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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 San Carlos Apache Tribe,
12 Plaintiff,

13 v.

14 Alex Azar, U.S. Department of Health and
Human Services; Michael Weahkee,
15 Principal Deputy Director, Indian Health
Service; United States of America,
16 Defendants.
17

No. 2:19-CV-05624-NVW

**MOTION TO DISMISS
COUNT II OF PLAINTIFF'S
COMPLAINT**

18
19
20 Defendants move for dismissal of Count II of Plaintiff's Complaint (Doc. 1)
21 pursuant to Fed. R. Civ. P. 12(b)(6) because Count II fails to state a claim upon which relief
22 can be granted and should be dismissed as a matter of law. Pursuant to LRCiv 7.2, this
23 motion is accompanied by the attached memorandum of points and authorities.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. INTRODUCTION**

26 In Count II of its complaint (Doc. 1), Plaintiff San Carlos Apache Tribe seeks a
27 construction of the Indian Self-Determination and Education Assistance Act ("ISDEAA")
28

1 (codified as amended at 25 U.S.C. § 5301 *et seq.*),¹ that would require the Indian Health
2 Service (“IHS”) to pay Plaintiff direct and indirect costs associated with income obtained
3 by the Tribe from third-party payers such as Medicare and Medicaid. Plaintiff’s request is
4 contrary to the plain language of the ISDEAA. Defendants are entitled to dismissal of
5 Count II of Plaintiff’s complaint as a matter of law.

6 The ISDEAA, and therefore the contract that Plaintiff entered into with IHS under
7 the ISDEAA, provides that Medicare, Medicaid and other third-party income Plaintiff
8 earned is *supplemental* to the amount of funding that the ISDEAA requires IHS to pay
9 Plaintiff. *See* 25 U.S.C. § 5325(m); Exhibit A.² The ISDEAA also expressly prohibits IHS
10 from funding direct and indirect costs associated with funding from non-IHS entities,
11 including expenditures of these Medicare, Medicaid, and other third-party funds. *See* 25
12 U.S.C. § 5326; *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418
13 (D.D.C. 2008), *reconsideration denied*, 655 F. Supp. 2d 62 (2009).

14 Despite this clear language, Plaintiff seeks to require IHS to pay additional Contract
15 Support Costs (“CSC”) on Plaintiff’s expenditure of non-IHS funds based on the faulty
16 notions that these non-IHS funds are part of the IHS-appropriated “Secretarial amount”
17 and that Plaintiff’s expenditure of these funds occurs as part of the same Federal program
18 that it is under contract to operate. But to do as Plaintiff asks would require this Court to
19 add, re-write, or ignore terms of at least five separate ISDEAA provisions: 25 U.S.C. §§

20 ¹ On August 1, 2016, the U.S. House of Representatives, Office of the Law Revision
21 Counsel, transferred the codification of the ISDEAA from 25 U.S.C. § 450 *et seq.* to 25 U.S.C.
22 § 5301 *et seq.* All ISDEAA citations in this filing have been updated to reflect the new
23 codification.

24 ² Plaintiff did not include the self-determination contract as an attachment to its
25 Complaint. Attached to this motion as Exhibit A is Contract No. HHS12472011100002C
26 along with the three annual funding agreements (AFAs) incorporated by reference at
27 (f)(2)(B) of the contract. The 2011 annual funding agreement (AFA) covered the period
28 1/1/2011 to 9/30/2011. The 2012 AFA covered the full fiscal year from 10/1/2011 to
9/30/2012. The 2013 AFA covered the full fiscal year from 10/1/2012 to 9/30/2013.
Plaintiff did not identify in its Complaint the predecessor contract that covered the period
10/1/2010 to 12/31/2010 so defendants have not appended it to this motion. The
predecessor contract contained generally the same provisions and can be provided to the
Court if necessary.

1 5325(a)(1), (a)(2), (a)(3)(A), (m), and 5326. This Court should decline Plaintiff's
2 invitation.

3 The ISDEAA's purpose is to facilitate Indian self-determination by allowing a tribe
4 or tribal organization to take over operations of an IHS or Bureau of Indian Affairs program
5 operated for the benefit of Indians because of their status as Indians. The ISDEAA provides
6 for the transfer of funds that the Secretary would have otherwise used to operate the
7 contracted program (the Secretarial amount), *id.* § 5325(a)(1), and for the Secretary to also
8 pay CSC for the tribal contractor's reasonable direct and indirect costs of operating that
9 program that are not already part of the Secretarial amount, *id.* § 5325(a)(2)–(3).

10 But the ISDEAA's CSC provisions do not create an unlimited funding source to
11 cover all of a tribal contractor's costs of administering programs funded with the many
12 other non-IHS awards, such as other sources of federal financial assistance, as well as state
13 financial assistance and third-party payments. The ISDEAA's CSC provisions limit IHS's
14 obligation to reimbursement of a tribal contractor only for those costs directly associated
15 with administering an IHS program or for that portion of a tribal contractor's indirect costs
16 properly allocable to the IHS program. The ISDEAA's CSC provisions do not provide for
17 IHS to reimburse a tribal contractor for its direct and indirect costs associated with its
18 expenditure of Medicare, Medicaid, and other program income, even if the tribe uses those
19 funds to provide additional health care services.

