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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Caremark, LLC; Caremark PHC, LLC; CaremarkPCS Health, LLC; Caremark Rx, LLC; Aetna, Inc.; and Aetna Health, Inc.,

Petitioners,

v.

The Chickasaw Nation; The Chickasaw Nation Department of Health; The Ardmore Health Clinic; The Chickasaw Nation Medical Center; The Purcell Health Clinic; The Tishomingo Health Clinic; and Chickasaw Nation Online Pharmacy Refill Center,

Respondents.

Case No. 2:21-cv-00574-SPL

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR ORDER TO COMPEL ARBITRATION

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INTRODUCTION

The Chickasaw Nation (the "Nation") has sued Petitioners and others in the United States District Court for the Eastern District of Oklahoma, alleging that Petitioners and other defendants have violated 25 U.S.C. § 1621e (the "Recovery Act") by failing to reimburse the Nation's pharmacies for certain pharmacy claims (the "Complaint"). The Nation owns and operates these pharmacies through the Chickasaw Nation Department of Health ("Department of Health"). The Nation's relationship with Petitioner Caremark, LLC ("Caremark"), however, is governed by a Provider Agreement, through which each of the Nation's pharmacies expressly agreed to arbitrate "[a]ny and all disputes . . . including but not limited to, disputes in connection with, arising out of, or relating in any way to" the Provider Agreement in Arizona (the "Arbitration Provision"). Having received the economic benefits of the Provider Agreement for many years, the Nation and its pharmacies cannot now repudiate their obligations under that same agreement by ignoring the Arbitration Provision and attempting to litigate in its preferred venue of the Eastern District of Oklahoma. Thus, the dispute in the Complaint, which unquestionably falls within the scope of the Arbitration Provision, must be arbitrated.

The Nation should not be allowed to circumvent the valid Arbitration Provision in the Provider Agreement by filing a Complaint in the Eastern District of Oklahoma, and framing its claims as allegedly arising solely under the Recovery Act, not under the parties' contracts. (Compl. ¶ 55 & n.17). In so doing, the Nation is attempting to undermine the bargained for benefits of the parties to the Provider Agreement. It also defies the underlying business realities where the Provider Agreement and incorporated Provider Manual set the terms and conditions for the reimbursement for each and every

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one of the pharmacy transactions at issue in this case. Moreover, Nation's Complaint contravenes the contract's choice of venue provision, which requires disputes to be arbitrated in Arizona, as well as settled Tenth Circuit law, which requires any action to compel arbitration be filed in this Court.

Under the Federal Arbitration Act ("FAA"), the Nation is bound by the Provider Agreement to arbitrate the dispute in the Complaint. This applies to Caremark and the other Petitioners named in the Complaint, as both the plain terms of the Provider Agreement and well-recognized principles of law and estoppel mandate that the Nation and its pharmacies arbitrate their claims against them. Indeed, numerous federal courts—including the District Court for the District of Arizona—have reached these conclusions when presented with virtually identical arbitration provisions involving claims against the same or similar parties as Petitioners.

Finally, the Nation cannot claim sovereign immunity to avoid arbitration. Supreme Court and Ninth Circuit precedent make clear that by agreeing to the Arbitration Provision, the Nation waived immunity for the purposes of this dispute.

FACTUAL BACKGROUND

I. The Nation's Pharmacies, Caremark, and the Complaint

The Nation owns and operates the pharmacies identified in the Complaint and named as Respondents to this Petition. *See* Compl. ¶ 1 ("Plaintiff the Chickasaw Nation (the 'Nation') has established a robust and sophisticated healthcare system, which includes several ITU Pharmacies throughout the territory of the Chickasaw Nation.") (footnote omitted); *id.* ¶ 73 & n.23. Caremark is a Pharmacy Benefit Manager ("PBM"). Petition Ex. 1 (Compl. ¶¶ 9-10, 14); Harris Decl. ¶ 3. As a PBM, Caremark provides

services to insurers, third-party administrators, business coalitions, and employer sponsors of group health plans. The array of services Caremark and its affiliates offer their PBM clients includes the administration and maintenance of pharmacy networks. In exchange for access to the sizable market of Caremark's PBM plans, the pharmacies included in the networks agree by contract to fill prescriptions for participants in Caremark's PBM clients' health plans and receive reimbursements for those prescriptions at rates specified in the contracts.

Beginning in 2003, the Nation's pharmacies, through the Nation's Department of Health, entered into the Provider Agreement with Caremark or one of its predecessor entities. (Harris Decl., ¶¶ 20-21, 24.) The Provider Agreement expressly incorporates the terms and conditions of the Provider Manual, as amended from time to time. (*See* Harris Decl. Exs. A-B at § 11 ("[T]his Agreement [i.e. the Provider Agreement], the Provider Manual, and all other Caremark Documents constitute the entire agreement between Provider and Caremark, all of which are incorporated by this reference as if fully set forth herein and referred to collectively as the 'Provider Agreement' or 'Agreement'")). The Provider Manual likewise states that it is a "part of the Provider Agreement and [is] incorporated into the Provider Agreement." (Harris Decl. Ex. M at § 1, "General Information."). Finally, the Nation's pharmacies also entered into network enrollment forms, or "NEFs," including as recently as 2020, which may amend and/or supplement the Provider Agreement and Provider Manual.[1] Taken together, these three sets of

[1] Most of the individual Provider Agreements and NEFs were signed by the Chief Pharmacist of the Nation for each ITU Pharmacy, who is now the Lieutenant Governor of the Nation. (*See* The Chickasaw Nation, Office of the Governor,

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documents—the Provider Agreement, the Provider Manual, and the NEFs—constitute the contractual relationship between the Nation's pharmacies and Caremark, and are referred to collectively as the "Provider Agreement" unless otherwise indicated.

