D; GSK Mem. 5, Dckt. No. 17).

    a. Title 25 U.S.C. §450j(k) states that the Cherokee Nation is deemed an executive agency for the purpose of purchasing off the Federal Supply Schedule ("FSS") while carrying out a 638 contract. (25 U.S.C. §450j(k)).

    b. The Settlement Agreement states that GSK caused claims for payment for Avandia "to be submitted to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk ("Medicare"); the Medicaid Program, Title XIX of the Social Security Act , 42 U.S.C. . §§ 1396-1396w-5 ("Medicaid"); . . . and caused purchases of [Avandia] by the Veterans Affairs Program, 38 U.S.C. § 1701-1743." These programs are defined as the "Government Health Care Programs." (Ex. A, ¶ D).

2. The Cherokee Nation has not expressly waived its sovereign immunity from suit. (Ex. A, *passim*).

3. The "Settlement Agreement between the United States and GSK did not release claims on behalf of the Indian Health Services or the Cherokee Nation." (United States Statement of Interest, attached hereto as Ex. "B," Dckt. No. 26; Ex. A, ¶ D). Further, IHS is an Operating Division ("OPDIV"), not an "agency."[2] As an OPDIV, IHS provides healthcare services to Indians. The Settlement Agreement did not include OPDIV's. (Ex. A, ¶D).

4. The scope of the release only applies to "Covered Conduct" directed at "Government Health Care Programs." (Ex. A, ¶¶ E and E(i)).

5. The Petition filed in Cherokee Nation District Court by the Cherokee Nation is based solely on claims arising under Cherokee Nation law, not the federal claims asserted in the

[2] http://www.hhs.gov/about/foa/opdivs/index.html, last visited July 22, 2014.

United States Complaint against GSK. The Petition expressly disclaims all causes of action arising under federal law. The Settlement Agreement releases only certain federal claims. (Ex. A, ¶ 2; Cherokee Nation's Third Amended Petition, Dckt. No. 1-1).

6. The Settlement Agreement did not release any claims arising under Cherokee Nation law. (Ex. A, ¶ 2; Ex. B, p. 9). The Settlement Agreement expressly states that it does "not release any claims against any other person entity" than those specifically named as parties. (Ex. A, ¶ 11).

7. Neither GSK nor the United States had a meeting of the minds regarding the parties to the contract and the scope of the consideration and release. (Ex. A, *passim*; Ex. B, p. 2; Dckt. No. 1, p. 1).

    i. The Cherokee Nation is neither a named party nor a signatory to the Settlement Agreement. (Ex. A, *passim*).

    ii. Neither GSK nor the United States government contemplated that the Cherokee Nation was a party and would be subject to the Settlement Agreement. (Ex. B, pp. 2, 12).

    iii. The Department of Justice ("DOJ") does not have authority to settle on behalf of the Cherokee Nation and the DOJ has no authority to litigate claims arising under tribal law. (Ex. B, pp. 15-17).

    iv. The Cherokee Nation was neither advised nor consulted by the DOJ regarding the negotiation and execution of the Settlement Agreement, was not present at its execution, or otherwise had any knowledge that its claims were being settled. (Ex. B, *passim*).

    v. The Cherokee Nation neither bargained for nor received consideration from GSK for a release under the Settlement Agreement. (Ex. B, *passim*).

III. DISCUSSION

A. The Settlement Agreement[3]

The Cherokee Nation is neither a "Government Health Care Program" nor was GSK's tortious conduct against the Cherokee Nation defined as "Covered Conduct" which was released under the Settlement Agreement.

[3] The Cherokee Nation attaches and incorporates the Statement of Interest [Dckt. No. 26] filed by the United States as Ex. "B."

