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

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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Johnson & Johnson (erroneously named in the complaint as Johnson & Johnson, Inc.) ("J&J") and Janssen Pharmaceuticals, Inc. ("Janssen") (collectively referred to as "Defendants"), respectfully submit this Response in Opposition to Plaintiff's Motion to Remand.

I. INTRODUCTION

This lawsuit focuses on Risperdal®, a prescription medicine approved by the U.S. Food and Drug Administration ("FDA") to treat schizophrenia and other serious mental health conditions. Risperdal belongs to a class of medicines known as "atypical" or "second generation" antipsychotics. The labeling, promotion, and sale of Risperdal is governed by the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399f ("FDCA"). The FDCA is one of the most comprehensive and complex prescription drug labeling laws in the world.[1]

Plaintiff, the Cherokee Nation ("Plaintiff"), filed this lawsuit on April 8, 2015 alleging that from March 3, 2002 to December 31, 2003, Defendants "misbranded" Risperdal. Based on the theory that Defendants misbranded Risperdal—i.e., violated federal law—Plaintiff brought state-law claims for negligence, breach of warranty, unjust enrichment/restitution, and for violation of the Oklahoma Consumer Protection Act. Plaintiff asserts that Defendants' purported actions entitle Plaintiff to damages and penalties in excess of $75,000.

Plaintiff served Defendants with a copy of the Petition on July 6, 2015. Defendants removed this action based on federal question jurisdiction and diversity jurisdiction on July 27, 2015. As explained in Defendants' Notice of Removal, Plaintiff's ability to prevail will turn on its proof that Defendants violated federal prescription drug labeling law, raising a necessary and disputed substantial federal issue and giving rise to federal question jurisdiction. Diversity

[1] *See* U.S. Food & Drug Admin., Laws, Regulations, Policies & Procedures for Drug Applications, http://www.fda.gov/drugs/developmentapprovalprocess/ucm090410.htm.

jurisdiction also exists because separate companies, not Plaintiff itself, provide the relevant healthcare services and therefore are the real parties in interest in this action.

Plaintiff's Motion to Remand does not contradict Defendants' contentions regarding federal subject matter jurisdiction and, in fact, demonstrates that removal was proper. By its own admissions, Plaintiff: (1) bases its state-law claims on alleged violations of federal prescription drug labeling law; and (2) incorporated separate entities to provide healthcare services to the Cherokee Nation's citizens. Under United States Supreme Court and Tenth Circuit precedent, these admissions provide federal subject matter jurisdiction under both federal question jurisdiction and diversity jurisdiction. As this action is properly in federal court, Plaintiff's Motion to Remand should be denied in its entirety.

II. ARGUMENT

A. This Court Has Federal Question Jurisdiction Under *Grable* and *Nicodemus*.

A defendant has a right to remove any case of which the district court would have had original jurisdiction. *See* 28 U.S.C. § 1441(a). District courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* § 1331. Under Supreme Court precedent, "arising under" jurisdiction exists not only over federal-law claims, but also over state-law claims which "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." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *see also Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1232 (10th Cir. 2006). This "doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."

Grable, 545 U.S. at 312. Under *Grable*, a court must engage in a "contextual enquiry" to determine whether it has federal question jurisdiction over a particular action. *Id.* at 318.

In *Grable*, the Court considered whether there was federal jurisdiction over a state-law quiet title action brought by a landowner against the tax sale purchaser of his property. The Internal Revenue Service had seized the landowner's property to satisfy his federal tax delinquencies and then sold the property. *Id.* at 310. Although the landowner received notice of the seizure and the sale, he brought a state-law quiet title action, alleging that the Internal Revenue Service had not notified him of the seizure in the manner required under the relevant federal statute. *Id.* at 310-11. The Court recognized that the landlord's state-law claim turned on whether he received adequate notice, as defined by federal law, and held that this question was properly answered in federal court. *Id.* at 314-15, 319-20.