The Provider Agreement sets forth the terms of the Nation's pharmacies' participation in the Caremark networks. Updates and amendments to the Provider Manual are distributed to all pharmacy-service providers in Caremark's network. (Harris Decl. ¶¶ 33-35 and Ex. I.). By accepting, acknowledging and acting under the Provider Agreement, the pharmacies agreed to be bound by the most recent Provider Manual in effect at the time. (*Id.* Ex. M (Provider Manual) § 15.07.). The most recent update and amendment to the Provider Manual was sent to the Nation's pharmacies in 2020. (Harris Decl. ¶ 41 and Ex. M.). Afterward, the Nation's pharmacies accepted amendments to the Provider Manual, including those containing the Arbitration Provision, and continued their submission of pharmacy claims to Caremark, thereby further ratifying their agreement to the terms of the amended Provider Manual. (*See* Ex. 1, Decl., ¶ 1; Ex. 2, Provider Manual, § 15.07, at 90.)

The Nation was not required to enter into any Provider Agreement with Caremark, but the Nation chose to do so in order to effectuate its rights of reimbursement and cost recovery under the Recovery Act. (*See* Petition Ex. 1, Compl. ¶ 55; *see id.* Ex. 2 (April 19, 2016 letter at p. 1).) The benefits to the Nation and its pharmacies of being parties to Caremark's Provider Agreement include access to Caremark's eligibility information at

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https://governor.chickasaw.net/About/Lt-Governor.aspx); (Harris Decl. Ex. B (Provider Agreement Signature Page)).

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the point of sale. By using a third-party subscription service, the Nation and its pharmacies can determine whether one of its members who presents a prescription in one of the Nation's pharmacies is eligible for prescription benefit coverage through a plan administered by Caremark. The Nation and its pharmacies also can call a Caremark help desk to inquire about a member's eligibility. Pursuant to the parties' contractual relationship, the Nation and its pharmacies have an ability to submit prescriptions electronically in real time to Caremark at the point of sale, though the pharmacies often submit pharmacy claims electronically to Caremark after the prescriptions have been dispensed. (Harris Decl. ¶ 16.). These are substantial logistical and economic benefits to the Nation's recovery efforts, and the Nation has acknowledged this. (*See* Petition Ex. 2 (April 19, 2016 letter at p. 1).)

As with any contract in exchange for the benefits received by the Nation and its pharmacies, they have agreed to certain terms and conditions. One of these is the requirement that any dispute between the parties be resolved through arbitration—including, as discussed below, any dispute regarding the Nation's rights under the Recovery Act pertaining to its pharmacies' claims, and any dispute relating to its pharmacies' participation in any of Caremark's networks. Specifically, the Arbitration Provision in the current Provider Manual provides in relevant part:

> Any and all disputes between Provider and Caremark ***[including Caremark's current, future, or former employees, parents, subsidiaries, affiliates, agents and assigns (collectively referred to in this Arbitration section as "Caremark")]***, including but not limited to, disputes in connection with, arising out of, or relating in any way to, the Provider Agreement ***or to Provider's participation in one or more Caremark networks or exclusion from any Caremark networks***, will be exclusively settled by arbitration. This arbitration provision applies to any dispute

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> arising from events that occurred before, on or after the effective date of this Provider Manual. Any dispute otherwise arbitrable hereunder shall be deemed waived, and no such dispute shall be made or raised, unless a Dispute Notice has been given to Caremark, or arbitration filed, as provided below. Unless otherwise agreed to in writing by the parties, the arbitration shall be administered by the American Arbitration Association ("AAA") pursuant to the then applicable AAA Commercial Arbitration Rules and Mediation Procedures including the rule governing Emergency Measures of Protection (available from the AAA). In no event may the arbitrator(s) award indirect, consequential, or special damages of any nature (even if informed of their possibility), lost profits or savings, punitive damages, injury to reputation, or loss of customers or business, except as required by Law.
>
> The arbitrator(s) shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate, including but not limited to, any claim that all or part of the agreement to arbitrate is void or voidable for any reason. In the event the arbitrator(s) determine that any provision of this agreement to arbitrate is invalid for any reason, such provision shall be stricken and all remaining provisions will remain in full force and effect. The arbitrator(s) must follow the rule of Law, and the award of the arbitrator(s) will be final and binding on the parties, and judgment upon such award may be entered in any court having jurisdiction thereof. Any such arbitration must be conducted in Scottsdale, Arizona and Provider agrees to such jurisdiction, unless otherwise agreed to by the parties in writing.

(Harris Decl. Ex. M, Provider Manual, § 15.09, at 91) (emphasis added). The Arbitration Provision also states that it "shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16." (*Id.*)

II. Procedural History

In April 2016, the Nation, through its legal department, wrote to Caremark regarding denials of payment on claims submitted by the Nation's pharmacies to Caremark. (Petition Ex. 2 (April 16, 2019 Letter, at 1).) In that letter, the Nation stated that: (i) it was acting under a "Provider Agreement" with Caremark through its Department of Health; (ii) the relationship established by this Provider Agreement

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"appeared to be beneficial" to the Nation; and (iii) the Nation had found nothing in the Provider Agreement, Provider Manual, or other correspondence with Caremark "explaining the sudden denial of claims or changing of claim practices." (*Id.* at 1-2.)

On December 29, 2020, the Nation filed the Complaint in the District Court for the Eastern District of Oklahoma against Caremark as well as Caremark PHC, LLC, CaremarkPCS Health, LLC, Caremark Rx, LLC, Aetna, Inc., and Aetna Health, Inc (collectively referred to in the Complaint as "Defendants" but referred to here as "Petitioners").[2] In the Complaint, the Nation principally alleges a violation of the Recovery Act by Caremark and the other Petitioners for their failure to reimburse its pharmacies for pharmacy claims.[3] (*See, e.g.*, Petition Ex. 1 (Compl.) ¶ 79 (alleging the Petitioners "violate[d]" the Recovery Act by "denying claims for covered medications the Nation submitted on behalf of covered Member-patients"). The Nation contends that its pharmacies are "exempt" from specified reasons for denial under the Recovery Act. (*Id.* ¶ 83.) The Nation makes a similar claim based on allegations about "drug discount programs." (*See id.* ¶¶ 86-102.)

