Ty D. Frankel (State Bar No. 027179)
tfrankel@bffb.com
BONNETT FAIRBOURN FRIEDMAN & BALINT, PC
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199

Michael Burrage (admitted *pro hac vice*)
Patricia A. Sawyer (admitted *pro hac vice*)
Reggie Whitten (*pro hac vice* application forthcoming)
mburrage@whittenburragelaw.com
psawyer@whittenburragelaw.com
rwhitten@whittenburragelaw.com
WHITTEN BURRAGE
512 N. Broadway Avenue, Suite 300
Telephone: (405) 516-7800
Facsimile: (405) 516-7859

Attorneys for Respondents

[Additional counsel listed on signature page.]

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.

Civil Action No. 2:21-cv-574-SPL

SPECIAL APPEARANCE FOR RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' PETITION TO COMPEL ARBITRATION AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Respondents respectfully specially appears by its counsel without waiver of sovereign immunity for the limited purpose of submitting this Response in Opposition to Petitioners' Petition for Order to Compel Arbitration (ECF No. 1) and Memorandum of Law in Support (ECF No. 13) (the "Response").[1] In support thereof, the Respondents state as follows:

I. INTRODUCTION

Petitioners ran to this Court months after the Nation filed its Complaint in the Oklahoma Action. They now request the ***same*** findings from this Court ***and*** the Federal District Court in the Oklahoma Action—*e.g.*, findings that (a) "the arbitration provision is valid and enforceable;" (b) "the valid delegation provision mean[s] the arbitrator must resolve all issues in this dispute;" (c) "the Nation's claims fall within the scope of the arbitration provision;" (d) the claims against Petitioners are subject to arbitration; and (e) "the Nation has waived sovereign immunity." Thus, as an initial matter, the Court should deny the Petition pursuant to the first-to-file rule to avoid conflicting rulings and promote judicial efficiency. However, even if the Court entertains Petitioners' arguments, the Petition should still be denied because the parties did not clearly and unequivocally agree

[1] As the terms are used herein: (i) "Petitioners" or "Caremark" collectively refer to Petitioners Caremark, LLC; Caremark PHC, LLC; CaremarkPCS Health, LLC; Caremark RX, LLC; Aetna, Inc.; and Aetna Health, Inc.; (ii) "Respondents" collectively refers to Respondents 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; (iii) the "Petition" or "Pet." refers to Petitioners' Petition for Order to Compel Arbitration (ECF No. 1); (iv) "Memorandum" or "Mem." Refers to Petitioners' Memorandum of Law in Support of their Petition (ECF No. 13); (v) this "Action" refers to the above-captioned action; (vi) the "Oklahoma Action" refers to *The Chickasaw Nation v. CVS Caremark, LLC, et al.* (Civil Action No. 20-cv-488-KEW), which is currently pending in the United States District Court for the Eastern District of Oklahoma; and (vii) "Complaint" or "Compl." refer to the Complaint filed by the Nation in the Oklahoma Action (ECF No. 1-2).

to arbitrate the Nation's claims. And, in any event, the Recovery Act displaces any agreement to arbitrate the Nation's claims.[2]

Petitioners also mis-frame the lawsuit underlying its Petition as though it involved a garden-variety contract dispute between two private parties who expressly and unambiguously agreed to arbitrate their disagreements. Petitioners are wrong.

Respondent the Chickasaw Nation (the "Nation") is a federally recognized and sovereign Native American tribe[3]—not the kind of private party involved in the run-of-the-mill arbitration decisions Petitioners cite. An agreement by the Nation (or any one of Respondents) to arbitrate a matter requires the Nation to waive sovereign immunity—something the Nation has not done. As such, Petitioners must show Respondents clearly and unequivocally agreed to arbitrate the claims at issue in this suit. They cannot make that showing. Indeed, Petitioners base their claims on arbitration provisions *to which the Nation never agreed.* Petitioners essentially admit the Chickasaw Nation pharmacies involved in this Action never signed *any* document with *any* Caremark entity that actually contained an arbitration provision.

Moreover, this case involves federal statutory rights under the Recovery Act, 25 U.S.C. § 1621e, not simply a lawsuit over a contract. That admission is dispositive, as the Nation has the same rights of recovery under 25 U.S.C. § 1621e(c) as the federal government. And, more fundamentally, the Recovery Act displaces any alleged agreement to arbitrate the Nation's claims.

Petitioners' failure to confront the posture of this case is a primary flaw in their position. The special status of sovereign Indian nations is clear. In *McGirt v. Oklahoma*,

---

[2] This Response is made for the limited purpose of allowing Respondents to respond fully to the Petition and Memorandum—including by asserting the Nation's sovereign immunity—and in no way waives or diminishes the Nation's sovereign immunity.

[3] The Nation operates the pharmacies of Respondents The Ardmore Health Clinic, The Chickasaw Nation Medical Center The Purcell Health Clinic, The Tishomingo Health Clinic, and The Chickasaw Nation Online Pharmacy Refill Center (which the Nation operates through Respondent The Chickasaw Nation Department of Health).