Since the Supreme Court's decision in *Grable*, numerous courts have concluded that federal jurisdiction exists over state-law claims in circumstances analogous to those presented here. For example, in *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227 (10th Cir. 2006), the Tenth Circuit concluded there was federal question jurisdiction over the plaintiffs' state law claims because proof of them would require resolution of a substantial, disputed federal issue—i.e., whether the defendant's "use of the right-of-way [had] exceeded the purpose for which it was granted." *Id.* at 1234-36; *see also, e.g.*, *Bowdrie v. Sun Pharm. Indus. LTD*, 909 F. Supp. 2d 179, 184-85 (E.D.N.Y. 2012) (finding existence of federal question jurisdiction under *Grable* where plaintiffs' state-law tort claims alleged that pharmaceutical manufacturer failed to meet its obligations under the FDCA and its implementing regulations); *N.Y. City Health & Hosps. Corp. v. WellCare of N.Y., Inc.*, No. 10 Civ. 6748, 2011 WL 70565, at *4-6 (S.D.N.Y. Jan. 7, 2011) (finding existence of federal question jurisdiction under *Grable* where plaintiffs' state-law

breach of contract claim raised issues about defendant's compliance with federal Medicare law), attached hereto as Exhibit 1; *Louisiana ex rel. Foti v. Eli Lilly & Co.* (*In re Zyprexa*), 375 F. Supp. 2d 170, 172-73 (E.D.N.Y. 2005) (holding, in case against a pharmaceutical company regarding another atypical antipsychotic, that the involvement of "substantial federal funding provisions" under Medicaid "and the allegations about the violation of federal law through improper off-label use" together "present[ed] a core of substantial issues" that established federal jurisdiction).

Plaintiff acknowledges that, under *Grable*, federal question jurisdiction can exist over state-law claims that raise disputed and substantial federal issues and which a federal forum can entertain without disturbing any balance between federal and state judicial responsibilities. But to avoid *Grable* and its progeny, Plaintiff claims that Defendants were "wrong" when they stated that "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." *See* Pl.'s Mot. to Remand and Brief in Support, ECF No. 18, Aug. 17, 2014 ("Mot. to Remand") at 6. A review of Plaintiff's claims, however, reveals the exact opposite—Plaintiff's claims are entirely dependent on whether the Risperdal allegedly purchased by Plaintiff was "misbranded" in violation of federal law.

In Count I, the negligence claim, Plaintiff alleges: "Defendants breached this duty, as it was negligent in the sale and/or distribution of misbranded Risperdal." Pet. ¶ 17 (emphasis added), Ex. 1 to Defs.' Notice of Removal [Doc. 5-1]. In Count II, the breach of warranty claim, Plaintiff alleges: "Defendants expressly and impliedly warranted to the Cherokee Nation that Risperdal was safe, effective, fit for its intended use, and not misbranded." *Id.* ¶ 19 (emphasis added). Plaintiff also alleges that: "Defendants breached these warranties due to Risperdal's

defective nature and the fact that the drug was misbranded, all in violation of 12A O.S. § 2-301 *et seq.*" *Id.* ¶ 21 (emphasis added). Similarly, in Count III, the unjust enrichment/restitution claim, Plaintiff asserts that it "is entitled to restitution to the extent of the increased revenue received by Defendants from Risperdal prescriptions that were purchased or reimbursed by the Cherokee Nation and which resulted from the sale of misbranded Risperdal." *Id.* ¶ 25 (emphasis added). Plaintiff further alleges: "In equity and fairness, it is Defendants, not the Cherokee Nation, who should bear the costs of misbranded Risperdal. Defendants have been unjustly enriched to the extent that the Cherokee Nation has had to pay for misbranded Risperdal." *Id.* ¶ 26 (emphasis added). Count IV, the consumer protection claim, rests on this alleged misconduct and therefore is also rooted in the alleged violation of federal law. *See id.* ¶ 27 ("By virtue of the acts alleged above . . . ."); *id.* ¶ 31 ("By virtue of the acts alleged above . . . ."). Clearly, every claim made by Plaintiff is for the alleged misbranding of Risperdal.

The FDCA is the sole source of authority governing whether the Risperdal purchased by Plaintiff was misbranded. Under the FDCA's complex provisions, a prescription medicine can be "misbranded" if, for example, the "labeling" does not "bear[] . . . adequate directions for use." *See* 21 U.S.C. § 352(f)(1); *see also id.* § 331 (prohibiting, inter alia, "introduction into interstate commerce of any . . . drug . . . that is . . . misbranded").