After being served with the Complaint, and pursuant to the terms of the Arbitration

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[2] The Complaint names "CVS Caremark LLC" as a defendant; however, there is no such legal entity. The Complaint also includes identical claims, based on the same allegations, against OptumRx, Inc., OptumRx Holdings, LLC, Optum, Inc., UnitedHealth Group, Inc., and United Healthcare Services, Inc; those parties are not before the Court in this Petition.

[3] Thus, this Court has jurisdiction over the instant Petition pursuant to 28 U.S.C. § 1331. *See Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009) ("A federal court may 'look through' a [FAA] § 4 petition to determine whether it is predicated on an action that 'arises under' federal law . . . ."), *superseded by statute on other grounds*, 803 F.3d 635 (Fed. Cir. 2015).

Provision, on February 10, 2021, Petitioners sent the Nation a Dispute Notice letter, seeking to resolve the dispute raised in the Complaint in accordance with the terms of the Arbitration Provision. (*See* Petition Ex. 4.) In a letter dated February 22, 2021, the Nation through its counsel responded by asserting that the Arbitration Provision does not apply to this dispute. (*See* Petition Ex. 5.)

Petitioners now bring the instant Petition to Compel Arbitration of the dispute in the Nation's Complaint, supported by the Declaration of Stephanie Harris, with accompanying exhibits, and this Memorandum of Law. Simultaneously, Petitioners are also seeking before the District Court for the Eastern District of Oklahoma a stay of all proceedings involving the Complaint.

SUMMARY OF ARGUMENT

The Nation, as owner and operator of its pharmacies, expressly agreed that all disputes "in connection with, arising out of, or relating in any way to" the Provider Agreement "will be exclusively settled by arbitration before a single arbitrator in accordance with the rules of the American Arbitration Association" in Scottsdale, Arizona. (*See* Harris Decl. Ex. M, Provider Manual, § 15.09, p. 91.) Having received the economic benefits of the Provider Agreement for years, the Nation and its pharmacies cannot now repudiate their obligations under that same agreement because they now apparently have a preference for federal court in Oklahoma. Indeed, as noted *infra*, at least ten other federal courts have held that claims by pharmacies with arbitration agreements similar or identical to the one at issue here must arbitrate their claims.

As in those cases, the Arbitration Provision incorporates the rules of the American Arbitration Association ("AAA"). Thus, an arbitrator must determine whether, in the

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first instance, the Arbitration Provision is enforceable and whether the claims fall within the scope of the clause.

Regardless, there can be no doubt that the Nation's claims in the Complaint fall squarely under the clause. Those claims must therefore be arbitrated in Arizona pursuant to the Arbitration Provision. That the Nation filed its Complaint in the Eastern District of Oklahoma asserting a violation of the Recovery Act does not alter this result. This Petition is properly venued and brought in this Court under the Federal Arbitration Act ("FAA"). Indeed, under Tenth Circuit law and the applicable venue clause in the Arbitration Provision, Petitioners are required to file their Petition in Arizona to resolve this dispute. And it is well-established that statutory rights of any type can be subject to arbitration.

Finally, the Nation cannot invoke sovereign immunity as a defense to Petitioners' arbitration demand. Under Supreme Court precedent, the Nation waived sovereign immunity by entering into the Provider Agreement. By agreeing to arbitrate disputes in Arizona—pursuant to AAA rules and under Arizona law—the Nation clearly and unequivocally waived sovereign immunity for the purpose of resolving disputes relating to the Provider Agreement.

LEGAL STANDARD

The FAA provides that a court, upon determining that an action before it is subject to an enforceable arbitration agreement, "*shall* . . . make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). The FAA embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24

(1983), *cited by Saari v. Smith Barney, Harris Upham & Co*., 968 F.2d 877, 883 (9th Cir. 1992); *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA thus creates a "presumption in favor of arbitration." *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1063 (9th Cir. 2020) (internal quotation marks omitted), *reh'g denied*, 2020 U.S. App. LEXIS 34081 (9th Cir. Oct. 28, 2020). "'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139 (9th Cir. 1991) (quoting *Mercury Constr.*, 460 U.S. at 24)).

Courts in the Ninth Circuit assess two issues to determine whether the FAA's mandate for compelling arbitration applies: (1) whether a valid arbitration agreement exists; and (2) whether the agreement encompasses the dispute at issue. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Thompson v. Isagenix Int'l, LLC*, Civ. No. CV-18-04599-PHX-SPL, 2020 U.S. Dist. LEXIS 50571, at *7 (D. Ariz. Mar. 24, 2020). "However, these gateway issues can be expressly delegated to the arbitrator where 'the parties clearly and unmistakably provide otherwise.'" *Brennan*, 796 F.3d at 1130 (quoting *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)) (emphasis omitted).