140 S. Ct. 2452 (2020), the Supreme Court held that, under treaties dating back two centuries, much of eastern Oklahoma remains "Indian Country" for purposes of the federal Major Crimes Act—meaning that states cannot prosecute Native American citizens for crimes committed on tribal land. If the fact Congress "wields significant constitutional authority when it comes to tribal relations" can lead to such a sea-change in the handling of criminal cases involving Native Americans, it certainly dictates a special result in deciding whether the Nation's claims—brought pursuant to an Act of Congress—are arbitrable.

This Court should deny the Petition for the reasons herein.

II. BACKGROUND

The lawsuit underlying the Petition involves the federal statutory claims of a federally recognized Native American tribe—Respondent the Chickasaw Nation. On December 29, 2020, the Nation filed its Complaint in the United States District Court for the Eastern District of Oklahoma against Petitioners (and other defendants not parties to this Action) asserting claims under the Indian Health Care Improvement Act ("IHCIA"), which contains a financial recoupment mechanism codified in 25 U.S.C. § 1621e (known as the "Recovery Act") authorizing Indian tribes to recover the cost of healthcare services from insurers.

Petitioners subsequently moved to stay the Oklahoma Action pursuant to Section 3 of the Federal Arbitration Act ("FAA"). In support of their motion to stay, Petitioners assert nearly the same arguments presented in their Petition—namely, that the Court in the Oklahoma Action should stay that action because the Nation's claims are subject to arbitration pursuant to the FAA.

In the Oklahoma Action, the Nation alleges Petitioners, through their pharmacy benefit managers ("PBMs"), violated the Recovery Act by denying tribal pharmacies' claims for covered prescription drugs. In so doing, Petitioners have imposed "a significant burden on funding for the Nation's healthcare program," "created a serious hazard to

[tribal] Members dependent on the Nation's healthcare system for their health and wellbeing," and "demonstrate[d] a reckless disregard for the rights of Native Americans." Compl. ¶¶ 109, 111.

Petitioners' wrongdoing thus frustrates the congressional purpose behind the Recovery Act, which is part of a larger federal scheme to promote the health of Native Americans and ensure ample financial resources to enable tribes to deliver health care services to their members. Congress has formally declared "its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole." 25 U.S.C. § 5302(b). As part of that commitment, Congress enacted the IHCIA, finding "[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. § 1601(1). Congress also found "the unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States." *Id.* at § 1601(5). In so finding, Congress declared "major national goal[s]" of the United States to include providing:

> the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States [and . . .]
>
> the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.

Id. at § 1601(2)-(3). Congress declared the achievement of these goals to be "the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians." *Id*. § 1602(1), (3).[4]

In 1988, recognizing that health care was available to many Indians through employers who provided health insurance plans to their employees, Congress added the Recovery Act to the IHCIA, giving the United States the right to recover the "reasonable expenses incurred by the Secretary in providing health services" to eligible Indians and Alaska Natives. Indian Health Care Amendments of 1988, Pub. L. No. 100–713, 102 Stat. 4811 (1988), codified at 25 U.S.C. § 1621e(a). As a Senate report explained, "insurers that collect premium payments from IHS-eligible Indian individuals or from tribal governments for coverage of IHS-eligible employees are being paid for insurance coverage which they are not providing. Given the well-documented insufficiency of resources that are available to tribal governments and Indian citizens, expenditures for insurance coverage that provides no benefits to the insured constitute an obvious waste of scarce resources." S. Rep. No. 508, 100th Cong., 2d Sess. 1988 U.S.C.C.A.N. 6183, 6197. To facilitate recovery, Congress preempted all contractual provisions (as well as all provisions of state and local law) that would "prevent or hinder" the right of recovery established in the Act. *See id.*

Shortly thereafter, Congress became aware that some insurance companies—in a precursor to Petitioners' current efforts to avoid their reimbursement obligations—were refusing to reimburse healthcare expenses paid by tribes on the specious ground that the

---

[4] *See* Declaration of Steven Greetham, Senior Counsel for the Chickasaw Nation ("Greetham Decl.", attached hereto as Exhibit 1) ¶¶ 12-13 ("The Chickasaw Nation, as a sovereign Tribal government, has invested significant resources in the development and expansion of its Tribal health care system infrastructure, which system serves not only Chickasaw citizens but—pursuant to our self-governance compacts with the Indian Health Services—Native persons throughout our region…

"Each day, the Chickasaw Nation must address the needs of its citizens and competing claims on Tribal resources within a governing structure established and operated in accord with Tribal law and which is expressly designed to promote and protect the interests of Tribal citizens. Those factors are present in our considerations every day as we, in Tribal government, make decisions on behalf of or which otherwise affect the Chickasaw Nation…").

Recovery Act was limited to claims made to insurers by the federal government.[5] Accordingly, Congress enacted the Indian Health Amendments of 1992. Those amendments added the phrase "an Indian tribe, or tribal organization" after "the United States," making clear that Indian tribes and tribal organizations enjoy the same right of recovery as the federal government. Pub. L. No. 102–573, Title II, § 209, 106 Stat. 4551 (1992).[6] H.R. Rep. No. 102–643, pt. 1, at 75 (1992) (explaining that "the Act is amended by this section to allow Indian tribes and tribal organizations the same rights as the