1. The Parties

The Settlement Agreement defined the term "Government Health Care Program" to include only the enumerated federal health care programs for which the United States provided a release. GSK now asks the Court to declare that "Government Health Care Programs" actually includes other, unnamed entities. Even GSK cannot identify which federal programs may have been included in the Settlement Agreement release. *See* GSK Reply 5 [Dckt. No. 25]. As with any settlement agreement, it is necessary for the parties to define the universe of claims prior to reaching a settlement so that the relevant and necessary parties are engaged in the settlement process and valid releases are provided. This allows the parties to evaluate an appropriate amount of consideration and to limit the scope of the release. It is for these reasons that the United States' release carefully and thoughtfully defined what programs were covered by the Settlement Agreement.

In the Settlement Agreement, the United States alleged that GSK caused claims for payment for Avandia "to be submitted to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk ("Medicare"); the Medicaid Program, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396w-5 ("Medicaid"); . . . and caused purchases of [Avandia] by the Veterans Affairs Program, 38 U.S.C. § 1701-1743." (Ex. A, ¶ D). These programs are defined as the "Government Health Care Programs." *Id*. As GSK acknowledges, neither the IHS nor the Cherokee Nation are named as one of the "Government Health Care Programs." (GSK Mem. 5, Dckt. No. 17).

Paragraph E of the Settlement Agreement defines the scope of the "Covered Conduct," and alleges that:

> GSK promoted Avandia to physicians and other health care providers with false and misleading representations about Avandia's lipid profile, effect on

> cardiovascular biomarkers, and the overall safety of Avandia and as a result, GSK knowingly caused false or fraudulent claims for Avandia to be submitted to, or caused purchases by, one or more of the Government Health Care Programs. (Ex. A, ¶ E(i).1).

Pursuant to Paragraph 2, the United States released GSK from "any civil or administrative monetary clams that the United States has or may have for the Covered Conduct" under specific, enumerated statutes or common law causes of action. (Ex. A, ¶ 2).

GSK's entire legal hypothesis hinges on whether the IHS is a party to the Settlement Agreement. GSK attempts to incorporate IHS into the Settlement Agreement as part of the Public Health Service which is established within the U.S. Department of Health and Human Services ("HHS"). A plain reading of the language of Settlement Agreement, however, reveals that HHS is not defined as a "Government Health Care Program." HHS is a signatory to the Settlement Agreement on behalf of the Medicare and Medicaid Programs, not on behalf of IHS or the Cherokee Nation. The language of the Settlement Agreement applies to "Covered Conduct" committed against the Programs enumerated in Section D, not to entire federal departments or sovereign Indian Nations. Simply put, HHS is not a signatory for the entire Department of the United States government, rather only as to the Medicare and Medicaid Programs as defined by the Settlement Agreement as being victims of the "Covered Conduct."

GSK offers an alternative argument as equally unavailing: the logical fallacy that because the Veteran's Affairs Program ("VA Program") purchases at the Federal Sources of Supply ("FSS") rate and the Cherokee Nation purchases at the FSS rate, the Cherokee Nation is the VA Program for purposes of the Settlement Agreement. The Cherokee Nation, however, does not run one of the Programs identified in Section D of the Settlement Agreement and is, thus, not a victim of the "Covered Conduct" whose legal claims the Settlement Agreement released. Title 38 is entitled "Veterans' Benefits," and Chapter 17 of that title describes the hospital, nursing home,

domiciliary, and medical care benefits available to eligible veterans. By its very terms, the Settlement Agreement releases only those purchases that the Veterans Affairs Program made on behalf of its beneficiaries – the veterans who are served by that program.

2. The Scope of the Release

"The Settlement Agreement language is clear and unambiguous: the Settlement Agreement does not release any claims on behalf of the IHS, the Cherokee Nation, or any other Indian tribe." (Ex. B, 9). The Settlement Agreement did not generally release "claims" on behalf of HHS and its various named and unnamed agencies; the Settlement Agreement released "any civil or administrative claim that the United States has or may have for the Covered Conduct . . . ." (Ex. B ¶ 2.5). Thus, the scope of the release is explicitly limited to the Covered Conduct, defined in Paragraph E, which alleges that "GSK knowingly caused false or fraudulent claims for Avandia to be submitted to, or caused purchases by, one or more of the Government Health Care Programs." (Ex. A ¶ E(i)). Neither IHS nor the Cherokee Nation is named as one of the Government Health Care Programs. (Ex. A ¶ D). The fact that HHS was a party to the Settlement Agreement, which is unsurprising given that HHS administers two programs – Medicare and Medicaid – for which the United States did release claims, does not enlarge the scope of the release to cover all of Indian Country.