ARGUMENT

I. The Arbitration Provision Requires Arbitration of the Nation's Dispute.

A. The Arbitration Provision Is Valid and Enforceable.

In determining the validity of an arbitration agreement, courts "apply general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in

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favor of arbitration." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

Here, the Provider Agreement is "[to] be construed, governed and enforced in accordance with the laws of the State of Arizona." *See* Harris Decl., Exs. A-B (Provider Agreement) ¶ 13. Under Arizona law, an arbitration provision is enforceable if the parties mutually consented to be bound by the agreement, the agreement is supported by adequate consideration, and no defense such as fraud or mistake exists. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 877 P.2d 284, 289-92 (Ariz. Ct. App. 1994). The Arbitration Provision in the Provider Agreement is enforceable since it contains mutual promises to submit to arbitration, which is all that Arizona law requires. *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.*, 995 F. Supp. 1060, 1066-67 (D. Ariz. 1997). Moreover, the Arbitration Provision is clear, legible, written in plain language, and equally binding on both parties. *See Fernandez v. Debt Assistance Network, LLC*, No. 19-cv-1442-MMA (JLB), 2020 U.S. Dist. LEXIS 20458, at *30 (S.D. Cal. Feb. 5, 2020) (arbitration provision subjecting any controversy or claim arising out of or related to the subject of the contract bound both parties equally). Finally, and perhaps most importantly, the Nation itself recognizes the existence and validity of the Provider Agreement and the Provider Manual, and thus by extension the Arbitration Provision contained therein. (*See* Petition Ex. 1 (Compl.) ¶ 55 n.17 ("Since 2005, the Chickasaw Nation Department of Health has acted under a Provider Agreement with Defendants' various PBM entities."); Petition Ex. 2 (April 19, 2016 Letter, 1).

Moreover, each of the Nation's pharmacies has been a party to the Provider

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Agreement for years, and at all times the Nation has treated the Provider Agreement as valid and effective and has received the benefits thereunder. (*See* Petition Ex. 1 (Compl.) ¶ 55 n.17; Petition Ex. 2 (April 19, 2016 Letter, 1).) Indeed, the Nation has accepted and ratified the terms of the most recently amended Provider Manual by continuing to submit claims to Caremark after its receipt. Harris Decl. Ex. M (Provider Manual § 15.07). Having received the economic benefits of the Provider Agreement, the Nation and its pharmacies cannot now repudiate their obligations thereunder.

At least 10 other federal courts faced with the same or substantively similar arbitration provisions in other Provider Agreements have held that they are valid and enforceable. *See Bowie's Priority Care Pharmacy, L.L.C. v. CaremarkPCS, L.L.C.*, No. 6:18–cv–0300–LSC, 2018 U.S. Dist. LEXIS 69963, at *20-21 (N.D. Ala. Apr. 26, 2018) (enforcing the 2018 Provider Manual's broad arbitration provision); *RX Pros, Inc. v. CVS Health Corp.*, No. 16–0061, 2016 U.S. Dist. LEXIS 8983, at *10-11 (W.D. La. Jan. 26, 2016) (granting Caremark's motion to compel arbitration after analyzing 2016 Provider Manual's arbitration provision); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 259–63 (5th Cir. 2014) (compelling arbitration and holding that whether claims were arbitrable was for arbitrator to decide); *Grasso Enters., L.L.C. v. CVS Health Corp.,* 143 F. Supp. 3d 530, 544 (W.D. Tex. 2015) (granting motion to compel arbitration); *Hopkinton Drug, Inc. v. CaremarkPCS, L.L.C.*, 77 F. Supp. 3d 237, 249 (D. Mass. 2015) (granting motion to compel arbitration); *Uptown Drug Co., Inc. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1183–86 (N.D. Cal 2013) (holding arbitration provision could be enforced); *Burton's Pharmacy, Inc. v. CVS Caremark Corp.*, No.

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1:11CV2, 2015 U.S. Dist. LEXIS 122596, at *34 (M.D.N.C. Sept. 15, 2015) (granting motion to compel arbitration and stay action), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 139432, at *1 (M.D.N.C. Oct. 14, 2015); *MedfusionRx, LLC v. Aetna Life Ins. Co.*, No. 3:12cv567-DPJ, FKB, 2012 U.S. Dist. LEXIS 191045, at *17 (S.D. Miss. Dec. 21, 2012) (granting motion to compel arbitration); *CVS Pharmacy, Inc. v. Gable Family Pharmacy*, No. CV 12–1057–PHX–SRB, 2012 U.S. Dist. LEXIS 191047, at *37 (D. Ariz. Oct. 22, 2012) (granting motion to compel arbitration); *Muecke Co., Inc. v. CVS Caremark Corp.*, No. V–10–78, 2012 U.S. Dist. LEXIS 191244, at *64-72 (S.D. Tex. Feb. 22, 2012) (granting motion to compel arbitration), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 191243, at *1 (S.D. Tex. Mar. 29, 2012), *modified*, 2014 U.S. Dist. LEXIS 185509, at *18-19 (S.D. Tex. June 27, 2014), *aff'd*, 615 F. App'x 837, 841–42 (5th Cir. 2015). The same result attends here.

B. The Valid Delegation Provisions Mean the Arbitrator Must Resolve all Issues in This Dispute.

The Nation and Caremark expressly delegated to an arbitrator the gateway issues of whether a valid arbitration agreement exists and whether the Nation's dispute falls under it. Thus, under Supreme Court and Ninth Circuit precedent, this Court's role on this Petition is limited: the Court need only confirm the existence of a valid delegation provision. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator . . . a court possesses no power to decide the arbitrability issue."); *Brennan*, 796 F.3d at

1130-31.[4] Here, the Arbitration Provision contains two delegation provisions, each of which supports the conclusion that the arbitrator, and not this Court, should decide all issues relating to the arbitrability of this dispute.

First, the parties incorporated into the Arbitration Provision the AAA Commercial Arbitration Rules, which is enough to establish that the parties agreed to delegate all issues, including gateway issues concerning arbitrability, to the arbitrator. *Brennan*, 796 F.3d at 1130; *see also Cochrane v. Open Text Corp.*, 692 F. App'x 848, 849 (9th Cir. 2017); *Marselian v. Wells Fargo & Co.*, No. 20-cv-03166-HSG, 2021 U.S. Dist. LEXIS 10651, at *19-20 (N.D. Cal. Jan. 20, 2021) (holding that, where agreement incorporated AAA rules, "[b]ecause the arbitrability of this dispute is itself a question for an arbitrator, it is neither necessary nor appropriate for the Court to consider the parties' positions regarding the scope and validity of the arbitration agreement"); *accord Swiger v. Rosette*, 989 F.3d 501 (6th Cir. 2021) ("A valid delegation clause precludes courts from resolving any threshold arbitrability disputes, even those that appear 'wholly groundless.'" (quoting *Henry Schein*, 139 S. Ct. at 529)); *Crawford*, 748 F.3d at 262-63.