[5] *E.g.*, Indian Health Amendments of 1991: Joint Hearing on H.R. 3724 Before the Comm. on Interior and Insular Affairs and the Subcommittee on Health and the Environment of the Comm. on Energy and Commerce, 102nd Cong. 206–09 (1992) (statement of Yukon-Kuskokwim Health Corporation) ("Certain insurance companies wrongfully denied—or simply ignored—all claims for covered services which were provided to Native Alaskan policyholders. [. . . .] This practice of automatically rejecting claims for IHS services provided to Native Alaskans is, in our opinion, plainly both discriminatory and unlawful. Congress addressed this problem in 1988, in Amendments to the Indian Health Care Improvement Act, by providing a right of recovery against private insurers with respect to expenses incurred by the Secretary in providing health services. 25 U.S.C. § 1621e. This law expressly overrides any contrary provision of private contract or state law. 25 U.S.C. § 1621e(c). The law also provides that all funds recovered through third party collections shall be available to the facilities providing health care services to Indians. 25 U.S.C. § 1621f [. . . .] The problem is this. The statutory language provides that 'the United States' shall have a right to recover against third party insurance companies. 25 U.S.C. § 1621e. There is no explicit language referring to tribes or tribal organizations. On this technicality, certain IHS officials have indicated that, in their view, tribal health contractors do not have a right to recover. Moreover, several private insurance companies have refused to pay these claims, as noted above [. . . .] The Administration has placed great emphasis on third party collections, with the Administration's FY 1993 proposed budget, as you know, calling for major increases in third party collections from private insurance companies. The language we propose is consistent with this policy of enhancing collection efforts.").

[6] *See* H.R. Rep. No. 102–643, pt. 1, at 45–46 (1992); S. Rep. No. 102-392, at 20-21 (1992) (identical language) ("The Committee has been informed of insurance companies refusing to pay tribal contractors for services and officials within the Indian Health Service questioning the contractor's right to recover in the absence of legislation. Therefore, the Committee Amendment includes language which clarifies that tribal health contractors have the same right to recover against private insurance companies that IHS enjoys."); 138 Cong. Rec. S18314-02 (daily ed. Oct. 29, 1992, statement of Sen. Daniel Inouye) ("Although original section 206 has not raised problems for most third-party payors, in a few instances such payors have refused to meet their statutory obligation to pay, resulting in many accumulated claims. The section 209 clarifying amendment will assure that these payors do not escape their obligations under the law. Mr. President, I am thankful for this opportunity to clarify the intent of the Congress with regard to the rights of tribal self-determination contractors who exercise their rights of recovery for third-party insurance purposes.").

Secretary to recover reasonable expenses incurred for the provision of health services to any individual through third party reimbursement").

Thus, the Recovery Act currently provides:

> (a) Right of recovery
>
> Except as provided in subsection (f), the United States, an Indian tribe, or tribal organization shall have the right to recover from an insurance company, health maintenance organization, employee benefit plan, third-party tortfeasor, or any other responsible or liable third party (including a political subdivision or local governmental entity of a State) the reasonable charges billed by the Secretary, an Indian tribe, or tribal organization in providing health services through the Service, an Indian tribe, or tribal organization, or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive damages, reimbursement, or indemnification for such charges or expenses if—
>
> (1) such services had been provided by a nongovernmental provider; and
>
> (2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

And the Act preempts any contractual provisions that "prevent or hinder" an Indian tribe's right of recovery:

> No law of any State, or of any political subdivision of a State and *no provision of any contract*, insurance or health maintenance organization policy, employee benefit plan, self-insurance plan, managed care plan, or other health care plan or program entered into or renewed after November 23, 1988, *shall prevent or hinder the right of recovery of the United States, an Indian tribe, or tribal organization* under subsection (a).

25 U.S.C. § 1621e(c) (emphasis added).

III. LEGAL STANDARDS

First, the first-to-file rule empowers district courts to "transfer, stay or dismiss an action when a similar complaint has already been filed in another federal court." *Alltrade, Inc., v. Uniweld Prods., Inc.*, 946 F.2d 622, 623 (9th Cir. 1991). The first-to-file rule applies when (1) a first-filed suit (2) involves the same issues and (3) the same parties. *Id.* at 625-26. If all of these requirements are met, the court will generally dismiss, stay, or transfer the second-filed action unless an exception to the first-to-file rule is present. *Id*.

Next, section 4 of the Federal Arbitration Act ("FAA") expressly requires a court decide whether the claim at issue is indeed arbitrable under the parties' agreement before directing the parties to arbitration. 9 U.S.C. § 4 ("*The court* shall hear the parties, and *upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. … If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.") (emphasis added). "When a party brings a petition to compel arbitration, *the Court* must "determine (1) whether a valid agreement to arbitrate exists, and, if it does, (2) whether the agreement encompasses the dispute at issue." *Petersen v. EMC Telecom Corp.*, 2010 WL 2490002 (D. Ariz. June 16, 2010).

Accordingly, the Supreme Court has made clear that a court's authority under Section 4 to compel arbitration "doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration." *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 537 (2019) (emphasis in original). "The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum." *Id*. at 537–38.

