IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION, Plaintiff, v. JOHNSON & JOHNSON, INC. AND JANSSEN PHARMACEUTICALS, INC., Defendants.	)	CASE NO. 6:15-cv-00280-JHP

PLAINTIFF'S MOTION TO REMAND AND BRIEF IN SUPPORT

Plaintiff Cherokee Nation, through undersigned counsel and pursuant to 28 U.S.C. § 1447(c), respectfully moves this Court to remand this action to the District Court of Sequoyah County, State of Oklahoma because this Court lacks subject matter jurisdiction.

I. INTRODUCTION

The Notice of Removal filed by Defendants Johnson & Johnson ("J&J") and Janssen Pharmaceuticals, Inc. ("JPI") (together, "Defendants"), fails to support the existence of federal subject matter jurisdiction.

The Cherokee Nation is a sovereign Indian nation and is not a "citizen" of the State of Oklahoma. As such, this Court lacks diversity jurisdiction under 28 U.S.C. § 1332, which requires that each defendant must be a citizen of a different state relative to each plaintiff and each party must be a citizen of some state, which requires United States citizenship. Defendants attempt to evade this jurisdictional prohibition by wrongly arguing that the Cherokee Nation is not the real party in interest and that it is otherwise estopped from contesting jurisdiction. They do so by relying on facts not plead which otherwise are speculative and entirely inaccurate.

The Court also lacks federal question jurisdiction because Defendants fail to establish, as they must, that the state-law claims in Plaintiff's Petition (a) necessarily raises a stated federal issue, (b) the issue is actually disputed, (c) the issue is substantial, (d) and the issue is one which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities. Instead, the Petition raises failed arguments long rejected by the Supreme Court and by courts in this Circuit.

II. LEGAL STANDARD

"For a paper to fall within the removal statutes, it must be unambiguous." *Farmland Nat'l Beef Packing Co., L.P. v. Stone Container Corp*., 98 Fed. Appx. 752, 755 (10th Cir. 2004). The removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand and resolved against removal. *Id.* (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Fajen v. Found. Reserve Ins. Co*., 683 F.2d 331, 333 (10th Cir. 1982)). A civil action is removable only if the plaintiff could have originally brought the action in federal court. *See* 28 U.S.C. § 1441(a).

Because federal courts are courts of limited jurisdiction, there is a presumption against federal jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). "The right to remove a case from a local forum into federal court is solely one conferred by statute [thus]. . . . [R]emoval statutes represent congressionally authorized encroachments by the federal courts into the various states' sovereignties [and] those provisions must be strictly construed, and their established procedures rigidly adhered to." *Town of Freedmon, Okla. v. Muskogee Bridge Co.*, 466 F. Supp. 75, 77-78 (W.D. Okla. 1978)(internal citations omitted).

Federal question jurisdiction attaches to a claim only if the federal question appears on the face of plaintiff's "statement of his own claim in the bill or declaration, unaided by anything

alleged in the anticipation or avoidance of defenses which it is thought the defendant may interpose." *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989).

III. DEFENDANTS FAIL TO DEMONSTRATE STATE CITIZENSHIP OF THE CHEROKEE NATION FOR PURPOSES OF DIVERSITY JURISDICTION.

The Cherokee Nation is a sovereign Indian nation and is not a "citizen" of the State of Oklahoma. As such, Defendants have not, and cannot, demonstrate diversity jurisdiction under 28 U.S.C. § 1332 – which requires complete diversity such that each defendant must be a citizen of a different state relative to each Plaintiff and each party must be a citizen of some state, which requires United States citizenship. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978); Erwin Chemerinsky, Federal Jurisdiction § 5.3.3, at 302 (Aspen, 5th ed. 2007).

Federally recognized Indian tribes, as sovereign governments, are similarly situated to states and are not citizens for diversity purposes. *See State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 563 n.2 (10th Cir. 1999) ("A state, or the arm or alter ego of a state…does not constitute a 'citizen' for diversity purposes."); *see also S.C. Dept. of Disabilities & Special Needs v. Hoover Univ., Inc*., 535 F.3d 300, 303 (4th Cir. 2008) ("It is well established that for purposes of diversity jurisdiction, a State is not a 'citizen.'") (citing *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973)). Thus, The Cherokee Nation's presence in this case precludes the exercise of federal diversity jurisdiction. *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth*., 207 F.3d 21, 27 (1st Cir. 2000); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Oneida Indian Nation v. Oneida County*, 464 F.2d 916, 922-23 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974).