Second, the Arbitration Provision contains an explicit delegation clause: "The arbitrator(s) shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate . . . ." (Provider Manual, § 15.09, p. 91.) This language clearly provides that the arbitrator, not a court, is to resolve disputes over the arbitrator's authority, including

[4] This is because the delegation provision is itself a "severable arbitration agreement[]" between the parties. *Brennan*, 796 F.3d at 1133.

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whether the dispute is subject to arbitration in the first instance. *See, e.g.*, *Debesay v. Sec. Indus. Specialists*, No. 2:20-cv-00927-RAJ, 2021 U.S. Dist. LEXIS 48353, at *4-6 (W.D. Wash. Mar. 15, 2021) (delegation provision required arbitration of "all disputes" including "'[d]isputes over the arbitrability of any controversy or claim which arguably is or may be subject to [the Arbitration Agreements].'") (citation and emphasis omitted).[5]

"When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract."[6] *Henry Schein*, 139 S. Ct. at 529. The Nation and its pharmacies have delegated arbitrability to the arbitrator; for this reason alone, this Court should grant the Petition.

C. The Nation's Claims Fall Within the Scope of the Arbitration Provision.

Even assuming that this Court, and not the arbitrator, were to decide the scope of

[5] *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003) (holding arbitration clause contains "sweeping language concerning the scope of the questions committed to arbitration, [so] this matter of contract interpretation should be for the arbitrator, not the courts, to decide"); *Optimum Prods. v. HBO*, No. 19-56222, 2020 U.S. App. LEXIS 39016, at *4 (9th Cir. Dec. 14, 2020) ("[W]here . . . the agreement contains a broad arbitration clause covering all disputes concerning the meaning of the terms and provisions of the agreement . . . [d]isputes over [the agreement] must be submitted to arbitration.") (internal quotations omitted); *accord Shaw Grp., Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 1212 (2d Cir. 2003) (contract's provision that all disputes "concerning or arising under" the contract shall be submitted to arbitration evinced a "clear and unmistakable agreement to arbitrate arbitrability") (internal quotations omitted); *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 359 (5th Cir. 2003) (explaining that *Green Tree* held that "arbitrators should be the first ones to interpret the parties' [arbitration] agreement").

[6] Further, the Supreme Court unanimously stated in *Henry Schein* that "A court has no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Henry Schein*, 139 S. Ct. at 529 (internal quotations omitted). Thus, the requirement a court submit disputes to the arbitrator applies "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.*

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arbitrability (which the Court should not), the Court should compel arbitration because there is no doubt that the Nation's dispute is subject to the Arbitration Provision.

The Nation's dispute over the reimbursement of pharmacy claims unquestionably falls within the Arbitration Provision because it is "in connection with, arises out of, or relates" to the Provider Agreement. The Ninth Circuit has held that to determine whether a dispute is arbitrable under this broad language, the "factual allegations need only 'touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985). The allegations in the Complaint readily satisfy this standard.

The dispute in the Complaint clearly "touch[es] matters" covered by the Provider Agreement. Although the Nation characterizes the dispute as one involving the Recovery Act, Caremark's payment and rejection of claims submitted by the Nation's pharmacies is the basis for all of the Nation's claims in the Complaint. *E.g.*, Compl., ¶ 108 (describing the issue in the dispute as pertaining to "the Nation's claims [to the defendants] for services"). The Nation's pharmacies' submission of claims for payment to Caremark, in its capacity as a PBM, not only "touches" the Provider Agreement—it goes to the very core of it. *See, e.g.*, *Edwards v. Vemma Nutrition*, No. CV-17-02133-PHX-DGC, 2018 U.S. Dist. LEXIS 15371, at *24-25 (D. Ariz. Jan. 30, 2018) ("Because Plaintiff is a distributor within the meaning of the Arbitration Provision and his claims arise out of a relationship with Vemma, his claims are subject to arbitration."). The Provider Agreement memorializes the entire contractual relationship between Caremark

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and the Nation and its pharmacies; these documents establish the amounts paid to the Nation and its pharmacies for all prescriptions as well as the specific networks in which the Nation and its pharmacies can participate. (Harris Decl. ¶ 17.) Any alleged violation here cannot be considered without dissecting the pharmacy transactions categorically and wholly governed by the Provider Agreement.

And the Nation itself has taken the position that this dispute arises out of the Provider Agreement. In its 2016 letters to CVS Health, the Nation identified the same dispute that it does in the Complaint, and explicitly connected it to the fact that "[s]ince 2005, the Chickasaw Nation Department of Health has acted under a Provider Agreement with Caremark." (Petition Ex. 2 (April 19, 2016 Letter, 1).)

In sum, the Nation's dispute is a dispute between the parties to the Provider Agreement, and certainly one that has occurred in connection with, arises out of, and relates to the Provider Agreement. Should there be any question about whether the Nation's claims fall within the scope of the Arbitration Provision (which there is not), ambiguities regarding the scope of arbitration must be resolved in favor of arbitration. *Mercury Constr.*, 103 S. Ct. at 941 n.27.

D. This Court can Compel Arbitration of the Claims in the Nation's Complaint.

Neither the fact that the Nation's Complaint was filed in Oklahoma nor that the Complaint asserts a violation of the Recovery Act prevents this Court from compelling arbitration pursuant to § 4 of the FAA.

Section 4 permits a party to commence an action to compel arbitration in "any United States district court which . . . would have jurisdiction under Title 28." 9 U.S.C.