20 **II. BACKGROUND**

21 **A. IHS Health Care Programs**

22 IHS delivers health care to more than two million American Indians and Native
23 Alaskans directly through IHS facilities and indirectly through ISDEAA contracts. *See* 25
24 U.S.C. §§ 13 (“Snyder Act”),³ 1601–83 (“Indian Health Care Improvement Act”
25 (“IHCIA”)), 5301 *et seq.* IHS directly provides health care to members of many of the 573
26

27 ³ In 1954, Congress transferred the health-care related functions of the Snyder Act from
28 the Department of the Interior to Health, Education, and Welfare, the predecessor of the
Department of Health and Human Services (“HHS”). *See* Pub. L. No. 83-568, 68 Stat. 674 (1954)
(codified at 42 U.S.C. § 2001).

1 federally-recognized tribes at IHS service units that it operates. In the course of providing
2 direct services, IHS collects reimbursements from Medicare and/or Medicaid programs
3 and, rather than sending such reimbursements to the general fund at the U.S. Treasury, has
4 been authorized to return them to each individual IHS health care service unit. *See, e.g.*,
5 42 U.S.C. § 1395qq; *see also* 25 U.S.C. §§ 1621f, 1641.⁴

6 Many federally-recognized tribes and tribal organizations have entered into
7 ISDEAA contracts to operate IHS health care programs. IHS transfers money out of its
8 lump-sum services appropriation to tribal contractors to operate IHS health care programs
9 under ISDEAA contracts. A portion of this amount is for contract support costs (“CSC”)
10 to these tribal contractors.⁵

11 In addition to these ISDEAA funds, many tribal contractors obtain reimbursements
12 from Medicare, Medicaid, and other third-parties.⁶ Many tribal contractors also receive
13 funds from other non-IHS sources, including states and other federal agencies.
14 Additionally, many tribes and tribal organizations supplement their IHS funding, state and
15 other federal funding, and other third-party funding with their own tribal funds so that they
16 can provide additional health care services.

17 **B. Tribal Self-Determination Under the ISDEAA**

18 **1. The Secretarial Amount**

19 At the request of a tribe or tribal organization, the ISDEAA requires the Secretary
20 of Health and Human Services (“HHS”) to enter into an ISDEAA contract for the tribal
21 contractor to take over a health care program, function, service, or activity (hereafter
22

23 ⁴ Congress has further provided that the collection of Medicare and Medicaid funds shall
24 not be taken into account in determining the amount of funds otherwise appropriated for IHS health
25 care programs. 25 U.S.C. § 1641(a).

26 ⁵ Since 2016, Congress has separately appropriated “such sums as may be necessary” for
27 IHS’s payment of tribes’ CSC. *See, e.g.*, Pub. L. No. 115-141, 132 Stat. 348. CSC is explained
28 below, *see infra*, at 5.

⁶ Tribal contractors may, for example, seek and collect third-party reimbursements from
Medicare and Medicaid, 25 U.S.C. § 1641(d); private insurance companies, *id.* § 1621e(a);
workers’ compensation funds, *id.* § 1621e(b); tortfeasors, *id.* § 1621e(e)(3)(A), and ineligible
persons, *id.* § 1680c.

1 collectively referred to as an “IHS program”) that IHS was performing for the benefit of
2 the tribe or its members. *See* 25 U.S.C. § 5321(a)(1). Once the parties enter into a contract,
3 IHS transfers to the tribal contractor the amount of funds the agency had allocated, or would
4 have allocated for its continued operation of the program, for the tribal contractor to operate
5 the program. *See id.* § 5325(a)(1). This is known as the “Secretarial amount.”

6 **2. Contract Support Costs**

7 When a tribal contractor obtains or renews an ISDEAA contract, the ISDEAA not
8 only requires the agency to pay the tribe the Secretarial amount but also requires the agency
9 to add “an amount” to the contract to reimburse the tribe for its CSC. *See* 25 U.S.C.
10 § 5325(a)(2), 3(A). For CSC, Congress requires IHS to pay:

11 an amount for the reasonable costs for activities which must be carried on by
12 a tribal organization as a contractor to ensure compliance with the terms of
13 the contract and prudent management, but which—

- 14 (A) normally are not carried on by the respective Secretary in his direct
15 operation of the program; or
16 (B) are provided by the Secretary in support of the contracted program from
17 resources other than those under contract.

18 *Id.* § 5325(a)(2).

19 Congress further provides that costs that are “eligible ... for the purposes of
20 receiving [CSC] funding ... include the costs of reimbursing each tribal contractor for
21 reasonable and allowable” expenses, including both:

- 22 (i) direct program expenses for the operation of the Federal program that is
23 the subject of the contract, [and]
24 (ii) any additional administrative or other expense related to the overhead
25 incurred by the tribal contractor in connection with the operation of the
26 Federal program ... pursuant to the contract.