It is well settled that a court, not an arbitrator, should decide the validity and applicability of an agreement to arbitrate, including whether there is an agreement to arbitrate at all. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 530 (2019) ("before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists").[7]

[7] *See also New Prime*, 139 S.Ct. at 538 (court, not arbitrator, handles dispute when "a party specifically challenges the validity of the agreement to arbitrate"); *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity under § 2

"To satisfy itself that such agreement [to arbitrate] exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010). The court must also decide whether the claim at issue falls within the parameters of the arbitration clause: "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* (emphasis in original). The Supreme Court has "never held that [the federal arbitration] policy overrides the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit.'" *Id*. at 302 (citation omitted). "Nor [has it] held that courts may use policy considerations as a substitute for party agreement." *Id.* at 303.

Lastly, a court, not an arbitrator, must decide whether Congress created a statutory exception to arbitrability in a particular circumstance. In *New Prime*, for example, the Supreme Court held a court, not an arbitrator, must decide whether a dispute falls within a statutory exception to arbitration for "contracts of employment" of certain transportation workers, even "[w]hen a contract delegates questions of arbitrability to an arbitrator." 139 S.Ct. at 536. The Supreme Court has repeatedly decided for itself questions about whether courts have authority to compel arbitration of particular claims under the FAA—even where the contract at issue contained a "delegation" clause purporting to vest authority to resolve all disputes in the arbitrator.[8] The reason is simple: the FAA cannot require a court

---

of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement . . . ."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (if the issue relates to "the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it") (internal quotation marks and citation omitted).

[8] *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101-02 (2012) (deciding whether Credit Repair Organizations Act contained "a 'congressional command' that the FAA shall not apply"); Pets. Br. 7-8, *CompuCredit Corp. v. Greenwood*, 2011 WL 2533009, at *7-*8 (U.S. June 23, 2011) (quoting arbitration provision, including delegation clause); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reversing order compelling arbitration because "nothing in the statute authorizes a court to compel

to compel arbitration unless the court determines the FAA actually applies in the first place.[9] The Recovery Act is clearly a "congressional command" precluding arbitration of Respondents' claims.[10]

IV. ARGUMENT

As an initial matter, the relief sought in the Petition should be denied pursuant to the first-to-file rule because Petitioners seek the same findings from this Court ***and*** the court in the Oklahoma Action—and Petitioners filed this Action long after the Nation filed its Complaint in the Oklahoma Action. The Nation also did not clearly and unequivocally agree to arbitration of the statutory claims raised in its Complaint. Specifically, the Nation never waived sovereign immunity. Greetham Decl. ¶¶ 6 and 7. As a matter of Chickasaw Nation law, only the Chickasaw Nation Governor or the Chickasaw Tribal Legislature may waive the Chickasaw Nation's sovereign immunity. Greetham Decl. ¶ 5. Neither did so here. Even if the Nation had clearly and unequivocally agreed to arbitrate the statutory claims raised here, the Recovery Act would displace any alleged agreement to arbitrate. Therefore, this Court should deny the relief requested in the Petition.[11]

A. THE COURT SHOULD DENY THE PETITION UNDER THE FIRST-TO-FILE RULE.

In an attempt to upend the Nation's legitimate venue choice, Petitioners filed this Action long after the Nation filed its Complaint in the Oklahoma Action. This Court should

---

arbitration of any issues, or by any parties, that are not already covered in the agreement"); *id.* at 282 n.1 (reprinting arbitration provision, including delegation clause).

[9] The principle that a court must decide whether the FAA applies, before applying it, is in addition to the well-settled rule that a court may require parties to arbitrate a dispute about arbitrability only if there is "clear and unmistakable evidence" they agreed to do so. *Henry Schein*, 139 S. Ct. at 531.

[10] Petitioners cite cases holding statutory claims are arbitrable. Mem. at 19. Those cases did not involve the Recovery Act or Native American legal rights. Moreover, the decisions in those cases as to arbitrability were rendered by courts rather than arbitrators—supporting the Nation's position here.

[11] Additionally, pursuant to the first-to-file rule, the Court should deny the relief sought in the Petition or, alternatively, stay this Action until the court rules on Petitioners' motion to stay in the Oklahoma Action, as Petitioners filed this Action months after the Nation filed its Complaint in the Oklahoma Action.

deny Petitioners' requested relief pursuant to the first-to-file rule, which will further the interests of judicial efficiency and avoid conflicting rulings. Alternatively, the Court should stay this Action until the Eastern District of Oklahoma rules on Petitioners' motion to stay pending in the Oklahoma Action.

The first-to-file rule empowers district courts to "transfer, stay or dismiss an action when a similar complaint has already been filed in another federal court." *Alltrade, Inc., v. Uniweld Prods., Inc.*, 946 F.2d 622, 623 (9th Cir. 1991). The rule "is intended to serve the purpose of promoting efficiency well and should not be disregarded lightly, and [t]he primary purpose behind the first-to-file rule is to avoid unnecessarily burdening the federal judiciary and to avoid conflicting judgments." *Quasar Energy Group LLC v. WOF SW GGP 1 LLC*, 2018 WL 6181277, at *6 (D. Ariz. Nov. 27, 2018), *report and recommendation adopted*, 2019 WL 325546 (D. Ariz. Jan. 25, 2019) (internal quotations and citations omitted). The Ninth Circuit has cautioned district courts, "in light of the important interests being served, the rule should not be disregarded lightly." *Alltrade*, 946 F.2d at 625.

The first-to-file rule applies when (1) a first-filed suit (2) involves the same issues and (3) the same parties. *Id.* at 625-26. If all of these requirements are met, the court will generally dismiss, stay, or transfer the second-filed action unless an exception to the first-to-file rule is present. *Id.* All three requirements of the first-to-file rule are satisfied here and no exception applies.