Not only is the Settlement Agreement release limited to claims on behalf of the named Government Health Care Programs, the Settlement Agreement releases only certain federal claims arising under certain conduct, specifically the United States releases:

> "…**Covered Conduct under the False Claims Act**, 31 U.S.C. §§ 3729-3733; the **Program Fraud Civil Remedies Act**, 31 U.S.C. §§ 3801-3812; the **Civil Monetary Penalties Law**, 42 U.S.C. § 1320a-7a; the **Food Drug and Cosmetic Act**, 21 U.S.C. § 301, et seq.; any statutory provision creating a cause of action for civil damages or civil penalties **for which the Civil Division of the Department of Justice has actual and present authority to assert and**

> **compromise pursuant to 28 C.F.R. Part 0, Subpart I, 0.45(d),** and common law claims for fraud, payment by mistake, breach of contract, disgorgement and unjust enrichment." (Ex. A ¶ 2).

(emphasis added). The petition filed by the Cherokee Nation in the District Court of the Cherokee Nation alleges violations of "the Cherokee Nation's Constitution, common law, tribal customs and statutory causes of action." (*Cherokee Nation Petition*. ¶ 2 [Dkt. No. 1-1]). The Petition expressly disavows any cause of action arising under or founded on federal law. *Id*. ¶ 11. The Petition seeks recovery for causes of action, such as products liability and breach of express and implied warranty, that are expressly excluded from the Settlement Agreement's release. *Id*. ¶¶ 164-76, 196-206. Further, the Civil Division of the Department of Justice did not have actual or present authority to assert and compromise the claims of the Cherokee Nation. (Ex. B, pp. 16-17). GSK's reliance on *Nevada v. U.S.*, 463 U.S. 110, is completely misplaced. In Nevada, the Court was considering a complex stream adjudication involving an Indian Nation, the United States, and settlors. The Court noted that the Department of Interior had conflicting statutory obligations to Indian Nations. In determining whether the United States could take a legal position that was against the Indian nation, the Court held that:

> But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.
> *Id*. at 142.

Here, there is no statutory conflict between the United States and the Cherokee Nation. Both agree that the DOJ does not have authority to prosecute on behalf of the Cherokee Nation. Likewise, *United States v. Minnesota*, 270 U.S. 181 (1926), involved the United States invoking federal court jurisdiction in an action against a state on behalf of a tribe when a direct action by the tribe would be dismissed on eleventh amendment grounds. *Id*. at 195. GSK does not have

eleventh amendment protection and so the DOJ is not required to bring this action on the tribe's behalf.

As a result, even if this Court were to find that either the Cherokee Nation is a party or that its claims fall under the settled claims of HHS and/or the VA, it is clear that the Settlement Agreement does not absolve GSK of any liability that it may have under Cherokee law.

B. Indian Self-Determination and Education Assistance Act: P.L. 93-638

Before contact with European settlers, Indian tribes provided governmental services to their own people. But with contact came drastically different service needs. Indian peoples needed Western medicine to address foreign diseases; instruction in English, reading and writing; and financial and employment assistance to address the loss of land and game for hunting. The United States government was eager to provide these services to further its goals of assimilating Indian people and acquiring Indian lands. Federal services to Indians, including healthcare, were never mere gratuities. Instead, they were provided in exchange for cessions of great tracts of land and rights, and to achieve a distinctly federal purpose. The federal obligation to provide healthcare services to Indian people arises from many sources: specific promises embodied in treaties and federal agreements; the protective relationship between the federal government and Indian people; the historical pattern of providing services; and the expression of this obligation in federal laws. *White v. Califano*, 437 F. Supp. 543, 551-555 (D.S.D. 1977).