Accordingly, not only does Plaintiff's Petition raise federal questions, but Plaintiff's core allegations, as outlined above, belie its assertion that a substantial federal question is not the sole foundation for Plaintiff's state-law claims. When a disputed issue of federal law is central to the state-law claim, the state-law claim "sensibly belongs in a federal court." *Grable*, 545 U.S. at 315; *see also id.* at 316-19 (distinguishing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986)), where the federal issue was collateral); *Gaming Corp. of Am. v. Dorsey & Whitney*,

88 F.3d 536, 551 (8th Cir. 1996) (tribal management companies' conspiracy claim arose under federal law: "The conspiracy claim here arises under federal law for the purposes of jurisdiction since federal law is the only measure of whether Dorsey and the nation conspired to commit an unlawful act or to commit a lawful act in an unlawful manner.").

In its Motion to Remand, Plaintiff relies on Janssen's federal criminal resolution to support its position that its claims do not require actual proof that both Defendants violated the misbranding provisions of the FDCA. Such reliance is misplaced. Despite Plaintiff's characterizations otherwise, Janssen[2] never "stipulated that Risperdal was defective when they [sic] sold it to the Cherokee Nation." *See* Mot. to Remand at 12 [Doc. 18]. The misdemeanor plea regarding misbranding under 21 U.S.C. § 352(f)(1) was not as to fraud but rather concerned a no intent, strict-liability offense. *See, e.g.*, *United States v. Watkins*, 278 F.3d 961, 964 (9th Cir. 2002) ("An article may be misbranded pursuant to the misdemeanor provision 'without any conscious fraud at all,' thus creating a form of strict criminal liability." (citation omitted)); *see also, e.g.*, *Rheinecker v. Forest Labs., Inc.*, 813 F. Supp. 1307, 1311 (S.D. Ohio 1993) (holding that violations of the FDCA attach "without any proof of intent, knowledge or awareness of wrongdoing"). In addition, nothing in the federal resolution was specific as to any Risperdal allegedly purchased by Plaintiff.

As a result, Plaintiff will be required to establish wrongful conduct specifically as to the Cherokee Nation. Stated another way, the plea does not eliminate Plaintiff's burden of proof. This reality is exemplified clearly in the decision of *Hood ex rel. Mississippi v. Eli Lilly & Co.*

[2] Plaintiff does not address the fact that Defendant J&J was not a party to the misdemeanor plea. Even if the federal criminal resolution were applicable to the claims against Janssen, which it is not, it still would not address the burden of proof necessary to Plaintiff's claims against J&J.

(*In re Zyprexa*), 671 F. Supp. 2d 397 (E.D.N.Y. 2009). Underlying the claims in *Mississippi* was the guilty plea by Eli Lilly, the manufacturer of another atypical antipsychotic, Zyprexa, to a misbranding violation for the following:

> Between September 1999 and March 31, 2001, Eli Lilly promoted Zyprexa in elderly populations as treatment for dementia, including Alzheimer's dementia. Zyprexa is not approved by the FDA for treatment of dementia or Alzheimer's dementia. Eli Lilly's promotion of Zyprexa for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Zyprexa's labeling did not bear adequate directions for each of the drug's intended uses.

Id. at 416. The State of Mississippi, similar to Plaintiff here, attempted to rely on Eli Lilly's guilty plea as dispositive of its state law claims. But the court rejected Mississippi's argument that the guilty plea entitled it to summary judgment:

> Mississippi moves for summary judgment as to liability on its [Consumer Protection Act] and unjust enrichment claims for the period from September 1, 1999 through March 31, 2001. The motion is based upon Lilly's having pleaded guilty in the federal district court for the Eastern District of Pennsylvania to a misdemeanor count under a strict liability "misbranding" statute. *See* 21 U.S.C. §§ 331(a), 333(a)(1), and 352(f)(1). The guilty plea did not admit any facts relating to Mississippi, or physicians who treated Mississippi Medicaid recipients. No dispositive evidence was offered on the elements of Mississippi's state law claims.

Id. at 464. The same result exists here, and Plaintiff cannot rely on Janssen's federal criminal resolution to avoid its evidentiary burden. To establish liability in this case, Plaintiff will be required to establish that the specific Risperdal it claims to have purchased was "misbranded" by Defendants in violation of federal law.[3]

[3] For these reasons, Plaintiff's additional arguments that "the state court would not necessarily need to resolve any federal questions in order to resolve Plaintiff's claims" and "there is no dispute as to Defendants' lack of compliance" with federal law also are unavailing. *See* Mot. to Remand at 7, 8 [Doc. 18]. Further, Plaintiff's reliance on the federal criminal resolution contradicts its assertion that its state-law claims are not based on violations of federal law.