Defendants seek to evade these established jurisdiction limitations by claiming that the Cherokee Nation is "merely nominal" as a party in this case, in that it lacks "an actual interest in

the substantive controversy." Notice of Removal at ¶ 23-26. But Defendants' argument is unsupported, wrong, and should be rejected.[1]

For instance, Defendants cite to unidentified "publicly available information" for the proposition that "The Cherokee Nation itself is not responsible for operating the many services provided to tribal members, including healthcare services." Notice of Removal at ¶ 24. Defendants claim, "upon information and belief based on publicly available information," that the parties with the actual interest in this matter is "Cherokee Nation Businesses and/or Cherokee Nation Healthcare Services." Notice of Removal at ¶ 25. As support for this claim, Defendants cite generally to a 3-page brochure, but offer no explanation or quotation to connect the brochure to their argument. *Id.* Rather, Defendants simply proceed with the conclusion: "As the real party in interest, it is the citizenship of Cherokee Nations [sic] Businesses and/or Cherokee Nation Healthcare Services that determines whether there is diversity jurisdiction under 28 U.S.C. § 1332." *Id.* at ¶ 26.

[1] Defendants also appear to assert some sort of "waiver" or "estoppel" argument, citing an allegation of diversity jurisdiction by Plaintiff in another case. Notice of Removal at ¶ 21 (citing *Cherokee Nation v. Nations Bank, N.A.*, No. Civ. 99-308-S (E.D. Okla. June 24, 1999)). To begin, the complaint in *Nations Bank*, a challenge to tribal garnishment orders, had to be filed in federal court. *Cherokee Nation v. Nations Bank, N.A.*, 67 F. Supp. 2d 1303, 1305 (E.D. Okla. 1999). *Nations Bank* did not decide any question of diversity jurisdiction. More important, the absence of diversity jurisdiction is a defect not capable of waiver. *See Wisconsin Dept. of Corrections v. Schact*, 524 U.S. 381, 389 (1998); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) ("When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."). Moreover, subject matter jurisdiction cannot be conferred under a judicial estoppel theory. *Lara v. Trominski*, 216 F.3d 487, 495 n.9 (5th Cir. 2000)("We are especially wary of applying judicial estoppel to create subject matter jurisdiction in the federal courts."); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 89 (2d Cir. 2000) ("Indeed, it has been cautioned that special care should be taken in considering whether judicial estoppel should even apply to matters affecting federal subject matter jurisdiction."); *Albecker v. Contour Prods.*, 2013 U.S. Dist. LEXIS 139865, *33 (N.D. Ill. Sept. 27, 2013) ("any stance [the parties] previously took ought not to preclude them—or, more importantly, the Court—from reevaluating jurisdiction in the future."). This Court should similarly reject Defendants' waiver/estoppel argument.

Defendants' argument ignores the law: Removal must be based on the four corners of the pleading. *McPhail v. Deere & Co.*, 529 F.3d 947, 953 (10th Cir. 2008)(preponderance of the evidence required to show federal jurisdiction which is difficult to meet in a scheme devoid of discovery); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978)("The general rule is that if a case arising (in fact) under the laws of the United States is filed in state court but is non-removable to a federal district court for want of assertion of the federal question *on the face of the complaint*, jurisdiction can attach only by the voluntary amendment of the plaintiff's pleadings.")(emphasis added).

Defendants' unsupported and self-serving statements contradict Plaintiff's allegation that "The Cherokee Nation purchased misbranded Risperdal between March 3, 2002 and December 31, 2003." Petition at ¶ 4. Plaintiff also alleges that "Defendants expressly warranted that Risperdal was not 'misbranded' when they sold it to the Cherokee Nation." *Id.* at ¶ 5. In contrast, the Petition *makes no mention* of any of Cherokee Nation's for-profit entities, including the entities cited in the Notice of Removal. Further, any recovery in this case will inure to the benefit of The Cherokee Nation constitutional entity and not to its for-profit business interests. Defendants' removal petition, therefore, is based on false conjecture and supposition that improperly and unpersuasively *contradict rather than address* the facts pled in the Petition. *See Cameron v. State Farm Mut. Auto. Ins. Co*., 2010 U.S. Dist. LEXIS 43222, *6 (D. Colo. Apr. 2, 2010) (rejecting conjecture as basis for removal).