27 *Id.* § 5325(a)(3)(A)(i)-(ii).

28 Congress additionally requires that CSC cannot “duplicate” funds provided as part
of the Secretarial amount. *Id.* § 5325(a)(3)(A). To clarify the requirement that such costs
must be allocable to the IHS Secretarial amount identified under the ISDEAA contract,
Congress expressly prohibits the expenditure of any ISDEAA funding, including the

1 Secretarial amount and CSC funding, for direct and indirect costs associated with any and
2 all non-IHS funds. *See* 25 U.S.C. § 5326.

3 The CSC at issue in this case thus contains two components:

4 (1) Direct CSC, which are direct costs that a tribe must incur to operate the specific
5 program at issue. *Accord* 2 C.F.R. § 200.413. Workers compensation is a common
6 example of direct CSC. Direct costs are CSC only if IHS did not include funding for such
7 costs in the Secretarial amount. *See* 25 U.S.C. § 5325(a)(2), (3)(A).

8 (2) Indirect CSC, which are the IHS's share of a tribe's indirect costs. *See id.*
9 Indirect costs ("IDC") are pooled overhead costs that benefit more than one program, such
10 as the costs of running information technology and payroll departments, or conducting
11 audits. *See id.*; *accord* 2 C.F.R. § 200.416. An agency may pay only those costs which
12 are "allocable" to the program. *See* 2 C.F.R. § 200.416. Additionally, indirect costs are
13 CSC only if IHS did not include funding for such costs in the Secretarial amount. *See* 25
14 U.S.C. § 5325(a)(2), (3)(A).

15 **3. Program Income**

16 Program income does not come from IHS. Tribal contractors directly bill third-
17 party payers and are directly reimbursed by those third parties. *See, e.g.*, 25 U.S.C.
18 § 1641(d).⁷ Title I of the ISDEAA expressly provides that "program income earned by a
19 trib[e] in the course of carrying out a[n] [ISDEAA] contract ... shall be used by the tribal
20 contractor to further the general purposes of the contract" and "shall not be a basis for
21 reducing the amount of funds otherwise obligated to the contract." 25 U.S.C. § 5325(m).⁸
22 This language is essential for ISDEAA contractors, since the default rule for most
23

24 ⁷ Alternatively, tribal contractors may elect to use IHS as an intermediary for payments from
25 Medicare and Medicaid. *See id.* § 1641(c). In that circumstance, Congress requires IHS to act as
a pass-through entity and distribute 100 percent of the funds to the contractor. *See id.*

26 ⁸ Similarly, for funding agreements under Title V, the ISDEAA provides that "[a]ll
27 Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as
28 supplemental funding to that negotiated in the funding agreement" and that "[s]uch funds
shall not result in any offset or reduction in the amount of funds the Indian tribe is
authorized to receive under its funding agreement." *Id.* § 5388(j).

1 government awardees is that they must use program income to defray the costs charged to
2 the government. *See, e.g.*, 2 C.F.R. § 200.307(e). Thus, without an exception to the general
3 rule, IHS would be required to reduce Plaintiff's Secretarial amount and related CSC
4 funding to account for the amounts that could be covered by Plaintiff's program income.

5 **4. History of Contract Support Cost Litigation**

6 When originally enacted, the ISDEAA did not provide for CSC funding to tribal
7 contractors and, instead, only authorized funding for the Secretarial amount. *See* Pub. L.
8 No. 93-638 ("638"), § 106, 88 Stat. 2203 (1975). Congress added provisions concerning
9 CSC in 1988, 1994, and 1998. *See* Pub. L. No. 100-472, 102 Stat. 2285, 2292-93 (1988)
10 (codified at 25 U.S.C. § 5325(a)(2)); Pub. L. No. 103-413, 108 Stat. 4250, 4257 (1994)
11 (codified at 25 U.S.C. § 5325(a)(3)(A)); Pub. L. No. 105-277, Div. A, § 101(e) [Title II]
12 (1998), 112 Stat. 2681-231, 2681-280 (codified at 25 U.S.C. § 5326).⁹

13 Congress, however, did not provide sufficient appropriations to pay all tribal
14 contractors' CSC, and from 1998 through 2013, capped annual appropriations to IHS for
15 CSC. *See, e.g.*, 108 Stat. 2527 (1994) (lump sum appropriation); 1999 Appropriations Act,
16 112 Stat. 2681, 2681-729 (1999) (capped appropriation). IHS administered its
17 appropriations by developing a policy for the equitable allocation of its appropriations
18 among all of its ISDEAA contractors. This allocation of the capped appropriations led to
19 years of litigation. Initially, courts not only approved, but indeed required, contracting
20 agencies to allocate CSC in this manner. *See, e.g., Ramah Navajo Sch. Bd., Inc. v. Babbitt*,
21 87 F.3d 1338, 1348-49 (D.C. Cir. 1996). The Supreme Court, however, eventually held
22 that IHS was liable for damages arising from breach of contract claims despite these limits
23 on the availability of appropriations. *See Cherokee Nation of Okla. v. Leavitt*, 543 U.S.
24 631, 639 (2005) (IHS liable despite limited lump-sum appropriation); *Salazar v. Ramah*