Since time immemorial there has been a Cherokee Nation that has exercised the rights of self-government on behalf of the Cherokee people. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The Cherokee Nation is a Federally recognized Indian tribe as defined in 25 U.S.C. § 450b(e) and 25 U.S.C. § 458aaa(b). Congress has directed that each provision of the ISDEAA shall be liberally construed for the benefit of Indian tribes participating in self-governance and

any ambiguity shall be resolved in favor of the Cherokee Nation. 25 U.S.C. § 458aaa-11(a). Nothing in the ISDEAA shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe. 25 U.S.C. § 450n.

The ISDEAA is the law most responsible for changes in healthcare services to Indians in the modern era. Titles I and II of the Act, enacted in 1975, allow tribes to enter into self-determination contracts with the federal government to take control of federal programs, including healthcare. These contracts are popularly known as "638 contracts" after the original public law number, Pub. L. No. 93-638, 88 Stat. 2203 (1975). Over the years, Congress has sought to enhance the degree of tribal control, first with Title III, which created a self-governance demonstration program to increase flexibility in administration of tribal programs,[4] then Title IV, which made self-governance permanent for the Department of Interior,[5] and then Title V, which made self-governance permanent for the IHS.[6] These laws and others building on their approach have resulted in a revolution in Indian healthcare services. In 1970, only 1.5% of BIA programs for Indians and only 2.4% of IHS programs were administered by Indian tribes and organizations.[7] Today, tribes administer more than half of these programs.[8] GSK's entire legal hypothesis is the exact opposite of the clear intent, purpose, context, and history of the ISDEAA.

C. Cherokee Nation Health Services

The Cherokee Nation provides medical care, including prescription drugs, to its members pursuant to a Compact under the ISDEAA and a Funding Agreement under the Self-Governance

[4] Pub. L. No. 100-472, Title II, § 209, 102 Stat. 2296 (1988).
[5] Pub. L. No. 103-413, § 204, 108 Stat. 4272 (1994).
[6] Pub. L. No. 106-260, § 501, 114 Stat. 713 (2000).
[7] President Richard M. Nixon, Special Message on Indian Affairs, H.R. Doc. No. 91-363, at 3 (1970).
[8] Indian Health Serv., U.S. Dep't of Interior, IHS Year 2014 Profile, available at http://www.ihs.gov/newsroom/factsheets/ihsyear2014profile/ Last visited July 17, 2014.

Act. The Cherokee Nation operates a network of eight health centers and one hospital throughout the Cherokee Nation's historic boundaries in what is now northeastern Oklahoma. The Cherokee Nation Health System is comprised of the following providers: Three Rivers Health Center, Bartlesville Health Clinic, Sam Hider Health Center, Will Rogers health Center, A-Mo Health Center, Redbird Smith Health Center, Wilma P. Mankiller Health Center, Vinita Health Clinic, and Cherokee Nation W.W. Hastings Hospital. Since 2002, Cherokee Nation Health Services has performed more than 4 million patient visits. The Cherokee Nation operates the largest tribally-operated health care system in the United States and enjoys a broad measure of flexibility in tailoring the scope and coverage of its Health Services to its members.

IV. TITLE 25 U.S.C. 450J(K) – THE CHEROKEE NATION IS ONLY DEEMED A FEDERAL AGENCY FOR THE LIMITED PURPOSE OF ACCESSING SOURCES OF SUPPLY AT THE FEDERAL RATE WHILE CARRYING OUT A 638 CONTRACT

Title 25 U.S.C. 450j(k) is neither mentioned in the Settlement Agreement, nor relied upon as a basis for a cause of action or an element of damages. There is simply no connection between the civil and criminal healthcare fraud violations settled by the United States and GSK's torts committed against and within the Cherokee Nation. GSK asserts that the Cherokee Nation is deemed a federal agency subordinate to the Settlement Agreement entered into between the United States and GSK by operation of 25 U.S.C. § 450j(k), a statute codified within the ISDEAA. GSK contends the 450j(k) "operates" to "deem" the Cherokee Nation a federal agency under the Settlement Agreement, but this is neither the purpose of the statute nor the result intended by Congress. Being "deemed" an executive agency is not the intended "*end*" of the statute, rather it is simply the "*means*" Congress used to accomplish a very limited purpose *i.e.* allowing Indian nations to purchase off the FSS at the discounted rated.