Additional information regarding Plaintiff's structure only cements the flaws and omissions in Defendants' Notice of Removal. The Cherokee Nation constitutional and corporate entities are separate and distinct. *See Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982)("the Mescalero Apache constitutional and

corporate entities [are] separate and distinct"). The Cherokee Nation's Constitution forms the basis for the Cherokee Nation's government. Cherokee Nation Health Services, LLC is a tribal Section 8(a) for-profit entity.[2] Cherokee Nation Businesses is a wholly owned corporation of the Cherokee Nation and serves as the holding company for all of The Cherokee Nation's for-profit entities.[3] Plaintiff did not plead, nor could it, that these for-profit entities purchased Risperdal from Defendants. Rather, the purchase and distribution of Risperdal falls within the control of the constitutional government because it is the constitutional government, not any of its for-profit entities, that operates the healthcare system for the benefit of its citizens.[4] *See* Petition at ¶¶ 4-5. Defendants marketed and sold Risperdal to Plaintiff, not any other entities. *Id*.

Based on the foregoing, Defendants have not, and cannot, demonstrate diversity jurisdiction under 28 U.S.C. § 1332.

IV. DEFENDANTS FAIL TO DEMONSTRATE FEDERAL QUESTION JURISDICTION.

Defendants also fail to demonstrate federal question jurisdiction pursuant to 28 U.S.C. § 1331. [5] Federal question jurisdiction attached to a claim only if the federal question appears on the face of plaintiff's "statement of his own claim in the bill or declaration, unaided by anything alleged in the anticipation or avoidance of defenses which it is thought the defendant may interpose." *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). For the last 140 years, 28 U.S.C. § 1331 has conferred jurisdiction on federal district courts over actions "arising under the Constitution, laws, or treaties of the United States." Act of Mar. 3, 1875, 18 Stat. 470 (codified

[2] http://cherokee-cnhs.com/Pages/home.aspx The Court may take judicial notice of information contained on government websites, like those operated by The Cherokee Nation. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 702 n. 22 (10th Cir. 2009).

[3] http://cherokeenationbusinesses.com/aboutUs/Pages/overview.aspx

[4] *See id.* (itemizing business, which does not include health care).

[5] Act of Mar. 3, 1875, 18 Stat. 470 (codified at 28 U.S.C. § 1331).

at 28 U.S.C. § 1331). A case can "arise under federal law" in one of two ways: (1) "when federal law creates the cause of action asserted," or (2) in a "special" and "slim" category of cases where state law claims "'necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064-65 (2013) (quoting *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005)); *see also Malloy v. Commerce Bank, N.A.*, 558 Fed. Appx. 787, 789-790 (10th Cir. 2014) (quoting *Grable*); *Shelton v. Sand Springs Pub. Sch., Indep. Dist. No. 2, Tulsa County*, 2015 U.S. Dist. LEXIS 6038, *4 (N.D. Okla. Jan. 20, 2015) (citing *Gunn* and *Grable*).

Defendants do not, and cannot, point to any federal law that creates the claims in Plaintiff's Petition.[6] Rather, Defendants rely exclusively on an attempt to meet the *Grable* factors. As detailed herein, Defendants cannot establish each (or any) of these factors.

Defendants' argument turns on this statement: "Plaintiff will not be able to prevail without showing that Defendants violated the complex and comprehensive federal statute governing the labeling, promotion, and sale of prescription drugs." Notice of Removal at ¶ 3. Defendants' statement is wrong. Even if federal issues are present in this case (which Defendants have not shown), the state court would not necessarily need to resolve any federal questions in order to resolve Plaintiff's claims. *See Merrell Dow Pharmaceuticals Inc. v.*

[6] Plaintiff's claims are brought "strictly pursuant to state law." Petition at ¶ 7. Plaintiff further alleges that: "Nowhere herein does Plaintiff plead, expressly or implicitly, any cause of action or request any remedy which is founded upon Defendants' violation of federal law or the United States Constitution. The issues presented in the allegations of the instant Petition do not implicate significant federal issues; do not turn on the substantial federal interpretation of federal law; nor do they raise a substantial federal question. Indeed, Plaintiff expressly avers that the only causes of action claimed, and the only remedies sought herein, are for those founded upon state law. None of Plaintiff's causes of action require the application of federal law. This Petition presents no federal question that is actually disputed and substantial." *Id.*

Thompson, 478 U.S. 804, 813 (1986) (the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction); *Shelton*, 2015 U.S. Dist. LEXIS 6038, at *7-8 (recognizing vitality of *Merrell Dow* after *Grable*); *Doe v. Sunflower Farmers Mkts., Inc*., 831 F. Supp. 2d 1276, 1281 (D.N.M. 2011)(same).