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§ 4. The Ninth Circuit has explained that this statutory language does not require a petition to be filed in any specific district; however, "by its terms, § 4 . . . confines the arbitration to the district in which the petition to compel is filed." *Textile Unlimited v. A..bmhand Co.*, 240 F.3d 781, 785 (9th Cir. 2001). Likewise, the Tenth Circuit has held that "where the parties agreed to arbitrate in a particular forum only a district court in that forum has authority to compel arbitration under § 4." *Ansari v. Qwest Communs. Corp.*, 414 F.3d 1214, 1219-20 (10th Cir. 2005).

The Arbitration Provision provides for arbitration to occur in Scottsdale, Arizona, and Petitioners have appropriately filed the instant Petition in the District of Arizona, i.e., the district court in that forum. Under *Textile Unlimited*, venue is proper before this Court under § 4, and this Court can exercise jurisdiction over the Nation, the Department of Health, and the Nation's pharmacies by virtue of the Provider Agreement.[7] *See Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 894 (9th Cir. 1996).

That the Nation is alleging a violation of the Recovery Act does not permit the Nation, its Department of Health, or its pharmacies, to avoid arbitration. The Nation in the Complaint disclaims that its claims are brought under the Provider Agreement. Compl., ¶ 55 n.17. But this conclusory allegation is not plausible, *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), and does not change the fact that, as explained *supra*,

[7] Specifically, this Court can exercise its jurisdiction over the Nation for the purposes of compelling arbitration because the Provider Agreement requires that the Nation submit this dispute to arbitration in Arizona and that Arizona law governs. *See, e.g.*, *Ventive, LLC v. Caring People, LLC*, No. 1:18-cv-00120, 2018 U.S. Dist. LEXIS 167937, at *8 (D. Idaho Sept. 26, 2018) ("[I]t seems clear that Avior's agreement to arbitrate in Idaho at least allows Idaho courts to exercise personal jurisdiction over Avior in cases related to that arbitration agreement.").

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the Nation's Recovery Act claim unquestionably is connected with, arises out of, and relates to the Provider Agreement.

"[T]he Supreme Court has ruled that arbitrators are competent to interpret and apply federal statutes." *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1111 (9th Cir. 2019) (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)). Thus, time and again, the Supreme Court has upheld arbitration of important federal statutory claims. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (Fair Labor Standards Act); *Am. Express*, 570 U.S. at 234 (Sherman Act) *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101 (2012) (Credit Repair Organization Act); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (Truth In Lending Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (Securities Act of 1933); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act of 1967). In short, it is "clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26.[8]

The Nation has not met—and cannot meet—its burden of showing that Congress intended to preclude arbitration of claims brought under § 1621e of the Recovery Act.

[8] This is because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26. Thus, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (internal quotations omitted).

See McMahon, 482 U.S. at 227. On its face, the Recovery Act does not preclude arbitration, and Petitioners are not aware of any case that holds that a dispute under the Recovery Act cannot be arbitrated. *See CompuCredit*, 565 U.S. at 104 ("Because the [Credit Repari Organizations Act] is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."); *Epic*, 138 S. Ct. at 1626.

II. The Claims Against all Petitioners Are Subject to Arbitration.

A. The Arbitrator Must Decide the Question of Enforceability as to all Petitioners.

The Arbitration Provision delegates to the arbitrator all issues, including "any dispute relating to the interpretation, applicability, enforceability or formation of the agreement to arbitrate." (Provider Manual, § 15.09, p. 91.) This necessarily includes any dispute over who can enforce the agreement. *See Brennan*, 796 F.3d at 1130.

Furthermore, numerous Courts of Appeals have concluded that a delegation provision like the one here requires the arbitrator to decide even whether non-signatories to an arbitration agreement can enforce it. *See Swiger*, 989 F.3d at 501 ("We . . . find that whether [non-signatory] Rees can enforce the arbitration agreement against Swiger presents a question of arbitrability that Swiger's arbitration agreement delegated to an arbitrator."); *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) (affirming decision permitting non-signatory to compel arbitration because "[w]hether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability" that must be decided by an arbitrator where the agreement "incorporate[d] the AAA

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Rules"); *Brittania-U Nig., Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017) (affirming district court's decision that whether signatory and two nonsignatories could compel arbitration was delegated to arbitrator by agreement incorporating rules similar to those of AAA).

B. The Plain Terms of the Provider Agreement Permit all Petitioners to Arbitrate.

The terms of the Arbitration Provision make clear that all Petitioners can compel arbitration against the Nation, the Department of Health, and the Nation's pharmacies. Arbitration is "a matter of consent," and so parties "may specify *with whom* they choose to arbitrate their disputes," which is what Petitioners did here. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (emphasis in original). The Arbitration Provision applies to all of Caremark's affiliates and subsidiaries: "all disputes between Provider and Caremark [*including Caremark's current, future, or former employees, parents, subsidiaries, affiliates, agents and assigns* (collectively referred to in this Arbitration section as 'Caremark')]." (Harris Decl. Ex. M (Provider Manual), § 15.09, p. 91) (emphasis added). Thus, the plain language of the Arbitration Provisions requires the Nation to arbitrate claims against all Petitioners because they are all Caremark's "parents, subsidiaries, [or] affiliates." *Shields v. Frontier Tech., LLC*, No. CV 11–1159–PHX–SRB, 2011 WL 13070409, at *7 (D. Ariz. Nov. 30, 2011) (finding that terms of agreement defining signatory as "includ[ing] by reference its parent company, subsidiaries and affiliates and their respective directors, officers, employees, and agents" to require plaintiff to arbitrate claims against affiliate nonsignatory defendants).

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C. Arizona Law Permits Non-Parties to Arbitrate in Circumstances Like Those Here.