A. Plain Language

This case begins and ends with the plain meaning of unambiguous terms of 450j(k) and the ISDEAA. The plain language of 450j(k) is self-limiting, that the Cherokee Nation is only deemed a federal agency for the limited purpose of purchasing goods and services at the government rate. The plain language does not state that the Cherokee Nation is a federal agency for any other purpose, such as for settlement agreements entered into by the United States. GSK asks this Court to look beyond the statute's plain language and deem the Cherokee Nation a federal agency for purposes of a Settlement Agreement that neither contemplates nor mentions any Indian nation or 450j(k). Title 25 U.S.C. §450j(k) states in relevant part:

> (k) Access to Federal sources of supply
>
> ***For purposes of section 501 of Title 40 (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers)***, a tribal organization ***carrying out a contract***, grant, or cooperative agreement under this subchapter ***shall be deemed an executive agency*** and part of the Indian Health Service ***when carrying out such contract***, grant, or agreement and the employees of the tribal organization ***shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency*** have such access. For purposes of carrying out such contract, grant, or agreement, the Secretary shall, at the request of an Indian tribe, enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or under any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements. (emphasis added).

25 U.S.C. § 450j(k); see also 25 U.S.C. § 458aaa-15(a) (applying § 450j(k) to Section V compacts). This authority allows tribes to place orders directly with FSS vendors for supplies and services available under the schedules. In short, tribes may access such sources of supply under the same terms and conditions as an executive agency. The Cherokee Nation can only be deemed a federal agency for the limited "purpose of Section 105" purchasing goods and services

at the federally reduced rate and for none other. The plain language, clear intent, purpose, context, history, and common sense lead to one simple conclusion; the Cherokee Nation is only deemed an executive agency for the limited purpose of purchasing goods at the government rate.

The ISDEAA seeks greater tribal self-reliance brought about through more "effective and meaningful participation by the Indian people" in, and less "Federal domination" of, "programs for, and services to, Indians." 25 U.S.C. § 450a(b). This goal is not accomplished by allowing the settlement of Indian nation claims by the United States silently and by implication, as GSK's construction proposes. Every statute, agreement, and federal regulation at issue in this case is in direct contradiction and conflict with GSK's proposed interpretation and construction.

Simply put, 25 U.S.C. § 450j(k) does not operate to deem the Cherokee Nation a federal agency for any "purpose" other than purchasing goods and services off the FSS. The nexus between purchasing off the FSS and the United States settlement of healthcare fraud related civil and criminal violations falls well short.

B. Indian Law Canons of Statutory Construction

In an effort to avoid the Indian law canons of construction and extrinsic evidence (both of which are fatal to GSK's argument), GSK contends that because all parties agree that the terms of the statute are unambiguous, there is no need to apply the canons or look at extrinsic evidence. A statute, however, is ambiguous if it is "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. U.S.*, 534 U.S. 84, 90 (2001). The Cherokee Nation and United States' agree on their understanding of the statute which is exactly opposite of GSK's understanding; thus, there are clearly two ways that this statute could be understood. GSK cannot avoid the canons or extrinsic evidence simply because it completely undermines it's case.

To the extent that 25 U.S.C. § 450j(k) could, therefore, be considered ambiguous regarding the extent to which the Cherokee Nation is considered a federal agency, and it is not, that ambiguity must be resolved in favor of the Cherokee Nation. The theory and practice of statutory interpretation of federal Indian law differs from that of other fields of law. The basic Indian law canons of construction require that statutes, agreements, and federal regulations be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *HRI Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000). "When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 260 (1992); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians").