25
26 ⁹ When adding the CSC provisions, Congress also expressed concern that IHS and the
27 Bureau of Indian Affairs were not transferring all of their resources, particularly for administrative
28 functions, to the tribes to allow the tribes to carry out contract requirements. *See, e.g.*, S. Rep. No.
100-274, at 9 (1988), *reprinted at* 1988 U.S.C.C.A.N. 2620, 2628. Accordingly, Congress also
amended the Secretarial amount to clarify that the agencies must include all such resources in that
amount. *See* Pub. L. No. 103-413, 108 Stat. 4250, 4257 (1994) (amending § 5325(a)(1)).

1 *Navajo Chapter*, 567 U.S. 182, 185 (2012) (Bureau of Indian Affairs liable despite capped
 2 appropriation); *see also Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 567 U.S. 930 (2012)
 3 (*vacating Arctic Slope Native Ass’n v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), in light of
 4 *Ramah Navajo*, making IHS liable despite overall cap on total CSC in appropriation).
 5 Since 2016, Congress has appropriated “such sums as may be necessary” for IHS’s
 6 payment of tribal contractors’ CSC. *See, e.g.*, Pub. L. No. 115-141, 132 Stat. 348 (2018).

7 Count II of the Complaint in this case, however, does not allege insufficient
 8 appropriations but instead seeks to construe the ISDEAA to require an expanded definition
 9 of CSC.¹⁰ Tribal contractors have brought similar claims before. *See Ramah Navajo*
 10 *Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), *overruled*, Pub. L. No. 105-277, Div. A,
 11 § 101(e) [Title II] (Oct. 21, 1998), 112 Stat. 2681-231, 2681-280 (codified at 25 U.S.C.
 12 § 5326). In passing § 5326, Congress clarified that:

13 notwithstanding any other provision of law, ... no funds appropriated by
 14 this ... Act shall be available for any contract support costs or indirect costs
 15 associated with any ... funding agreement entered into between an Indian
 tribe or tribal organization and any entity other than the [IHS].

16 25 U.S.C. § 5326. Since its passage, only two courts have ruled on the meaning of § 5326.
 17 *See Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008)
 18 (Walton, J.), *reconsideration denied*, 655 F. Supp. 2d 62 (2009); and *Seminole Tribe of Fla.*
 19 *v. Azar*, 376 F. Supp. 3d 100 (D.D.C. 2019) (Contreras, J.).¹¹ Other decisions concerning
 20 a tribal contractor’s attempt to expand the definition of CSC are *Navajo Health*
 21 *Foundation—Sage Memorial Hospital v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016) ;
 22 and *Cook Inlet Tribal Council, Inc. v. Mandregan*, 348 F. Supp. 3d 1 (D.D.C. 2018),
 23 *vacated in part on reconsideration by Cook Inlet Tribal Council v. Mandregan*, 2019 WL
 24 3816573, August 14, 2019, *appeal filed*, No. 19-5005 (D.C. Cir.).

25 Most recently, the United States District Court for the District of Columbia
 26 addressed the exact issue raised in this motion, and granted judgment to defendants stating,

27
 28 ¹⁰ Counts I and IV of the Complaint allege insufficient appropriations.

¹¹ These cases are described in Section IV.C. herein.

1 [T]he Court reads § 5388(j)¹² to define third-party revenue as a source of
 2 funding that is supplemental to and separate from the amount negotiated in
 3 the funding agreement under § 5388(c) and thus ineligible for CSC. The
 4 Court also agrees with the IHS that § 5325(a) does not entitle the Tribe to
 5 collect CSC for its expenditure of third-party revenue, as that section’s
 6 references to the “Secretarial amount” to which CSC must be added and the
 7 “Federal program” that generates CSC do not include third-party revenue.

8 *Swinomish Indian Tribal Community v. Azar, et al.*, No. 18-cv-1156, 406 F.Supp.3d 18, 27-
 9 28 (D.D.C. 2019), *appeal filed*, No. 19-5299 (D.C. Cir.); *But see, Navajo Health*
 10 *Foundation—Sage Memorial Hospital v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016).

