IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§	
Plaintiff,	§	Case No. CJ-2017-816
vs.	§	
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC.; (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	§	The Honorable Thad Balkman ***Discovery Motion Submitted to***: Special Discovery Master William C. Hetherington
Defendants.	§	

NON-PARTY MOTION TO QUASH SUBPOENA DUCES TECUM OF THE CHICKASAW NATION

The Non-Party Movant Chickasaw Nation (hereinafter "Nation"), a federally recognized tribe, appearing specially by its counsel without waiving any of the Nation's procedural rights, objections, defenses, or sovereign immunity, and only for the limited purpose set forth herein, hereby moves the Court for an order quashing the January 24, 2019, Subpoena Duces Tecum (hereinafter "Subpoena") issued by Defendants Janssen Pharmaceuticals, Inc., Johnsons &

Johnson, Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc. and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc (collectively "Defendant").

The Chickasaw Nation is a federally recognized American Indian tribe possessing sovereign immunity from unconsented suit. The Nation is not a party to this suit and does not otherwise waive its sovereign immunity or subject itself to the jurisdiction of this Court. As such, the subject subpoena should be quashed. *See Bonnet v. Harvest (U.S.) Holdings, Inc.*, 742 F.3d 1155 (10th Cir. 2014).

I. TRIBAL SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED

It is well established that Indian tribes are "domestic dependent nations" which possess an "inherent sovereign immunity" from unconsented suit. *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024,2030 (2014). (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509(1991)). As a matter of federal law, an Indian tribe is subject to suit *only* where Congress has authorized the suit, *or* the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). This prohibition against unconsented suits proceeding against an Indian tribe is a bedrock principle of federal Indian law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (holding Indian tribes possess the same degree of immunity from suit that has traditionally been enjoyed by other sovereigns, including the United States and the individual states).

Tribal sovereign immunity applies equally to actions filed in federal and state court. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 41 (quoting *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 12). The only way to circumvent a tribe's immunity is an express waiver of the immunity by Congress or the tribe itself, *id.*, and no waiver exists that would authorize Defendant's attempt to invoke this Court's jurisdiction over the Chickasaw Nation in this matter.

Recently, in *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (2014), the Tenth Circuit reversed a lower court's denial of a motion to quash based on tribal immunity, holding the subpoena itself was a "suit" against the tribe triggering tribal sovereign immunity where the tribe was a non-party to the case and the subpoena sought tribally owned records.[1] The *Bonnet* case has been cited in subsequent decisions from United States District Courts in Oklahoma. *See e.g., James Dillion v. BMO Harris Bank, N.A. Four Oaks Bank & Trust, et al.*, Case No. 16-mc-5-CVE-TLW (N.D. Okla. Feb. 2, 2016). Defendant's subpoena in this matter should likewise be quashed.

II. IN THE ALTERNATIVE, DEFENDANT'S SUBPOENA IS OVERLY BROAD, UNDULY BURDENSOM, AND UNDULY PREJUDICIAL AND SEEKS IRRELEVANT DOCUMENTS

The Subpoena seeks information outside the bounds of the pending lawsuit. In Oklahoma, parties may not conduct discovery on matters irrelevant to the claims and defenses in the lawsuit. See 12 O.S. § 3226. This Court possesses "broad discretion" to ensure discovery progresses justly and efficiently. *State ex rel. Protective Health Serv. v. Billings Fairchild Ctr., Inc.*, 2007 OK CIV APP 24, ¶ 8, 158 P.3d 484, 488. To that end, "district courts should not neglect their power to restrict discovery where justice requires protection for a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Quinn v. City of Tulsa*, 1989 OK 112, 777 P.2d 1331, 1342 (internal citations omitted); 12 O.S. § 2004.1(C)(3). This power should be exercised here for several reasons.

First, the Subpoena is patently overly broad. For example, the Subpoena seeks documents from May 1996 to present—a 23-year period. The sheer volume of what Defendant is requesting outweighs any possible benefit that comes from such information. Because these records would

[1] In *Bonnet*, Judge Baldock, writing for the panel (Judges Gorsuch and Bacharach), stated "[t]he issue before us is whether a subpoena duces tecum served on a non-party Tribe and seeking documents relevant to a civil suit in federal court is itself a "suit" against the Tribe triggering tribal sovereign immunity. Exercising jurisdiction under 28 U.S.C. Sec. 1291, pursuant to the collateral order doctrine, we hold the answer is yes." *Id.*

amount to truckloads of discovery, there is no way the Nation would be able to produce them in the near future. The time and expense required for the Nation to respond to Defendant's broad search would require a disproportionate amount of effort which would hamper the Nation's ability to conduct other essential tasks to support of the needs of the citizens of the Nation. A subpoena that is on its face overly broad and oppressive constitutes an undue burden. *See Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998); *Linder v. Calero-Portocarrero*, 180 F.R.D. 168, 174 (D.D.C. 1998).

Second, the Subpoena seeks documents which are irrelevant to the actual claims and defenses in this lawsuit. The Nation is not a party to this lawsuit, and the health information of its citizens is not relevant to the State's claims. This Subpoena seems to be an attempt by the Defendants to drag in as many non-parties as possible to prolong discovery. The Nation is not interested in this suit or its claims and defenses. The right to discovery is not without limits and material sought must be relevant. *Quinn v. City of Tulsa*, 1989 OK 112, ¶ 63, 777 P.2d 1331. Any document request that has not established the relevancy of the request and is extremely broad should be denied. *See Jones Packing Co. v. Caldwell*, 1973 OK 53, ¶ 3, 510 P.2d 683. Defendant has not established the connection between the requested documents from the Nation and the State of Oklahoma's lawsuit. Without such a showing, there is no basis for burdening the Nation with this Subpoena.

Third, the Subpoena requests documents that are a clear breach of the doctor-patient confidentially and HIPAA. The Subpoena requests include documents that reflect patient information, including patient experience with certain treatment at the Nation's facility. Compliance with this request has the potential to put the Nation in violation of federal law and subject to harsh penalties. An entity covered by the Health Insurance Portability and

Accountability Act ("HIPAA"), 42 U.S.C.A. § 1320d-6(a)(3), may disclose protected health information of an individual without court order or prior written consent of the individual only if the covered entity receives assurances, as defined by HIPAA, that the party seeking the information has given or caused to be given notice of the request or made efforts to secure a protective order that meets HIPAA standards. Defendants have not made the necessary assurances, nor have they sought a protective order necessary for the information sought.

Finally, compliance with the Subpoena is not possible by the date provided therein. (February 11, 2019). In Fact, it would take months and thousands of dollars to do what Defendant is requesting. The Subpoena is patently unreasonable and overly burdensome.

CONCLUSION

Based on the arguments set forth above, the Nation's retained and asserted sovereign immunity from unconsented suit bars Defendant's attempt to invoke this Court's jurisdiction for any purpose, let alone for purposes of enforcing a Subpoena in an action to which the Chickasaw Nation is not a party. Moreover, the Subpoena should be quashed as overly broad and unduly burdensome and for such further reasons the Court seems proper.

Respectfully,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on February 11, 2019 to:

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