First, the Oklahoma Action was filed well before the instant matter. Petitioners filed this Action on April 5, 2021—over three months *after* the Nation filed its Complaint in the Oklahoma Action (which the Nation filed on December 30, 2020). Petitioners now engage in gamesmanship to wrongfully upend the Nation's legitimate venue choice despite the fact that the very claims Petitioners contend should be arbitrated are pending in the Oklahoma Action.

Second, Petitioners and the Nation are parties to this Action and the Oklahoma Action.[12] Thus, the second prong of the test is satisfied.

Third, the issues in this Action and the Oklahoma Action are substantially similar. For example, Petitioners are seeking the ***same*** findings from this Court and the Court in the Oklahoma Action—*i.e.*, findings that (a) "the arbitration provision is valid and enforceable;" (b) "the valid delegation provision mean[s] the arbitrator must resolve all issues in this dispute;" (c) "the Nation's claims fall within the scope of the arbitration provision;" (d) the claims against Petitioners are subject to arbitration; and (e) "the Nation has waived sovereign immunity." *Compare* Mem. *with* Petitioners' Motion to Stay the Oklahoma Action.[13] Moreover, this Action arises from the Nation's Complaint in the Oklahoma Action. Thus, the issues in this Action and the Oklahoma Action are substantially similar. Accordingly, the third prong of the test is also met.

Further, none of the exceptions to the first-to-file rule apply in this case. The limited exceptions to the first-to-file rule are "bad faith, anticipatory suit, and forum shopping." *Alltrade*, 946 F.2d at 628 (internal citations omitted). The Nation filed its Complaint in good faith to resolve an ongoing dispute regarding payments Petitioners owe to it under federal law. The Oklahoma Action is not anticipatory and Petitioners cite to no evidence

[12] As for the second and third requirements, the Ninth Circuit does not require strict identity of issues or parties—rather, "substantial similarity" is sufficient. *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss.*, 787 F.3d 1237, 1240 (9th Cir. 2015); *see also Sprout Fin., LLC v. CapFund Enterprises Inc.*, 2020 WL 1482627, at *2-3 (D. Ariz. Mar. 26, 2020) (Logan, J.) ("mechanically applying the rule based on the presence of identical parties in both actions would allow parties to defeat it simply by omitting one defendant in either action, which would severely undermine and restrict its application. … Like for the similarity of parties, the issues do not need to be identical between the two actions but only substantially similar."); *Centocor, Inc. v. Medimmune, Inc.*, 2002 U.S. Dist. LEXIS 21109, at *11 (N.D. Cal. Oct. 21, 2002) ("[C]ourts generally do not require identical issues or parties so long as the actions involve closely related questions or common subject matter."); *see also Bashiri v. Sadler*, 2008 WL 2561910, at *2 (D. Ariz. June 25, 2008) (finding parties between two actions to be substantially similar where the parties in both actions were the same, but one of the actions included two additional parties not present in the other action).

[13] Respondents hereby incorporate Petitioners' Motion to Stay the Oklahoma Action by reference (publicly available at ECF No. 61 on the docket of the Oklahoma Action (Civil Action No. 20-cv-488-KEW)).

supporting such an argument. The Oklahoma Action was not filed with knowledge that a suit by Petitioners was imminent, nor did the Nation have any indication that Petitioners planned to file suit when it filed its Complaint in Oklahoma. *See Intersearch Worldwide, Ltd. v. Intersearch Grp, Inc.*, 544 F. Supp. 2d 949, 960 (N.D. Cal. 2008) ("A suit is 'anticipatory' for the purposes of being an exception to the first-to-file rule if the plaintiff in the first-filed action filed suit on receipt of specific, concrete indications that a suit by the defendant was imminent.") (citations omitted). Rather, Petitioners' Action is wholly responsive to the Nation's Complaint in the Oklahoma Action. Petitioners would not have filed this Action but for the Oklahoma Action, which the Nation filed over three months before Petitioners' Action. *See id*. Moreover, Defendants cannot genuinely argue the Nation engaged in forum shopping. Rather, the Nation's choice of venue was wholly proper and made in good faith. The Nation is headquartered in Oklahoma, and it received Petitioners' wrongful claim denials in Oklahoma. These facts properly support and form the basis of the Nation's Complaint in the Oklahoma Action. Thus, the Eastern District of Oklahoma is the proper venue for the Oklahoma Action.

Lastly, courts have applied the first-to-file rule—staying or dismissing petitions to compel arbitration—in cases like this one. *See, e.g.*, *JD Inv. Co., LLC v. Agrihouse, Inc.*, 2009 WL 113277, at *1 (W.D. Wash. Jan. 13, 2009) (dismissing petition to compel arbitration under the first-to-file rule because the petition was filed after respondent filed a declaratory judgment action in another federal district relating to the parties' agreement at issue and concluding that "[i]t would best serve the interests of judicial comity and efficiency for this Court to refrain from exercising jurisdiction so that the Colorado court may proceed in the first-filed action.").[14]

[14] *See also Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 503 (8th Cir. 1999)("Because the District Court in Missouri was the first court in which jurisdiction attached, it had priority to consider this arbitrability question as a matter of comity. … [T]he arbitrability question is the same in a motion to compel arbitration as in a motion to stay proceedings pending arbitration."); *Eagle Creek Software Servs., Inc. v. Paradise*, 826

Thus, pursuant to the first-to-file rule, the Nation respectfully requests the Court deny the Petition.