The Executive and Judicial Branches have likewise strongly supported tribal self-government. Executive Orders expressly acknowledge the government-to-government relationship between the United States and the Tribes and require federal agencies to "consult and coordinate" with Tribes on matters affecting them. *See, e.g.,* Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, 74 Fed. Reg. 57,881 (Nov. 5, 2009); Exec. Order No. 13084, 63 Fed. Reg. 27,655 (May 14, 1998). Here, the DOJ did not "consult and coordinate" with the Cherokee Nation or any tribal governments regarding the Settlement Agreement.

Consistent with the Indian law canons of construction, the ISDEAA states in 25 U.S.C. §458aaa-11(f):

> (f) Rules of construction
>
> Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

To the extent that there could be any ambiguity, it must be resolved in favor of the Cherokee Nation's construction that it is not a federal agency under the Settlement Agreement. If § 450j(k) can reasonably be construed as the Cherokee Nation would have it construed, it must be construed that way. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988). Applying the Indian law canons of construction, the Cherokee Nation cannot be deemed a federal agency for purposes of the Settlement Agreement.

GSK's proposed construction of this statute makes the Cherokee Nation a federal agency for other purposes, deeming it federal agency for purposes of settlement agreements entered into between the United States and third-parties. GSK's interpretation is in direct conflict with the plain language and clear purpose of both the ISDEAA and Self-Governance Acts. The statutory context of the ISDEAA and the Self-Governance Act reinforce the Cherokee Nation's construction of § 450j(k), that the Cherokee Nation is only deemed a federal agency for the limited purpose of accessing sources of supply at the federal rate while carrying out a 638 Contract. This construction promotes both Acts' purposes by enhancing tribal control and increasing flexibility in the administration of tribal health care programs.

C. Congressional Intent in the Event of Ambiguity

In 1994, Congress added subsection 105(k) to the ISDEAA. Though the Cherokee Nation contends that the statute is unambiguous on its face, if the Court finds that it is capable of

being interpreted in two or more ways, the Court need only look at the legislative history to find Congress' intent. For purposes of legislative history, committee reports are the most important source for determining legislative intent. Within a report there is often a "section-by-section" analysis of the bill that is most useful when a single section of a bill is at issue. The Congressional Record for the 103rd Congress, Senate Committee on Indian Affairs, provides a section by section analysis of the statute that states:

> New Subsection 105(k) ***cures a technical problem which has deprived tribal organizations of the ability to take advantage of the same federal airfares and lodging rates*** which apply when Indian programs are administered by federal employees. ***This unintended consequence has substantially increased the cost of administering programs subject to the Act,*** and effectively treats self-determination contracts as if they were ordinary government procurement contracts, ignoring the government-to-government relationship upon which the Act is based. The amendment corrects this problem and ***allows tribal organizations and their employees the same access as federal agencies*** to rates for air travel and similar sources of supply which are regularly negotiated by the General Services Administration.

S. Rep. 103-374, at 8 (1994). Congress made the Cherokee Nation eligible to access the FSS simply to save money. Congress viewed the transactions that are subject to this statute in conformance with the long history of government-to-government relationship between the Cherokee Nation and the United States. This statute's limited purpose was to "cure" the "technical problem" that Indian Nations were inadvertently denied discounted rates for federal purchases in the past, not to carte blanche declare that the Cherokee Nation is a federal agency. Being "deemed" an executive agency was the "means" to accomplish Congress' goal of granting tribes access to the FSS.

Further, a look at the statement by the Chairman of the Senate Committee on Indian Affairs, Senator Ben Nighthorse Campbell, explains this statute plainly enough:

INDIAN TRIBAL PURCHASES OF PRESCRIPTION DRUGS IN SELF GOVERNANCE

> Mr. Helms.
>
> Mr. President, it would be helpful to get clarification for the RECORD from the manager of H.R. 1167, the distinguished **Chairman of the Senate Committee on Indian Affairs**. I understand the H.R. 1167, the bill to amend the Indian Self-Determination and Education and Assistance Act ***to provide for further self-governance by Indian tribes***, contains a provision that ***allow Indian tribes to purchase prescription drugs from the Federal Supply Schedule for the purpose of providing health services to Indians under contract with the Indian Health Service***.
>
> Mr. Campbell.
>
> I would be glad to clarify this matter for the distinguished Senator from North Carolina. ***Your understanding is correct***. (emphasis added).