11 C. Plaintiff’s Allegations in the Complaint

12 Plaintiff San Carlos Apache Tribe is a federally recognized Indian tribe with its tribal
 13 headquarters in San Carlos, Arizona. Complaint, ¶ 5. The Tribe operates health care
 14 programs and activities of the IHS. *Id.*, ¶ 7. These programs are operated pursuant to
 15 contracts that IHS awarded to the Tribe pursuant to Title I of the ISDEAA (25 U.S.C. §§
 16 5301-5332) that expressly incorporate Title I into the terms. *Id.*, ¶¶ 8-10, 14. The contracts
 17 also include the Tribe’s annual funding agreements (AFAs) issued pursuant to 25 U.S.C. §
 18 5329(C). *Id.*, ¶¶ 11, 14. Section 5325(a)(1) provides for the direct program funding, also
 19 called the “Secretarial amount.” *Id.*, ¶ 15. The ISDEAA and AFAs also require that IHS
 20 pay contract support costs as provided by Section 5325. *Id.*, ¶ 16.

21 During the fiscal years at issue here (2011-2013) IHS paid CSC to the Tribe. *Id.*, ¶
 22 23. IHS paid for indirect costs only for the Tribe’s direct cost base that was funded with
 23 IHS-appropriated dollars, not including funds from third-party revenues the Tribe
 24 generated. *Id.*, ¶ 29.

25 On September 28, 2017, the Tribe filed claims for reimbursement of unpaid contract
 26 support costs incurred in FY 2011-2013. *Id.*, ¶ 40. IHS denied the claims on July 10, 2019.
 27 *Id.*, ¶ 41. The Tribe filed its Complaint on November 14, 2019. Count II of the Complaint
 28 alleged “Breach of Contract (Failure to Pay Indirect Contract Support Costs Associated

¹² Section 5388(j), applicable to Title V agreements, is a parallel provision to § 5325(m), which applies to Title I agreements.

1 with Third-Party Revenues-Funded Portion of the Program).” *Id.* ¶¶ 50-55.

2 **III. STANDARD OF REVIEW**

3 In interpreting the ISDEAA’s provisions, this Court should begin with the
4 “language of the statute.” *Red Lake Band of Chippewa Indians v. U.S. Dept. of Interior*,
5 624 F. Supp. 2d 1, 24 (D.D.C. 2009) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438,
6 450 (2002)). “If Congress has directly spoken to the issue, that is the end of the matter.”
7 *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 558 (D.C.
8 Cir. 2016) (citing *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460,
9 465 (D.C. Cir. 2007)). Only if the terms are ambiguous should they be “construed
10 liberally” to the benefit of the tribes. *See id.* (quoting *Cal. Valley Miwok Tribe v. United*
11 *States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008)). Even so, this canon may not be
12 determinative of how to read the ISDEAA. *Accord, Chickasaw Nation v. United States*,
13 534 U.S. 84, 94 (2001) (“[T]o accept as conclusive the canons on which the Tribes rely
14 would produce an interpretation that we conclude would conflict with the intent embodied
15 in the statute Congress wrote.”).

16 Under the Contract Disputes Act, “[t]o recover for breach of contract, a party must
17 allege and establish: (1) a valid contract between the parties, (2) an obligation or duty
18 arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach.”
19 *Allen v. United States*, 140 Fed. Cl. 550, 560 (Fed. Cl. 2018) (citing *San Carlos Irr. &*
20 *Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989)). Moreover, “there is
21 a minimum burden for a plaintiff, in asserting a breach of contract claim, to explicitly
22 identify the provisions and terms of the contract that have been breached.” *Id.* (quoting
23 *Gonzalez-McCaulley Inv. Grp. v. United States*, 93 Fed. Cl. 710, 715 (2010)); *see also*
24 *Ketchikan Indian Cmty. v. HHS*, CBCA 1053-ISDA, 1054-ISDA, 1055-ISDA, 13 BCA ¶
25 35,436 (burden to establish liability in CSC claims includes “establishing that a particular
26 cost is a CSC”). The contractor has the burden of proving the fundamental facts of liability
27 and damages *de novo*.” *TLT Constr. Corp. v. United States*, 60 Fed. Cl. 187, 193 (Fed. Cl.
28 2004) (citing *Assurance Co. v. United States*, 813 F.2d 1202, 1205 (Fed. Cir. 1987)).

1 In evaluating a motion to dismiss under Rule 12(b)(6), “[r]eview is limited to the
2 complaint, materials incorporated into the complaint by reference, and matters of which
3 the court may take judicial notice.” *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 530
4 (9th Cir. 2019)(citing *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061
5 (9th Cir. 2008)).