Similarly unpersuasive is Plaintiff's argument that the fact that it did not "*mention* the FDCA" in its Petition demonstrates that it is not asserting a violation of the FDCA. *See* Mot. to Remand at 9 [Doc. 18]. Plaintiff's intentional choice not to reference the FDCA—the only source of the relevant "misbranding" provision—does not defeat federal question jurisdiction because "[u]nder the 'artful pleading' doctrine, . . . a plaintiff may not defeat removal by failing to plead federal questions that are essential elements of the plaintiff's claim." *Turgeau v. Admin. Review Bd.*, 446 F.3d 1052, 1060 (10th Cir. 2006) (citation omitted); *see also Util. Supply Co. v. AVB Bank*, No. 10-CV-124-JHP, 2010 WL 4941506, at *4 (N.D. Okla. Nov. 30, 2010) (denying motion to remand due to existence of federal question: "It is apparent that even though USC never cited Article 4A, its negligence claim specifically invokes Article 4A's language and methods."), attached hereto as Exhibit 2.

When engaging in the requisite "contextual enquiry" of whether a state-law claim raises a substantial federal question, a court also must consider the strength of the "federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable*, 545 U.S. at 313. Interpreting, applying, and determining whether companies have violated the FDCA by misbranding prescription medicines is important to the federal system as a whole—i.e., it is a substantial federal issue. There is a strong federal interest in having a federal court decide the federal questions raised by Plaintiff's Petition regarding whether Defendants violated the FDCA in the labeling of Risperdal. Ensuring uniformity of prescription drug labeling throughout the United States is one of the principal purposes of the FDCA and the FDA's prescription drug labeling regulations. *See, e.g.*, Proposed Labeling for Oral Aspirin-Containing Drug Prods., 50 Fed. Reg. 51,400, 51,403 (Dec. 17, 1985) (codified at 21 C.F.R. § 201) ("FDA has a well-

established policy of promoting uniformity in the area of labeling."), attached hereto as Exhibit 3. Uniform interpretation of those laws is of equal importance.

In arguing that the issues here are not substantial and that remand is appropriate because there is no private right of action for violations of the FDCA, *see* Mot. to Remand at 9 [Doc. 18], Plaintiff relies on a reading of *Merrell Dow* that did not survive *Grable*. After *Grable*, the existence of a private right of action is merely "relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that [28 U.S.C.] § 1331 requires." 545 U.S. at 318 (quoting *Merrell Dow*, 478 U.S. at 810). Plaintiff's claims here are not the "garden variety" tort claims brought by individuals like the kind the Supreme Court cautioned in *Merrell Dow* would attract an unprecedented "horde" of filings in federal court. This case is not, for example, the type of case where a plaintiff has alleged personal injury and one element of the state-law personal injury claim includes an alleged violation of federal law. Rather, it is an attempt by a large for-profit corporation to collect damages and impose enormous monetary penalties based ***entirely*** on a supposed violation of federal law and in the absence of any allegations regarding personal injury. Further, this is not an instance where the product at issue is subject to "*some* form of federal regulation." *See* Mot. to Remand at 10, 11 (emphasis added) [Doc. 18]. The federal regulation present here is not incidental to the conduct at issue, but controls it entirely. There is no risk that removal of the types of claims Plaintiff has brought here will attract a "horde" of similar claims.

Plaintiff's claims, on the face of the Petition, are entirely dependent on a violation of federal law and raise substantial federal issues, and this Court has subject matter jurisdiction over the claims. Removal on the basis of federal question jurisdiction was appropriate and Plaintiff's Motion to Remand should be denied.

B. This Court Has Diversity Jurisdiction Because There Is Complete Diversity Between Defendants and the Real Plaintiff in Interest and Plaintiff Seeks More Than $75,000.

Federal courts also have original jurisdiction over matters involving citizens of different states where the amount in controversy exceeds $75,000. Both of those prerequisites are present here.