B. THE PARTIES DID NOT CLEARLY AND UNEQUIVOCALLY AGREE TO ARBITRATE THE NATION'S CLAIMS.

Tribal sovereignty and Federal Indian Law require a clear and unequivocal agreement to arbitrate. None exists; the contracts Petitioners cite do not reflect such a clear and unequivocal agreement to arbitrate the claims at issue in the Oklahoma Action. Therefore, the Court should deny Petitioners' requested relief.

1. Tribal Sovereignty and Federal Indian Law Require a Clear and Unequivocal Agreement to Arbitrate.

The Court should deny the Petition unless Petitioners can show clear and unequivocal agreements between Petitioners and Respondents to submit the claims at issue in the Oklahoma Action to arbitration. They cannot do so here. Federally recognized tribal nations (such as the Chickasaw Nation) exercise "sovereign functions," *McGirt*, 140 S.Ct. at 2466, and are entitled to "inherent sovereign immunity." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). "The baseline position, [the Supreme Court has] often held, is tribal immunity." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) (citation omitted). For tribes as well as States, "common-law immunity from suit" is a "core aspect[] of sovereignty." *Id.* at 2030. And, "[a]s a matter of standing policy, the Chickasaw Nation does not sign any agreement that would subject itself, as a Tribal sovereign, to the laws of any other sovereign." Greetham Decl. ¶ 11; s*ee also id.* ¶¶ 12-13 ("[T]he Chickasaw Nation would never knowingly subject disputes relating to this critical infrastructure to a corporate arbitration process, either in a distant forum or otherwise. […] Any attempt to force the Nation to sacrifice Federal statutory rights under the Recovery Act and to incur the risk of proceeding through

---

F. Supp. 2d 1139, 1142 (D. Minn. 2011)("the instant motion to compel arbitration [] is stayed pending resolution of the threshold contract-formation question by the Massachusetts court [*i.e.*, the first-to-file court]").

corporate arbitration unsuited to our governmental structure and prerogatives would impose an unreasonable, unacceptable, and unjustifiable burden on the Chickasaw Nation and its citizens.").

Thus, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Petitioners do not argue Congress has abrogated tribal immunity. Instead, Petitioners focus on purported arbitration provisions. But it is settled that a tribal waiver of sovereign immunity "'must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation omitted); *see Potawatomi*, 498 U.S. at 509 ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe."); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015) ("clear and unequivocal waiver of immunity"); *see also Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165, 172–73 (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512–13 (1940).[15] As the next section shows, the Nation did not clearly agree to the arbitration provisions in this case, much less "clearly" and "unequivocally" agree to arbitrate its claims. *See* Greetham Decl. ¶¶ 4-11.

Moreover, the Nation bringing suit in the Oklahoma Action does not automatically waive immunity from an entirely separate arbitration proceeding in a far-off venue such as Arizona or California, without an Article III adjudicator and without a right to appeal. Nor does it automatically waive immunity from this Action—a federal suit in a different court to compel arbitration. The Oklahoma Action Complaint states "[t]he Nation consents to *this Court's* exercise of jurisdiction over it for the purposes of *this suit*." Compl. ¶ 43. As the Tenth Circuit (per then-Judge Gorsuch) has explained in upholding the assertion of tribal immunity, "sovereign immunity is 'a personal privilege which [a sovereign] may

[15] *See* Greetham Decl. ¶ 5 ("As a matter of Chickasaw Nation law, only the Chickasaw Nation Governor or the Chickasaw Tribal Legislature may waive the Chickasaw Nation's sovereign immunity.").

waive at [its] pleasure,'" and waivers "'of sovereign immunity are strictly construed.'" *Ute Indian Tribe*, 790 F.3d at 1009 (citations omitted). "[I]mmunity encompasses not merely *whether* [a sovereign] may be sued, but *where* it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original); *see also West v. Gibson*, 527 U.S. 212, 226 (1999) ("It is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums."). Immunity even extends to counterclaims *within the same action in the same court*: "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action [in federal court] filed by the tribe." *Okla. Tax Comm'n*, 498 U.S. at 509; *Ute Indian Tribe*, 790 F.3d at 1011 ("[A] tribe's decision to go to court doesn't automatically open it up to counterclaims—even compulsory ones") (Gorsuch, J.).

The Supreme Court applied the "clear" statement standard to an arbitration agreement in *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), holding that "to relinquish its immunity, a tribe's waiver must be 'clear.'" *Id.* at 418 (citation omitted). Under the facts of *C & L Enterprises*, the tribe's agreement to arbitrate *was* clear. The Court emphasized the *Tribe itself* had prepared the contract containing the arbitration provision. *Id.* at 420, 423. The tribe's contract expressly provided that all claims or disputes would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") and that an award could be enforced in any state or federal court having jurisdiction. *Id*. at 419. The Court found this language "clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court." *Id*. at 423.