146 Cong. Rec. S7715-01, 2000 WL 1079250 (Cong.Rec.). The plain language of this statute, confirmed by the Chairman of the Senate Committee on Indian Affairs, limits the application of 25 U.S.C. 450j(k) to the specific purpose of purchasing prescription drugs from the FSS, at the federally discounted rate, when carrying out a contract under the ISDEAA.

To overly simplify the interpretation of this statute: Who? Tribal organizations carrying out a 638 contract. What? Are deemed executive agencies to access federal sources of supply. When? When carrying out 638 contracts. How? By deeming Indian Nations executive agencies making them eligible to access federal sources of supply. Why? To save money and so that tribes are not deprived of the ability to take advantage of rates that apply when Indian programs are administered by federal employees. Treating ISDEAA contracts as ordinary government procurement contracts would exponentially increase the cost of administering programs under the ISDEAA and would ignore the government to government relationship upon which the ISDEAA is based.

The statute does not say what GSK proposes, that the Cherokee Nation is deemed a federal agency for "purposes of settlement agreements of civil and criminal healthcare fraud

actions brought by the United States against drug companies for violation of federal statutes." The Cherokee Nation did not purchase Avandia on behalf the United States, rather it purchased Avandia for its own use, in its own healthcare facilities, and for its own members. It was not the United States decision to purchase Avandia, it was the Cherokee Nation's decision.

V. SOVEREIGN IMMUNITY AND SUBJECT MATTER JURISDICTION

The next issue this Court must decide is whether it has subject matter jurisdiction over a declaratory judgment action against a non-consenting, sovereign Indian Nation. Sovereign immunity is an issue of subject matter jurisdiction, in other words, it a specific limitation of the federal judiciary's Article III powers to hear "cases" or "controversies." In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984), the Supreme Court made what remains perhaps the most sweeping pronouncement on the subject of sovereign immunity, describing it as "a constitutional limitation on the federal judicial power established in Art[icle] III" that effectively deprives federal courts of any jurisdiction to entertain such claims. The Court found that sovereign immunity restricts the judicial power under Article III, "partakes of the nature of a jurisdictional bar," and "sets forth an explicit limitation on federal judicial power of … compelling force." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). The Court has frequently referred to sovereign immunity as a "jurisdictional bar" and a limit on its Article III powers. *Id.* at 678. Moreover, the sovereign immunity doctrine is consistent with the way in which questions of subject matter jurisdiction are treated. For example, both may be raised for the first time on appeal; similarly, both may be raised by the court *sua sponte*.

It is well established that as sovereign nations existing pre-European contact, the Cherokee Nation is immune from suit unless it has expressly waived its immunity from suit. The Cherokee Nation has virtually unlimited scope to waive its sovereign immunity, an ability of

which it frequently take advantage in order to maintain credibility in the market place. Because the Cherokee Nation has sovereign immunity, this Court lacks subject matter jurisdiction over the present case.

VI. THE CONTRACT

Finally, if the Court finds the Cherokee Nation is a party, that sovereign immunity does not deprive the Court of subject matter jurisdiction, that 25 U.S.C. § 450j(k) deems the Cherokee Nation an executive agency under the Settlement Agreement, the Court must still find that there is a valid, enforceable contract. GSK alleges in its Complaint the following:

> The United States entered into the Settlement Agreement on its own behalf, and on behalf of the Cherokee Nation, among others. Accordingly, ***the Settlement Agreement is binding on the Cherokee Nation***. [Dckt. No. 1, p. 1] (emphasis added).

The United States takes the following contrary position:

> The United States submits this brief to clarify its position that the Settlement Agreement between the United States and GSK did not release claims on behalf of the Indian Health Service or the Cherokee Nation….The United States notes, however, that ***GSK's response to these arguments rests on the assumption that the Cherokee Nation is a party to and is bound by the Settlement Agreement, a contention with which the United States disagrees for the reasons discussed below***. [Dckt. No. 26, p. 2] (emphasis added).