6 “To survive a motion to dismiss for failure to state a claim, a complaint must contain
7 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
8 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*
9 *Twombly*, 550 U.S. 544, 570 (2007)). Those factual allegations “must be enough to raise a
10 right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

11 **IV. ARGUMENT**

12 **A. Third-Party Revenues Supplement Funds That IHS Must Pay Plaintiff** 13 **under the ISDEAA and Do Not Trigger Additional IHS Payment** 14 **Obligations.**

15 Medicare, Medicaid, and other program income is “earned by a tribal organization
16 in the course of carrying out a self-determination contract,” not provided by the Secretary
17 as part of the Secretarial amount. *See* 25 U.S.C. § 5325(m). Nor does Plaintiff’s ISDEAA
18 contract provide for IHS to turn over non-IHS funds to Plaintiff as part of the Secretarial
19 amount. Rather, Plaintiff’s contract requires Plaintiff to maintain an efficient billing
20 system to obtain third party revenues from payers such as Medicare, AHCCCS (Arizona’s
21 Medicaid program), and private insurance so that Plaintiff can obtain those reimbursements
22 directly from the third-party payers if it chooses to seek reimbursement from them for
23 eligible health care services provided. Exhibit B, Objective 1: D.¹³

24 Plaintiff’s ISDEAA contract can only reasonably be read to provide that Plaintiff’s
25 earnings shall be treated as supplemental funding to that negotiated in the AFA. For
26 example, in the FY 2013 Scope of Work document for the Tribe’s Emergency Medical
27

28 ¹³ Exhibit B is one of several FY 2013 Scope of Work documents appended to the
AFA, and incorporated into the contract through the FY 2013 AFA at (d)(2).

1 Services program it is contemplated that the Tribe can bill IHS Contract Health Services
2 for medically referred inter-facility transports, and that such billing will be paid in
3 accordance with IHS's Contract Health Rules and Regulations, not the ISDEAA AFA
4 terms. Exhibit B. Thus, both the ISDEAA and Plaintiff's ISDEAA contract expressly
5 provide that Plaintiff's third-party revenues are ancillary to, and not part of, the amount of
6 funds that IHS is required to pay Plaintiff.

7 Section 5325(m) also provides that program income earned "shall not be the basis
8 for *reducing* the amount of funds otherwise obligated to the contract." 25 U.S.C.
9 § 5325(m) (emphasis added). Neither this statutory provision nor Plaintiff's ISDEAA
10 contract requires IHS to pay any *additional* amount of funds as a result of the fact that
11 Plaintiff has earned program income.

12 Finally, neither § 5325(m) nor Plaintiff's ISDEAA contract requires Plaintiff to
13 collect payments from third parties including the Medicare and Medicaid programs. *See*
14 25 U.S.C. § 5325(m); Exhibit A. Rather, both the statute and Plaintiff's contract
15 contemplate that *if* Plaintiff obtains these reimbursements from non-IHS sources, Plaintiff
16 must treat those payments as an additional, separate source of funding beyond that which
17 the ISDEAA contract requires IHS to provide. *Id.*

18 Thus, Plaintiff's program income is separate from the amount of funds IHS is
19 required to pay under the ISDEAA and Plaintiff's ISDEAA contract.

20 **B. The ISDEAA's Payment Provisions Do Not Provide for Plaintiff's Non-IHS**
21 **Funds to be Part of the Secretarial Amount.**

22 The ISDEAA requires IHS to pay an "amount of funds ... not ... less than [IHS]
23 would have otherwise provided for the operation of the programs ... for the period covered
24 by the contract." 25 U.S.C. § 5325(a)(1). This is the Secretarial amount. Congress did
25 not use the terms "Medicare," "Medicaid," or "program income" or otherwise identify such
26 funds as part of the Secretarial amount in § 5325(a)(1). Section 5325(m) does not
27 characterize Medicare, Medicaid or other program income as part of the Secretarial
28 amount. *See id.* § 5325(m). Rather, it provides that such funds are "*earned* by a tribal
organization in the course of carrying out a self-determination contract" and "shall not be

1 the basis for *reducing* the amount of funds otherwise obligated to the contract.” *Id.*
2 (emphasis added).

3 “Congress kn[ows] how to differentiate between [different statutory terms] when it
4 want[s] to,” and its choice not to use a term elsewhere in the statute “should be given
5 effect.” *Jones v. Bock*, 549 U.S. 199, 222 (2007); *Sosa v. Alvarez-Machain*, 542 U.S. 692,
6 711 n.9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and
7 different language in another, the [C]ourt assumes different meanings were intended.”).
8 Accordingly, in order to give effect to each of these statutory provisions, this Court should
9 hold that Medicare, Medicaid, and other program income is not part of the Secretarial
10 amount.

11 There is no merit to Plaintiff’s implication that it is entitled to CSC based on its
12 expenditure of non-IHS funds because it allegedly spent the funds on the same Federal
13 program that it is under contract with IHS to operate. *See* Complaint, ¶¶ 28-30. The
14 ISDEAA’s CSC provisions expressly prohibit IHS from paying CSC on non-IHS funds,
15 and only require IHS to pay CSC for the reasonable, necessary, and non-duplicative direct
16 and indirect costs allocable to Plaintiff’s expenditure of the Secretarial amount.