This case is the opposite of the situation in *C & L Enterprises*. There, the Court stressed the tribe did not "find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe." 523 U.S. at 423. Here, the opposite is true: Caremark drafted the agreements, and there is

no express agreement committing the Nation's claims against Petitioners to arbitration. *See* Greetham Decl. ¶¶ 6-7 ("Neither the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature have waived the Chickasaw Nation's sovereign immunity relative to any Defendant named in the above-referenced matter, nor have the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature signed any agreement with any Defendant named in the above-referenced matter that contained any waiver of the Chickasaw Nation's sovereign immunity. Neither the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature authorized any person to sign any agreement with any Defendant named in the above-referenced matter that contained any waiver of the Chickasaw Nation's sovereign immunity."). Under the common-law rules of contract interpretation, and as recognized by the Supreme Court in *C & L Enterprises*, "a court should construe ambiguous language against the interest of the party that drafted it.'" *Id.* at 423 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (construing form contract containing arbitration clause)). That rule applies with particular force when the contract in question is one of adhesion, as is the case here.[16] *See Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016). Arizona law is to the same effect. *Andrews v. Blake*, 69 P.3d 7, 13 (Ariz. 2003).

Here, Respondents did not draft the agreements in question, and any ambiguities should therefore be construed against Petitioners. Further, the agreements were designed not for agreements with sovereign tribal entities, but instead for general use with a wide

[16] Under the FAA, when a party "draft[s] an ambiguous document . . . [it] cannot now claim the benefit of the doubt." *Mastrobuono*, 514 U.S. at 63. The Restatement explains that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Restatement (Second) of Contracts § 206 (1981). *Accord* 11 Williston on Contracts § 32:12 ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.") (rev. 2018); 5 Corbin on Contracts § 24.27 (rev. 2018); 2 Farnsworth, Contracts § 7.11 (rev. 2018).

network of commercial pharmacies.[17] It is hardly surprising the agreements fail to clearly and unequivocally waive immunity. Hence, this case presents the situation where, under *C & L Enterprises*, the standard for finding tribal agreement to arbitration *cannot be met.*

Decisions following *C & L Enters.* demonstrate the "clear" and "unequivocal" standard is a high bar. For example, in *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006), the Ninth Circuit held a tribe's waiver of immunity must be "clear" and "unequivocal" and rejected the argument that the tribe waived immunity to suit "when it provided in [a tribe employee] employment application that he could be terminated 'for any reason consistent with applicable state or federal law,' or when it stated in the Employee Orientation Booklet that it would 'practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin ... and other categories protected by applicable federal laws.'" *Id.* In *Ute Indian Tribe of the Uintah and Ouray Reservation*, then-Judge Gorsuch held that a forum selection clause did not clearly and unequivocally waive tribal immunity, even though it provided: "[o]riginal jurisdiction to hear and decide any disputes or litigation arising pursuant to or as a result of this Agreement shall be in the United States District Court for the District of Utah." 790 F.3d at 1009; *see also Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, 2011 WL 400108, *5 (W.D. Wash. Sept. 7, 2011) (no waiver of tribal immunity, even where "the waiver has the requisite clarity," because "the dispute is over whether the Tribe actually agreed to the waiver").[18]

---

[17] Petitioners' forum choices at issue here emphasize this point. *See* Greetham Decl. ¶¶ 9-10 ("As a matter of standing policy, when the Chickasaw Nation has agreed to waive its sovereign immunity for purposes of dispute resolution, it selected a forum and mechanism convenient to the Chickasaw Nation reservation, such as its own courts or other Oklahoma-based forum. In my experience, the Chickasaw Nation would never agree to any dispute resolution in a distant forum like Arizona or California, and I am unaware of any instances of its ever having done so.").

[18] *See also Cosentino v. Pechanga Band of Luiseno Mission Indians*, 637 F. App'x 381 (9th Cir. 2016) (affirming dismissal of petition to compel arbitration because "[a] tribe's waiver of immunity must be 'clear'"); *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 688 n.9 (8th Cir. 2011) ("This provision is readily distinguishable from the

The cases cited by Petitioners show waiver exists only in contexts wholly opposite to this case, such as where the sovereign itself drafts an arbitration agreement or clearly and unequivocally agrees to arbitration.[19]

As the next section shows, the Nation did not "clearly" and "unequivocally" waive its immunity by agreeing to an arbitration provision.

2. The Contracts Defendants Cite Do Not Reflect a Clear and Unequivocal Agreement to Arbitrate the Claims in this Suit.

Caremark identifies five Chickasaw Nation pharmacies with which it allegedly had an arbitration agreement. But the documents Caremark submitted in support of its motion

---

arbitration provisions that operated as express waivers of tribal immunity in *C & L Enterprises*"); *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150 (10th Cir. 2011) (holding that a tribe's waiver of immunity must be expressed "clearly and unequivocally" and rejecting argument that the tribe waived immunity to suit "through a single sentence contained in the casino's employee handbook."); *Bruner v. Creek Nation Casino*, 2007 WL 9782751, *4 (N.D. Okla. Feb. 28, 2007) (finding any waiver was not clear and distinguishing *C & L Enterprises*); *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 170 (N.D.N.Y. 2006) (distinguishing *C & L Enterprises* and opining, "Plaintiff has not shown the existence of any agreement or contract by the terms of which the Seneca Nation clearly, expressly and unequivocally waived its sovereign immunity"); *Att'y's Process and Investigation Srvs., Inc. v. Sac and Fox Tribe of The Mississippi In Iowa*, 401 F. Supp. 2d 952, 963 (N.D. Iowa 2005) (arbitration clause does not clearly waive immunity where "the very validity of the Agreement is in dispute").