Even if the Arbitration Provision did not contain this express language, Arizona law permits nonsignatories to compel signatories to arbitrate where, as here, "the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Sun Valley Ranch 308, Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 294 P.3d 125, 134-35 (Ariz. Ct. App. 2012) (internal quotations omitted). Thus, the *Sun Valley* court permitted a nonsignatory to invoke and enforce an arbitration clause in an agreement against a signatory where "the trier of fact will be required to consider the [agreement] in resolving plaintiffs' claims, and [the nonsignatory's] conduct is intertwined with that of other defendants who signed the [agreement]." *Id.* at 135; *see also Guglielmo v. LG&M Holdings LLC*, No. CV-18-03718-PHX-SMB, 2019 U.S. Dist. LEXIS 121102, at *16-17 (D. Ariz. July 19, 2019) (applying Arizona law and permitting nonsignatories to enforce arbitration clause in agreement between plaintiff and defendant company because they "are owners of Defendant Company and the issues between them and Plaintiffs are the same as between Plaintiffs and Defendant Company. The people, alleged wrongs, and legal issues are deeply intertwined."). The allegations against and relationships between Caremark and the other Petitioners satisfy this standard.

D. Equitable Estoppel Principles Permit all Petitioners to Compel Arbitration.

The Nation's claims against all Petitioners also are subject to arbitration under equitable estoppel principles. The Arizona Court of Appeals has recognized that "[u]nder

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well-established common law principles, a nonsignatory may be entitled to enforce, or be bound by, an arbitration provision in a contract executed by others" *Schoneberger v. Oelze*, 96 P.3d 1078, 1081 n.5 (Ariz. Ct. App. 2004), *superseded on unrelated grounds by statute*, Ariz. Rev. Stat. Ann. 14-10205 (Lexis 2012).[9] Furthermore, California courts, which Arizona courts may look to,[10] have held: "[E]quitable estoppel applies when the plaintiff's claims" are "intimately founded in and intertwined with the underlying contract obligations." *Jones v. Jacobson*, 125 Cal. Rptr. 3d 522, 538 (Cal. Ct. App. 2011) (internal quotation marks omitted); *see also Metalclad Corp. v. Ventana Envtl. Org. P'ship*, 1 Cal. Rptr. 3d 328, 334 (Cal Ct. App. 2003) (same). Accordingly, the Fifth Circuit, analyzing this exact issue, held: "[B]ecause *Schoneberger* suggests that Arizona courts would likely accept an arbitration-by-estoppel theory, we believe that Arizona law, as informed by apposite and well-reasoned California law, would permit the non-signatory Defendants to compel the signatory Plaintiffs to arbitrate their claims."[11] *Crawford*, 748 F.3d at 261.

Similarly, in *Mundi v. Union Sec. Life Ins. Co.*, the Ninth Circuit reasoned that a

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[9] State contract law governs whether a nonsignatory may compel a signatory to an arbitration agreement. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *Crawford*, 748 F.3d at 261-62.

[10] The Arizona Supreme Court has said: "[I]f Arizona law has not addressed an issue, we look approvingly to the laws of California, especially when interpreting a similar or identical statute" so long as the reasoning of the California case law is sound. *Moore v. Browning*, 50 P.3d 852, 859 (Ariz. 2002) (internal quotation marks omitted).

[11] The Fifth Circuit further explained: "the plaintiff to be estopped need not rely exclusively on the terms of the agreement containing an arbitration clause." *Crawford*, 748 F.3d at 260 (citing *Boucher v. Alliance Title Co.*, 25 Cal. Rptr. 3d 440, 447 (Cal. Ct. App. 2005)). Rather, "'[t]he focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant.'" *Id.* (quoting *Boucher*, 25 Cal. Rptr. 3d at 447).

nonsignatory to an arbitration agreement could compel arbitration against a signatory party where (1) "'the subject matter of the dispute [is] intertwined with the contract providing for arbitration,'" and (2) the "'relationship among the parties . . . justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.'" 555 F.3d 1042, 1046-47 (9th Cir. 2009) (quoting *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359-62 (2d Cir. 2008)).

Petitioners meet both the California law "intertwined" standard, and the *Mundi* "intertwined" and "relationship" standard,[12] and thus properly can compel the Nation, the Department of Health, and the Nation's pharmacies to arbitrate the claims in the Complaint against them.

1. The Nation's Claims Are Intertwined With the Provider Agreement.

The Nation's claims against all Petitioners are "founded in" and "intertwined with" the obligations imposed by the Provider Agreement—i.e., the respective obligations and rights of the parties related to the submission, processing, and payment of claims of the Nation's pharmacies.

In the Complaint, the Nation contends that *all* "Defendants knowingly,

[12] The *Mundi* standard is more demanding than the one under California law, and under *Arthur Andersen*, this Court should apply state, not federal, law to the question of estoppel. However, even under *Mundi*, the Nation is estopped from avoiding arbitration against Petitioners. *See CVS Pharmacy, Inc. v. Gable Family Pharmacy*, No. CV 12-1057-PHX-SRB, 2012 U.S. Dist. LEXIS 191047, at *26 (D. Ariz. Oct. 19, 2012) (acknowledging that the *Mundi* test is stricter than state law but concluding that under either standard the signatory was estopped from avoiding arbitration against nonsignatories under a nearly identical Arbitration Provision and similar defendants).

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intentionally, and unjustifiably refuse to pay to the Nation the funds it is entitled to recoup for pharmaceutical benefits, medical devices, and other products and services provided to Members with Defendant-administered and/or -issued coverage." (Petition Ex. 1 (Compl.) ¶ 6.); *see also id.* ¶¶ 76-77 (describing pharmacy claim submission process). More broadly, the Nation's claims against all Petitioners turn on alleged violations of the Recovery Act based on Petitioners' conduct related to the Nations' pharmacies' claims, meaning the Complaint's claims necessarily rely on the terms of the Provider Agreement. *See supra*, Section I.A.