17 **C. Section 5326 Prohibits the Use of IHS Funds to Pay the Costs of**
18 **Expending Non-IHS Funds.**

19 Section 5326 of the ISDEAA prohibits payment of CSC on all non-IHS funds, including
20 Medicare, Medicaid or any other third-party reimbursements. Congress passed § 5326 for
21 the express purpose of overruling the Tenth Circuit’s opinion in *Ramah Navajo Chapter v.*
22 *Lujan*, 112 F.3d 1455 (10th Cir. 1997). *See* Pub. L. No. 105-277, Div. A, § 101(e) [Title
23 II] (Oct. 21, 1998), 112 Stat. 2681-231, 2681-280 (codified at 25 U.S.C. § 5326); *see also*
24 H.R. Rep. 105–609 at 57, 108, (1998) (expressing “concern” about the decision made by
25 “the court in the [1997 *Ramah Navajo*] case,” and “recommend[ing] ... specifying that IHS
26 funding may not be used to pay for non-IHS [CSC] support costs.”); *id.* at 110 (same).¹⁴

27 ¹⁴ Congress passed the same clarifying legislation with respect to the BIA, except that, in
28 light of events that transpired after the Tenth Circuit’s ruling, it made that provision applicable to
the BIA on and after November 29, 1999. *See* 25 U.S.C. § 5327.

1 In *Ramah Navajo*, a certified nationwide class of tribal contractors that had entered
2 into contract with the Bureau of Indian Affairs (“BIA”) sought to require that agency to
3 expand its CSC to include non-BIA programs for which the tribal contractors were
4 otherwise *unable* to recover their direct and indirect costs. *See* 112 F.3d at 1459. The
5 Tenth Circuit erroneously found that § 5325(a)(2) was ambiguous; liberally construed the
6 provision for the benefit of the plaintiff tribal contractors; and held that the provision
7 required the BIA to increase its CSC to make up for “the failure of other agencies to pay
8 their full share of indirect costs.” *Id.* at 1462.

9 Congress’s reaction was swift: it passed § 5326 to clarify that § 5325(a)(2) meant
10 what it said:

11 Before, on, and after October 21, 1998, and notwithstanding any other
12 provision of law, funds available to the [IHS] in this Act or any other Act for
13 Indian self-determination or self-governance contract or grant support costs
14 may be expended only for costs directly attributable to contracts, grants and
15 compacts pursuant to the Indian Self-Determination Act and no funds
16 appropriated by this or any other Act shall be available for any contract
17 support costs or indirect costs associated with any contract, grant,
cooperative agreement, self-governance compact, or funding agreement
entered into between an Indian tribe or tribal organization and any entity
other than the [IHS].

18 25 U.S.C. § 5326. Congress thus clarified that § 5325(a)(2) could not be construed to
19 require IHS to pay for the direct and indirect costs associated with any non-IHS funds, even
20 if the tribal contractors could not otherwise recover those costs from those non-IHS
21 sources. *Seatrain Shipbuilding Corp. v. Shell Oil Corp.*, 444 U.S. 572, 596 (1980)
22 (“[V]iews of subsequent Congresses ... are entitled to significant weight” in interpreting
23 prior legislation, “particularly ... when the precise intent of the enacting Congress is
24 obscure.”).

25 In light of § 5326, it would be improper to construe either §§ 5326 or 5325(a)(2)
26 and (3)(A) to allow a tribal contractor to obtain additional recovery of its direct and indirect
27 costs, once from non-IHS, third parties and then a second time from IHS. This Court
28 should thus reject any such construction. *See Tunica*, 577 F. Supp. at 418; *see also*

1 *Seminole Tribe of Fla.*, 376 F. Supp. 3d at 109-10 (finding that § 5326 limits the definition
2 of CSC set out in § 5325(a)(2), (3)(A), and finding, as result that the ISDEAA “‘explicitly
3 prohibits’ IHS from ‘funding ... indirect costs ‘associated with’ non-IHS entities.’”)
4 (quoting *Tunica*, 577 F. Supp. 2d at 418).

5 In *Tunica*, the plaintiff tribal contractors alleged a breach of their ISDEAA contracts
6 based on IHS’s alleged failure to fully reimburse them for all direct and indirect costs
7 associated with *all* federal programs administered by the plaintiffs, not just those funded
8 by IHS. See 577 F. Supp. 2d at 389-92. The court found that while the language contained
9 in § 5326 was “inartful,” “the only plausible interpretation of § [5326] is the one favored
10 by the defendants; *i.e.*, that the statute prevents the IHS from paying more than its *pro rata*
11 share of the indirect costs incurred by contracting tribes and tribal organizations.” *Id.* at
12 417-18. The court thus held that “[s]ection [5326] explicitly prohibits the funding of
13 indirect costs “associated with” non-IHS entities,” and further held that “§ [5326] must be
14 considered in interpreting § [5325].” *Id.* at 418-19. The *Tunica* court thus concluded that,
15 in light of the plain meaning of § 5326, the only reasonable interpretation of § 5325(a)(2)
16 is that it requires IHS to only pay CSC for indirect costs that are properly allocated to IHS.
17 See *id.* at 422-23 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal
18 principle of statutory construction that a statute ought, upon the whole, to be so construed
19 that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or
20 insignificant.”)).