Importantly, Defendant JPI and its attorneys have already entered into a Guilty Plea Agreement with the United States, whereby JPI agreed to plead guilty to a one count Information charging JPI with the introduction into interstate commerce of drugs that were misbranded – a misdemeanor arising from its illegal misbranding of its drug Risperdal between March 3, 2002 and December 31, 2003. Specifically, JPI stipulated to the following facts:

> d. Between March 3, 2002 and December 31, 2003, JPI, through Janssen Pharmaceuticals ElderCare sales force, promoted Risperdal to health care providers for treatment of psychotic symptoms and associated behavioral disturbances exhibited by elderly non-schizophrenic dementia patients. JPI's promotion of Risperdal for these additional intended uses caused Risperdal to be misbranded under 21 U.S.C. § 352(f)(1), because Risperdal's labeling did not bear adequate directions for these intended uses.
>
> e. Between March 3, 2002, and December 31, 2003, Janssen Pharmaceuticals Inc., caused shipments of Risperdal to be introduced into interstate commerce, and these shipments constituted misbranded drugs due to the conduct described above."

Ex. 1 and 2.[7]

JPI has already pleaded guilty to misbranding Risperdal. Defendants present no explanation to support the notion that Plaintiff's claims will "raise substantial and disputed questions about whether Defendants complied with federal law" – there is no dispute as to Defendants' lack of compliance. *E.g. Lane v. CBS Broad., Inc*., 612 F. Supp. 2d 623, 632 (E.D. Pa. 2009)(explaining impact of guilty plea on meeting state law requirements in granting

[7] The Court may take judicial notice of a guilty plea. *Anderson v. Cramlet*, 789 F.2d 840, 845 (10th Cir. 1986) (taking judicial notice of guilty plea).

remand); *Rittenhouse v. Minerva*, 1998 U.S. Dist. LEXIS 12161, *3 (E.D. Pa. Aug. 6, 1998)(allegations that defendant entered a guilty plea to conduct which *also* violates a federal statute not sufficient for removal).

Even without a guilty plea, remand is appropriate. In *Merrell Dow*, plaintiffs brought a state court action alleging that the prescription drug Bendectin caused birth deformities when taken by the mother during pregnancy. The plaintiffs alleged that Bendectin was "misbranded" in violation of the FDCA. The Court noted that the FDCA does not create or imply a private right of action, thus, the causes of action did not arise under federal law and were improperly removed to federal court. 478 U.S at 814 ("congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.") The court held that "[a] violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States' within the meaning of 28 U.S.C. § 1331." *Id.* at 817.

Merrell Dow also renders irrelevant Defendants' statement that they "dispute the allegations in Plaintiff's Complaint, which ostensibly assert claims that they violated the FDCA by selling Risperdal that was misbranded." Notice of Removal at ¶ 14. *First*, in light of JPI's guilty plea, Defendants' denial as to their misbranding is disingenuous and ineffective. *Second*, Defendants state that Plaintiff's allegations "ostensibly" assert a violation of the FDCA. That concession is telling; Plaintiff's Petition does not, in fact, even *mention* the FDCA, let alone assert violations of that statute (and, according to *Merrell Dow*, nor could it).

Ultimately, Defendants have failed to demonstrate why the state court would need to resolve substantial and disputed federal questions in order to allow the fact-finder to conclude that Defendants acted negligently (Count I), or breached its warranty (Count II), or was unjustly enriched (Count III), or engaged in unfair or deceptive conduct (Count IV). Defendants' violations of state common law or the Oklahoma Consumer Protection Act concern issues quintessentially suited to a state's police powers. "To the extent that it is necessary to construe a federal statute in order to determine the merits of the defense of truth in this case, the state courts are competent to read and apply federal law." *Hetherington v. Griffin Television, Inc*., 430 F. Supp. 493, 500 (W.D. Okla. 1977).