1. Defendants Are Not Limited to Plaintiff's Petition in Establishing Diversity Jurisdiction.

At the outset, Plaintiff misstates the standard for establishing diversity jurisdiction and the scope of materials this Court may consider when determining whether diversity jurisdiction is present. As the parties seeking removal, Defendants have to establish the existence of diversity jurisdiction by a preponderance of the evidence. *Middleton v. Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014). In meeting that burden, Defendants are not limited to the allegations of Plaintiff's Petition.

Despite Plaintiff's assertion to the contrary, the decision in *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008), does not compel the conclusion that "[r]emoval must be based on the four corners of the pleading." *See* Mot. to Remand at 5 [Doc. 18]. In fact, in *McPhail*, the Tenth Circuit explained that where, as here, there are facts at issue concerning the existence of diversity jurisdiction, a party may seek to conduct discovery regarding those facts. *Id*. at 954; *see also Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) ("[W]here the pleadings are inadequate, we may review the record to find evidence that diversity exists."); *Cousina v. Mass. Mut. Life Ins. Co.*, No. 12-CV-00532-JHP-TLW, 2012 WL 6726453, at *2 (N.D. Okla. Dec. 27, 2012) ("In ruling on motion to remand, a court should determine its jurisdiction over [a] case based upon plaintiff's pleadings at time of removal, supplemented by any affidavits or deposition transcripts filed by parties. Plaintiff does not dispute any of the supplemental

allegations contained in Mass Mutual's Notice of Removal; therefore, the allegations are taken as true.") (citations omitted), attached hereto as Exhibit 4; *Praetoria Grp., LLC v. Octavian Sec. Ams.*, No. 13-CV-00818-JHP-TLW, 2014 WL 793548, at *1 (N.D. Okla. Feb. 26, 2014) ("The required jurisdictional amount in controversy may be established through allegations contained in the complaint (including exhibits to the complaint), estimates of damages and other relevant materials."), attached hereto as Exhibit 5; *Smallwood v. BP Am. Prod. Co.*, No. 10-CV-182-JHP, 2010 WL 3769256, at *2 (Sept. 27, 2010) ("When the removability of the case is not clear from the face of the Complaint, 'other papers' may be relied on to determine whether subject matter jurisdiction is appropriate and, therefore, whether the case is removable."), attached hereto as Exhibit 6. The second case Plaintiff erroneously relies on to support its argument that removal based on diversity jurisdiction is limited to the four corners of the pleading, *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978), actually addressed removal based on federal question jurisdiction, not diversity jurisdiction, and is inapposite.

2. There Is Diversity of Citizenship Among the Real Parties in Interest.

Plaintiff's entire opposition to diversity jurisdiction is that "The Cherokee Nation is a sovereign Indian nation and is not a 'citizen' of the State of Oklahoma." Mot. to Remand at 3 [Doc. 18]. As is apparent from Defendants' Notice of Removal, however, removal on the basis of diversity jurisdiction was not sought on the basis of the citizenship of the Cherokee Nation. Rather, Defendants maintain that diversity jurisdiction exists because the Cherokee Nation is not the real party in interest in this litigation.

When determining the citizenship of the parties, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980); *see also Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1369 (10th Cir. 1998) (same); *Branch Banking & Tr. Co.*

v. Bixby Inv'rs, L.P., No. 11-CV-0358-CVE-TLW, 2011 WL 4348212, at *3 (N.D. Okla. Sept. 16, 2011) ("In determining questions of removability courts look only to the residence of real and substantial parties to the controversy and must disregard nominal or formal parties."), attached hereto as Exhibit 7. *See generally* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party."); Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.").

When determining whether a party is "merely nominal" or the real party in interest, "the focus of the inquiry [is] on whether the party has an actual interest in the substantive controversy." *Dennis v. Progressive N., Ins. Co.*, No. CIV-14-1375-HE, 2015 WL 1356922, at *2 (W.D. Okla. Mar. 24, 2015), attached hereto as Exhibit 8. In this case, Plaintiff is the nominal party, and the real party in interest is Cherokee Nation Businesses and/or Cherokee Nation Healthcare Services. The public information available reflects that these separate entities, rather than Plaintiff, provide healthcare services for the Cherokee Nation's citizens. *See* Defs.' Notice of Removal, ECF No. 5, July 27, 2015 ¶¶ 24-25; Ex. 9 to Defs.' Notice of Removal [Doc. 5-9].[4] For example, a brochure disseminated by Cherokee Nation Businesses specifically states that:

> CNB [Cherokee Nation Businesses] is engaged in preserving Cherokee culture, contributing to services for Cherokee citizens, and supporting the local economy through its programs and services, such as . . . [o]perating the largest tribal health system in the United States, including a 58-bed hospital, eight outpatient facilities with medical, dental, vision and other health care services.