It is evident from the above statements that there was no meeting of the minds regarding the formation of the Settlement Agreement between GSK and the United States as to the scope of the release and the consideration to be exchanged. If the Court determines the Settlement Agreement void as a matter of law, the rest of the litigation will be moot and the parties can return to the status quo ante.

It is well-established that "[a] valid settlement agreement is an enforceable contract . . . ." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc*., 102 F.3d 12, 17 (1st Cir. 1996). A settlement agreement is a contract and its enforceability is determined by applying general contract law.

GSK cannot offer any proof that there was ever an offer, acceptance, consideration, or performance between the Cherokee Nation and GSK. *See* Restatement (Second) of Contracts (1981). GSK cannot do so because the Cherokee Nation is not a party to said contract, i.e. the Settlement Agreement. "The Settlement Agreement does not release any claims on behalf of the Indian Health Service, the Cherokee Nation, or any other Indian tribe. Because such a release is not included in the Settlement Agreement, and GSK did not provide consideration for such a release, the Court should deny GSK's cross-motion for summary judgment." (Ex. B, p. 9).

If the Settlement Agreement is binding on the Cherokee Nation, as GSK contends, the Cherokee Nation has provided GSK with valuable consideration in the form of a release of all claims and has not received any consideration, despite the fact that GSK knew, or should have known, of the Cherokee Nation's property interest in the Settlement Agreement. The Cherokee Nation seeks to have the Settlement Agreement declared void *ab initio* and request the parties be placed in the *status quo ante* the Settlement Agreement.

Reformation or rescission of a contract is within this Court's equitable powers. *See Mickelson v. Barnet*, 390 Mass. 786, 791 (1984). "[T]here is practically universal agreement that, if the material mistake of one party was caused by the other, either purposefully or innocently, or was known by the other or was of such character and accompanied by such circumstances that the other had reason to know of it, the mistaken party has the power to avoid the contract." 7-28 Corbin on Contracts § 28.41; *see also Les Construction Beauce Atlas, Inc. v. T.R. White Co*., No. 95354, 2006 Mass. Super. LEXIS 455 at *7-8 (Mass. Super. Ct. Aug. 28, 2006); *Torrao v. Cox*, 26 Mass. App. Ct. 247, 250-51 (1988).

The Settlement Agreement is also voidable by the Cherokee Nation as it is 1) an adversely affected party; 2) the mistakes relates to a basic assumption on which the Settlement

Agreement was made i.e. the scope of the releases and the amounts of consideration; 3) the mistake has a material effect on the agreed exchange of performances i.e. the Cherokee Nation released GSK from liability but did not receive consideration for the release; and 4) the mistake was not one as to which the Cherokee Nation bore the risk as it was never made aware of the settlement negotiations, did not execute said agreement, and was not notified of that it had released any claims until the filing of the instant action. *See* Restatement (Second) of Contracts, §153 (2006). The resulting imbalance in the agreed exchanges is so severe that the exchanges are not only less desirable to the Cherokee Nation, but is also more advantageous to GSK. Essentially, the Cherokee Nation gave, and GSK received, something more than what the parties bargained for.

There were mistakes of both parties at the time the Settlement Agreement was entered into that relate to a basic assumption between the parties and which were in direct conflict with one another. GSK, the Cherokee Nation, and the United States were all mistaken as to the identity of the correct parties, the scope of releases, and the amount of consideration contained in the Settlement Agreement. Thus, the Cherokee Nation may void the Settlement Agreement on the ground that all parties were mistaken as to the nature or extent of the contract.

VII. CONCLUSION

Wherefore, for the reasons stated above, the Cherokee Nation requests the Court enter judgment in its favor, deny the declaratory judgment, award it costs and attorney's fee, and for all other relief this Court deems just and equitable.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorneys of record for the Plaintiff and interested parties through the Court's electronic filing system ("ECF") on July 23, 2014.

/s/Curtis N. Bruehl