21 In *Seminole*, the plaintiff proposed to reprogram its allocation of funds provided as
22 part of the Secretarial amount for its FY 2018 funding agreement for salaries, wages, and
23 fringe benefits from 71 percent to 98.93 percent of the Secretarial amount, and to increase
24 its indirect CSC as a result. See *Seminole Tribe of Fla.*, 376 F. Supp. 3d at 106. The
25 plaintiff proposed to pay for the remaining direct costs of the IHS program it was under
26 contract to administer with its own tribal funds. See *id.* After finding that the ISDEAA
27 “‘explicitly prohibits’ IHS from ‘funding ... indirect costs ‘associated with’ non-IHS
28 entities,’” *id.* at *6 (quoting *Tunica*, 577 F. Supp. 2d at 418), the court found that the

1 plaintiff appeared to be improperly trying to apply an indirect cost rate that it had negotiated
2 based on a smaller base for salaries, wages, and fringe benefits to its newly-proposed larger
3 base in order to obtain an improper increase in CSC. *See id.* at *7. The court further found
4 that “if the base has been inflated—even with IHS funds—and the indirect cost rate does
5 not account for or offset that inflation, the effect is that the indirect CSC amount is being
6 calculated based in part on the Tribe’s own resources.” *Id.* at *10. This would be a
7 “problem,” the court concluded, as the Tribe’s estimate would be based on costs that are
8 not actually “‘attributable to’ or ‘associated with’ the Tribe’s self-determination contract.”
9 *Id.* (citing 25 U.S.C. § 5326).¹⁵

10 Notwithstanding any argument Plaintiff might make to the contrary, it is beyond
11 reasonable dispute that program income from Medicare, Medicaid, and other third-party
12 reimbursements are non-IHS funds. Section 5326 thus prohibits IHS from paying CSC on
13 the Plaintiff’s expenditure of those reimbursements.

14 **D. Section 5325’s Prohibitions Against Duplication Also Preclude Paying CSC**
15 **on Expenditures of Medicare and Medicaid Reimbursements**

16 Even if Plaintiff’s Medicare and Medicaid reimbursements were considered part of
17 the Secretarial amount, § 5325’s prohibitions against paying CSC for the costs of activities
18 covered by the Secretarial amount would apply here. Plaintiff’s claim for CSC on the basis
19 that Medicare, Medicaid, and other third-party reimbursements should be treated as part of
20 the Secretarial amount runs afoul of § 5325(a)(3)(A)’s exclusion from CSC of any funds
21 that duplicate costs provided in the Secretarial amount.

22 When IHS directly operates a health care program, Congress requires it to place any
23 Medicare and Medicaid reimbursements it might obtain “in a special fund” to be held by
24 the agency, and to ensure that each IHS health care service unit “receives 100 percent of
25 the amount” of the funds it has collected from the service unit. 25 U.S.C.
26 § 1641(c)(1)(A).¹⁶ Since “100 percent” of these funds directly “pass through” to the tribal

27 ¹⁵ Finding insufficient evidence to rule definitively, the court remanded the case
28 back to the agency for further negotiations. *See id.* at *10.

¹⁶ When a tribal contactor requests that IHS collect these third party Medicare and

1 contractor, § 5325(a)(3)(A)'s non-duplication requirement excludes them from eligibility
2 for CSC. Thus, Plaintiff's claim that third-party reimbursements are part of the "Federal
3 program" does not advance its cause. Section 5325(a)(3)(A)'s non-duplication requirement
4 would still exclude these third-party payments from eligibility for CSC precisely because
5 Medicare and Medicaid payments include direct and indirect costs associated with
6 providing those services.

7 Additionally, to the extent that Plaintiff expends any Medicare and Medicaid funds
8 on additional health services that are, in turn, also eligible for Medicare or Medicaid
9 reimbursement, Plaintiff will recover the direct and indirect costs associated with providing
10 those additional services when it submits claims and obtains those additional third-party
11 reimbursements. Plaintiff's attempt to obtain additional CSC on top of these new Medicare
12 and Medicaid reimbursements would provide Plaintiff with an improper windfall. *See*
13 *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1464 (10th Cir. 1997) ("nothing in the
14 Act entitles a tribe to a windfall or requires defendants to ignore indirect costs funding a
15 tribe receives from other sources"), *overruled on other grounds by* 25 U.S.C. §§ 5326-27.

16 **V. CONCLUSION**

17 For the reasons stated herein, defendants ask the Court to grant their Motion to
18 Dismiss Count II of Plaintiff's Complaint.

19 RESPECTFULLY SUBMITTED this 21st day of January 2020.

20
21 MICHAEL BAILEY
22 United States Attorney
23 District of Arizona

23 *s/ Brock Heathcotte*
24 BROCK HEATHCOTTE
25 Assistant United States Attorney
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27
28 _____
29 Medicaid funds for the contractor, Congress requires IHS to distribute 100 percent of those
30 funds to the tribal contractor. *See id.; id.* § 1641(c)(2).

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants in this case:

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