[4] Plaintiff's argument as to Defendants' reliance on publicly available information, Mot. to Remand at 4 [Doc. 18], is curious because Plaintiff admits that the Court can take judicial notice of such publicly available documents, *id.* at 6 n.2. Defendants may rely on publicly available materials to support removal on the basis of diversity jurisdiction. *See Nichols v. Golden Rule Ins. Co.*, No. 10-cv-00331, 2010 WL 1769742, at *4 (D. Colo. May 3, 2010), attached hereto as Exhibit 9.

Ex. 9 to Defs.' Notice of Removal [Doc. 5-9]; *see also* Cherokee Nation Businesses, http://cherokeenationbusinesses.com/Pages/home.aspx ("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."), attached hereto as Exhibit 10.

Despite contesting the existence of diversity jurisdiction, Plaintiff nevertheless admits that Cherokee Nation Businesses and Cherokee Nation Healthcare Services are separate corporate entities. Mot. to Remand at 6 [Doc. 18] ("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."); *id*. ("Cherokee Nation Health Services, LLC is a tribal Section 8(a) for-profit entity.").[5] Plaintiff then proceeds to sidestep the question as to the real party in interest for this litigation. Instead of directly addressing the question, Plaintiff coyly asserts that "any recovery in this case will inure to the benefit of The Cherokee Nation constitutional entity and not to its for-profit business interests" and that "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." *Id.* at 5, 6.

[5] Defendants also may rely on Plaintiff's admission of diversity jurisdiction in Plaintiff's federal court action in *Cherokee Nation v. Nations Bank, N.A.*, No. Civ. 99-308-S (E.D. Okla. June 24, 1999). *See State Farm Mut. Auto. Ins. Co. v. Dyer*, 19 F.3d 514, 519 (10th Cir. 1994) ("The evidentiary admission of Colley in the wrongful death action on Dyer's residence is admissible against Colley in this action."). Plaintiff's admission in *Nations Bank* demonstrates Plaintiff's acknowledgement that there are circumstances under which diversity jurisdiction is appropriate. Notably, although Plaintiff claims that its previous action "had to be filed in federal court," Mot. to Remand at 4 n.1 [Doc. 18], Plaintiff neither explains why it alleged the existence of diversity jurisdiction nor asserts that its claim of diversity jurisdiction was in error.

The issue, however, is not whether the for-profit businesses are subject to the ultimate "control" of Plaintiff or whether Plaintiff may ultimately "benefit" from the litigation.[6] Rather, the focus is on the party with the actual interest in the controversy; in other words, the party that provided the services at issue and who allegedly was harmed by the claimed misconduct. *See Centra, Inc. v. Chandler Ins. Co.*, 229 F.3d 1162, 2000 WL 1277672, at *9 (10th Cir. 2000) (unpublished) ("It is well established that, 'where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone . . . who has a right of recovery, even though in an economic sense real harm may well be sustained [by other entities as a result] . . . of such wrongful acts.'"), attached hereto as Exhibit 11; *Seminole Nation of Okla. v. Salazar*, No. CIV-06-556-SPS, 2013 WL 230151, at *4 (E.D. Okla. Jan. 22, 2013) ("The 'real party in interest' is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.") (citation omitted), attached hereto as Exhibit 12.

Defendants' properly submitted material, as well as Plaintiff's admission in its Motion as to the existence of separate corporations, demonstrate that the direct operation of healthcare operations is not undertaken by the Cherokee Nation but rather by separately incorporated entities that, unlike the Cherokee Nation, *are* citizens for purposes of diversity jurisdiction under existing Tenth Circuit precedent. *See Gaines*, 8 F.3d at 729 ("A tribe may also charter a corporation pursuant to its own tribal laws, and such a corporation will be considered a citizen of

[6] Plaintiff cites to Paragraphs 4 and 5 of its Petition to support its assertion that "the constitutional government" of the Cherokee Nation "operates the healthcare system for the benefit of its citizens," Mot. to Remand at 6 [Doc. 18], but those allegations are not actually contained within those paragraphs. Further, that statement is contradicted by the Cherokee Nation Businesses' brochure, which states the exact opposite. *See* Ex. 9 to Defs.' Notice of Removal [Doc. 5-9].