Defendants sold a product to Plaintiff that Defendants *admitted by guilty plea in federal court* was misbranded. Federal law is not implicated in this state law consumer case, and federal law does not give rise to Plaintiff's causes of action. Federal question jurisdiction does not automatically arise if there is a federal ingredient in a cause of action brought under state law. *Merrell Dow*, 478 U.S. at 813 (the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction); *Shelton*, 2015 U.S. Dist. LEXIS 6038, at *7-8 (recognizing vitality of *Merrell Dow* after *Grable*); *Doe v. Sunflower Farmers Mkts., Inc*., 831 F. Supp. 2d 1276, 1281 (D.N.M. 2011)(same). "To the extent that it is necessary to construe a federal statute in order to determine the merits of the defense of truth in this case, the state courts are competent to read and apply federal law." *Hetherington v. Griffin Television, Inc*., 430 F. Supp. 493, 500 (W.D. Okla. 1977).

Critically, allowing all state law consumer cases to be removed to federal court if some part of the product is subject to some form of federal regulation – as Defendants advocate here – "would undermine key federalism principles that strike the balance of power between state and

federal courts." *Zamora v. Wells Fargo Home Mortg*., 831 F. Supp. 2d 1284, 1305 (D.N.M. 2011). Nearly every product in the United States is subject to some form of federal regulation. Allowing federal question jurisdiction for all consumer products litigation that are subject to a federal regulation would flood the federal court system with state law consumer cases. This would clearly disturb the balance of judicial responsibilities intended by Congress.

V. FEES AND COSTS SHOULD BE AWARDED UNDER 28 U.S.C. §1447(c)

Pursuant to 28 U.S.C. § 1447(c), the Court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The decision whether to award fees "should turn on the reasonableness of the removal." *Martin v. Franklin Capital Corp*., 546 U.S. 132, 141 (2005). An award of attorney's fees is appropriate "where the removing party lacked an objectively reasonable basis for seeking removal." *Id.*

Defendants here lacked an objectively reasonable basis for seeking removal. A wealth of authority holds that an Indian tribe is not a resident of any state for diversity jurisdiction, *see* §III, *supra*, and that federal question jurisdiction is not raised when claiming a drug is mislabeled or misbranded. *See,* §IV, *supra*. Moreover, removal is based on the face of the complaint *and not* on conjecture and speculation raised in the Notice of Removal. Based on these circumstances, an award of attorney's fees is warranted. *Cf. Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1,* 607 F.3d 1251, 1255 (10th Cir. 2010)(finding legal support for removal to be too weak to support objectively reasonable removal and affirming award of fees and costs); *Huber-Happy v. Estate of Rankin*, 233 Fed. Appx. 789, 790 (10th Cir. 2007) (affirming award of fees where removal filed in the face of "well-established principle").

Plaintiff respectfully requests an opportunity to present its fees and costs, incurred in connection with this instant motion. Such a presentation would include the time and expenses

incurred in drafting the instant motion and supporting briefing, and presenting oral argument, if necessary.

VI. CONCLUSION

The Cherokee Nation is a sovereign Indian nation and not a "citizen" of any state for purposes of diversity jurisdiction. The Cherokee Nation expressly disclaimed any federal cause of action in its state court petition. Defendants stipulated that Risperdal was defective when they sold it to the Cherokee Nation. The Cherokee Nation's state law claims do not state a federal issue, much less one that is actually disputed and substantial. Allowing federal question jurisdiction on a state law consumer claim would disturb the Congressionally approved balance of federal and state judicial responsibilities.

WHEREFORE, the Cherokee Nation respectfully requests that this action be remanded to the District Court of Sequoyah County, Oklahoma for further proceedings. Plaintiff also requests the Court to award, pursuant to 28 U.S.C. § 1447(c), costs and expenses, including attorney's fees, incurred by Plaintiff as a result of the improper removal of this matter to this Court, and all other relief deemed just and equitable.

Respectfully submitted,

s/Curtis "Muskrat" Bruehl
Curtis "Muskrat" Bruehl, OBA # 19418
THE BRUEHL LAW FIRM
14005 N. Eastern Avenue
Edmond, OK 73013
(405) 509-6300
(405) 509- 6268 (Facsimile)
curtbrue@gmail.com

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that a true and correct copy of the above document was served upon the attorneys of record through the Court's electronic filing system "ECF") on August 17, 2015.

/s/ *Curtis "Muskrat" Bruehl*