2. The Nation Alleges a Relationship Among Petitioners That Supports Estoppel.

The Nation alleges interdependent and concerted action among Caremark and the other Petitioners, and thus a relationship among them that supports application of estoppel.

First, as noted above, the Complaint makes broad, sweeping allegations against all Petitioners collectively. This alone is sufficient to show that the claims are intertwined. *See Jureczki v. Banc One Tex., N.A.*, 252 F. Supp. 2d 368, 378 (S.D. Tex. 2003) (concluding plaintiff estopped from avoiding arbitration with nonsignatory defendants where "neither the factual nor the legal allegations asserted in plaintiffs' complaint distinguish between the individual defendants"), *aff'd*, 75 F. App'x 272 (5th Cir. Tex. 2003).

Second, the Nation explicitly alleges that various Petitioners are agents or alter egos of each other: "Defendant CaremarkPCS Health, L.L.C. and Caremark L.L.C. are agents and/or alter egos of Defendant Caremark Rx, L.L.C., and Defendant Caremark

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Rx, L.L.C. is an agent and/or alter ego of CVS Health." (Petition Ex. (Compl.) ¶ 13.)

Third, the Nation alleges that Caremark acted "on behalf" of Aetna, Inc., and Aetna Health, Inc, which in turn were allegedly responsible for denying the Nation's pharmacy claims, through Caremark and the other Petitioners. (*Id.* ¶ 27.)

And fourth, the Nation specifically alleges interconnected conduct, in that: (i) Caremark denied the pharmacies' claims in Caremark's capacity as PBM "on behalf of the respective health benefits plans [it] managed (predominantly, Aetna . . .)," and (ii) "Aetna, Inc. is responsible for denying the Nation's claims under 25 U.S.C. § 1621e by means of its parents CVS Caremark and CVS Health's PBM." (*Id.* ¶¶ 4, 27.)

The Nation therefore has alleged a relationship among Caremark and the other Petitioners that supports a finding of estoppel.[13]

III. The Nation Has Waived Sovereign Immunity.

The Nation waived sovereign immunity with respect to this dispute when it entered into the Provider Agreement, agreeing to the Arbitration Provision therein. The Supreme Court has held that a tribe waives sovereign immunity where, as here, it enters into a contract with a clause requiring arbitration of all contract-related disputes and agreeing that arbitration awards may be enforced "in any court having jurisdiction thereof." *C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532

[13] Because the all Petitioners can enforce the Arbitration Provision, they also have standing for the purposes of this Petition. *Gable*, 2012 U.S. Dist. LEXIS 191047, at *36 ("Having found that the arbitration clauses are triggered as to the Caremark entities, their injury in fact is clear: Respondents have failed to arbitrate as contractually agreed upon, and thus the Caremark entities are 'aggrieved' parties within the meaning of section four of the FAA.").

U.S. 411, 418-19 (2001) (concluding that the incorporation of AAA rules, providing that "'the arbitration award may be entered in any federal or state court having jurisdiction,'" into the agreement represented a 'clear' waiver of immunity"); *accord Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 231 (8th Cir. 2008); *Val/Del, Inc. v. Super. Ct.*, 703 P.2d 502, 509 (Ariz. Ct. App. 1985).

The Ninth Circuit has interpreted *C & L* as holding that a clear waiver of tribal sovereign immunity exists where there is: "(1) a clause stating that all contractual disputes should be resolved according to American Arbitration Association Rules and providing for enforcement of the arbitrator's award in accordance with applicable law in any court having jurisdiction thereof; and (2) a choice-of-law clause consenting to the law of the project location, Oklahoma." *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 813 n.5 (9th Cir. 2001) (citations, alteration, and internal quotation marks omitted).

These requirements are satisfied here: the Arbitration Provision requires that any arbitration take place in Arizona, and the Provider Agreement provides that the laws of Arizona govern. (Harris Decl. Exs. A-B (Provider Agmt.) ¶ 13; *id.* Ex. M (Provider Manual) § 15.09, p. 91). Indeed, the Arbitration Provision contains language substantially identical to the language that *C & L* Court relied on to find waiver. First, the Arbitration Provision clearly requires all disputes be settled in arbitration: "Any and all disputes between Provider and Caremark . . . including but not limited to, disputes in connection with, arising out of, or relating in any way to, the Provider Agreement . . . will be exclusively settled by arbitration." (*Id.* Ex. M (Provider Manual) § 15.09, p. 91).

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Second, the Arbitration Provision incorporates the AAA Rules, (*see id.*), which in turn provide: "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." (AAA Commercial Rules, R-52(c), https://adr.org/sites/default/files/Commercial%20Rules.pdf). Third, the Arbitration Provision provides that "judgment upon such award may be entered in any court having jurisdiction thereof," and requires the arbitration to "be conducted in Scottsdale, Arizona." (Harris Decl., Ex. M (Provider Manual) § 15.09, p. 91; *see also id.* Exs. A-B (Provider Agmt.) § 13 (Arizona choice of law provision).)

The Arbitration Provision is indistinguishable from the one before the Supreme Court in *C & L*, as it clearly and unequivocally provides that disputes will be settled by binding arbitration in a specific jurisdiction under specific law, making it a valid waiver of the Nation's sovereign immunity for this dispute. *See C & L Enters.*, 532 U.S. at 414-16; *Benton v. Clarity Servs.*, No. 16-cv-06583-MMC, 2018 U.S. Dist. LEXIS 57762, at *5 (N.D. Cal. Apr. 4, 2018) (finding waiver where agreement provided party "may 'in connection with the enforcement' of said agreement, 'institute formal action, either by arbitration or commencing an action in a state court . . . or United States District Court") (citation omitted).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the Petition to Compel Arbitration against the Nation, the Chickasaw Nation Department of Health, and the Nation's pharmacies on the claims brought by the Nation in the Complaint against Petitioners.

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Dated this 5th day of April, 2021.

Respectfully submitted,

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