a state for purposes of diversity jurisdiction."); *see also Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 724 (9th Cir. 2008) (holding that corporation formed under tribal law was a citizen of the state of its principal place of business); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1181 (D.S.D. 2012) ("The distinction between an unincorporated tribal entity and an incorporated tribal entity is well-recognized and critical to determining whether Great Plains is a citizen of any state for purposes of diversity jurisdiction.") (collecting cases and authority); William C. Canby, Jr., *American Indian Law In A Nutshell* 249 (5th ed. 2009) ("A tribe may, however, charter a tribal corporation that becomes a citizen of the state and its principal place of business for purposes of diversity jurisdiction."), attached hereto as Exhibit 13.

Stated another way, the extensive and comprehensive corporate holding company structure adopted by the Cherokee Nation to conduct every aspect of its commercial affairs illustrates that Plaintiff is, at best, a nominal or formal party whose citizenship should be disregarded for purposes of diversity jurisdiction because it is not the real party in interest. In essence, the Cherokee Nation is the equivalent of a parent corporation that chose to form separate corporations to conduct its business affairs. Under such circumstances, however, a parent corporation is not the real party in interest. *Centra*, 2000 WL 1277672, at *9 ("A parent corporation may not pierce its own corporate veil to render it the real party in interest. The mere fact that CenTra may have consolidated its financial statements, billings, or tax returns with its subsidiaries does not alter the force of this doctrine.") (citations omitted), attached hereto as Exhibit 11; *Mainord v. Sharp*, 1977 OKLA CIV APP 29, 569 P.2d 546, 548 (1977) ("A shareholder in a corporation has no title or legal right to the assets of the corporation. The shareholder's property rights are limited to a proportionate share of the dividends, and assets on

dissolution. . . . The real party in interest rule is designed to protect the defendant by insuring that the party with the legal right to sue brings the action.") (citations omitted).

The authority cited by Plaintiff does not preclude a finding of diversity jurisdiction where, as here, the Indian tribe is a nominal party whose presence is not indispensable and the real party in interest is an entity separately incorporated and, therefore, a citizen for purposes of diversity jurisdiction. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) (finding lack of diversity jurisdiction where tribal authority was "an arm of the Tribe, not separately incorporated"); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) ("The district court was correct in treating the tribe as an indispensable party and holding that it could exercise diversity jurisdiction only if the tribe—whose reservation is wholly located in Connecticut—[was] a citizen of Connecticut."); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (issue of separately incorporated entities not addressed by court); *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) (no diversity jurisdiction where one of two plaintiff-tribes did not have a separately incorporated entity as real party in interest). This distinction was noted succinctly by the court in *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1334 (D. Kan. 1997), where the Court found there was no diversity jurisdiction because "[Plaintiff] Calumet does not contend that the Tribe operates its gaming enterprise as a corporate entity instead of in its constitutional capacity." *Id.* at 1325 n.2 (citing *Gaines*, 8 F.3d at 729-30).

Significantly, Plaintiff does *not* contest the assertion in Defendants' Notice of Removal that "Cherokee Nation Businesses and Cherokee Nation Healthcare Services are organized under Oklahoma law and have principal places of business in Oklahoma." Defs.' Notice of Removal

¶ 27 [Doc. 5]. Nor does Plaintiff challenge that the amount in controversy exceeds $75,000. *Id.* ¶ 30. Thus, as Cherokee Nation Businesses and/or Cherokee Nation Healthcare Services are the real parties in interest, diversity jurisdiction exists in this matter.

3. At a Minimum, Defendants Have Set Forth Sufficient Facts to Warrant Jurisdictional Discovery Before the Court Issues a Decision on Diversity Jurisdiction.

In its Motion to Remand, Plaintiff relies on factually unsupported assertions to claim that there is no separate corporation that provides healthcare services to the Cherokee Nation's citizens, including the services at issue in this action. Under Tenth Circuit precedent, Plaintiff should not be able to rely on such unsupported statements. *See Gaines*, 8 F.3d at 728-29 (noting detailed affidavits of tribe president that named entity was never incorporated). Despite Plaintiff's unsupported assertions regarding the corporate structure of the Cherokee Nation Businesses, Plaintiff's public pronouncements and concessions support a conclusion that Plaintiff is not the real party in interest in this case. If, however, the Court determines that there is no federal question jurisdiction over this matter, Defendants respectfully request that the Court defer ruling on the issue of whether there is diversity jurisdiction and allow Janssen to seek discovery on this issue. *See McPhail*, 529 F.3d at 954 ("We also note that to the extent that a defendant must rely on the federal discovery process to produce this evidence (perhaps because there was no time to do so in state court) he may ask the court to wait to rule on the remand motion until limited discovery has been completed . . . ."). The proposed discovery Janssen would serve on Plaintiff regarding jurisdictional issues, if permitted by the Court, is attached as Exhibit 14.

C. Plaintiff's Request for Attorneys' Fees Lacks Merit.

Finally, the court need not get to Plaintiff's request for attorneys' fees and costs. At the outset, Defendants have established that this Court has subject matter jurisdiction over this

matter and, therefore, any request for fees and costs is inappropriate. Even if this Court chooses to remand this action, however, Plaintiff's request is improper and should be rejected.

As noted by this Court, "absent unusual circumstances, this court 'may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.'" *Rouse v. Tex. Capital Bank*, No. CIV-11-300-RAW, 2011 WL 6369901, at *1 (E.D. Okla. Dec. 19, 2011) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)), attached hereto as Exhibit 15; *see also Moore v. Travelers Ins. Co.*, No. 07-CV-10-JHP-SAJ, 2007 WL 1072215, at *4 (N.D. Okla. Mar. 30, 2007) ("The Court finds that an award of attorney's fees would not be 'just' under these circumstances. As Defendants note, no published opinions by the Tenth Circuit have addressed the particular issue raised in Plaintiff's Motion and there is conflicting authority on this issue in lower courts. Moreover, the Court's conclusion that Defendant failed to provide sufficient evidence to establish the requisite amount in controversy does not necessarily indicate that Defendants lacked an objectively reasonable basis for removal." (footnote omitted)), attached hereto as Exhibit 16; *Treat v. Liberty Ins. Corp.*, No. 07-CV-466-JHP-FHM, 2007 WL 3407165, at *4 (N.D. Okla. Nov. 7, 2007) ("[T]he Court does not find an award of attorney's fees to be appropriate in this case. The Court is convinced that Liberty Mutual 'had a legitimate basis for believing' that the case fell within this Court's jurisdiction. That belief simply did not translate into a legally sufficient Notice of Removal.") (citation omitted), attached hereto as Exhibit 17.

Defendants had an objectively reasonable basis upon which to seek removal on the grounds of both federal question jurisdiction and diversity jurisdiction. The decisions cited by Plaintiff do not alter this conclusion. In one case, *Huber-Happy v. Estate of Rankin*,

233 F. App'x 789, 790 (10th Cir. 2007), removal was sought in violation of a well-established principle that federal courts will not assume general jurisdiction over state-court probate matters. In the other, *Porter Trust v. Rural Water Sewer & Solid Waste Management District No. 1*, 607 F.3d 1251, 1255 (10th Cir. 2010), the court found that the argument was inconsistent with the plain language of Section 1441(a) of the removal statute. In contrast, Defendants' removal here is based on existing Supreme Court and Tenth Circuit precedent, which support its assertion of federal question jurisdiction and diversity jurisdiction (including a right to request discovery to challenge the assertion that Plaintiff is the real party in interest). *See Grable*, 545 U.S. at 314; *Nicodemus*, 440 F.3d at 1236; *Gaines*, 8 F.3d at 729; *McPhail*, 529 F.3d at 954. The request for attorneys' fees should therefore be rejected by the Court.

III. CONCLUSION

This Court has federal jurisdiction over Plaintiff's claims under 28 U.S.C. §§ 1331, 1332, and 1441 and *Grable*. For all of the reasons set forth above and in Defendants' Notice of Removal, Defendants respectfully request that this Court deny Plaintiff's Motion to Remand. Given Defendants' objectively reasonable basis for seeking removal of this case, Defendants further request that this Court deny Plaintiff's request for fees and costs under 28 U.S.C. § 1447(c).

Respectfully submitted,

Dated: August 31, 2015

/s/Amy Sherry Fischer

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CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of August 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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