[19] In *Val/Del, Inc. v. Super. Ct.*, 703 P.2d 502, 508-09 (Ariz. Ct. App. 1985) (cited in Mem. at 27), the court found that the tribe unequivocally expressed its agreement to arbitrate the claims at issue. Also, unlike the Nation here, the tribe in *Val/Del* waived its argument that no agreement to arbitrate existed. *Id.* at 509. In *Benton v. Clarity Servs., Inc.*, 2018 WL 1626676, at *2 (N.D. Cal. Apr. 4, 2018) (cited in Mem. at 28), the court relied solely on *C & L Enterprises* to conclude that the tribal entities at issue waived sovereign immunity by agreeing to an arbitration provision. However, as discussed above, the court in *C & L Enterprises* found waiver primarily because—unlike the Nation here—the tribe there prepared the contract containing the arbitration provision. 523 U.S. at 423. Petitioners also cite *Oglala Sioux Tribe v. C&W Enters.*, 542 F.3d 224 (8th Cir. 2008) (cited in Mem. at 27), but that case found that, while some individually negotiated contracts clearly and unequivocally agreed to arbitration, another did not: "There is no contractual waiver of the Tribe's sovereign immunity in the Base and Blotter contract. The Base and Blotter contract contained the Tribe's consent to suit in its Tribal Court, with no arbitration provision. A sovereign tribe has full authority to limit any waiver of immunity to which it consents." *Id.* at 231.

show that *none of the pharmacies ever signed a contract with Caremark containing an arbitration clause.*[20]

Indeed, neither the Chickasaw Nation Governor nor the Chickasaw Tribal Legislature authorized any person to sign any agreement with any defendant named in the Oklahoma Action that contained any waiver of the Chickasaw Nation's sovereign immunity. Greetham Decl. ¶ 7.

Petitioners offer two documents labeled "Provider Agreements" and three labeled "Network Enrollment Forms."[21] None contains an arbitration clause or even the word "arbitration." Instead, Petitioners engage in a series of somersaults in a vain effort to retroactively incorporate an arbitration provision. As shown below, these efforts are for naught.

i. Provider Agreements Do Not Establish an Agreement to Arbitrate.

With respect to the Provider Agreements, Petitioners contend that the documents incorporate an arbitration provision in the insurer's Provider Manual. But while the Provider Agreements do provide that "this Agreement, the Provider Manual, and all other

[20] Moreover, the Nation was ***required*** to submit claims to the underlying health insurers through their respective PBMs, and thus, forced to enter into contracts with the PBM or forego all rights to any recovery from Defendants (this is another example of how Defendants violate the Recovery Act). *See* Declaration of Carrie M. Law, Undersecretary of Operations, Hospital and Clinics for the Chickasaw Nation (attached hereto as Exhibit 2) ¶¶ 4-5 ("In order for the Chickasaw Nation to receive a reimbursement for a qualifying expense under a Member's health plan issued by Aetna or UnitedHealth Group (or an affiliate thereof), the Chickasaw Nation must submit a claim through the respective health insurer's pharmacy benefit manager[]. The Member's underlying health insurer (i.e., Aetna and UnitedHealth Group, or an affiliate thereof) will not reimburse the Chickasaw Nation unless the Chickasaw Nation submits claims through the insurer's PBM. [] Thus, in order to receive any reimbursement from a Member's health insurer, the Chickasaw Nation must enter into a contract with that plan's PBM.").

[21] These Provider Agreements and Enrollment Forms are exhibits to the Stephanie Harris Declaration ("Harris Decl."; ECF No. 5-1) and are available at ECF No. 9. Exhibit A is a Provider Agreement with Caremark LLC and CaremarkPCS LLC dated August 17, 2010 and signed on behalf of the Chickasaw Nation Medical Center. Exhibit B is a Provider Agreement with Caremark Inc. and CaremarkPCS dated January 3, 2006 and signed on behalf of Purcell Indian Health Clinic. Exhibit C, D, and E are AdvancePCS Network Enrollment Forms dated July 21, 2003 and signed on behalf of Ardmore Health Clinic Pharmacy, Carl Albert Indian Hospital, and Tishomingo Clinic Pharmacy.

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,'" this argument is fatally flawed.

► First, the Provider Agreements were signed in 2010 and 2006. However, while Petitioners submitted Provider Manuals for 2014, 2016, 2018, and 2020, they did not submit such Provider Manuals for 2006 or 2010. *See* Exs. J, K, L, M to Harris Decl. The 2014, 2016, 2018, and 2020 Provider Manuals were created long after the Provider Agreements were signed and cannot establish the pharmacies clearly and unequivocally agreed to arbitration at the time of signing. And there is no evidence for Petitioners' apparent contention the pharmacies agreed to be bound by unilateral changes inserted in the Provider Manual years later. Indeed, both of the Provider Agreements provide "[a]ny changes to this agreement must be initialed"—indicating both parties would need to assent to any changes, such as the addition of an arbitration provision. Petitioners have provided no evidence, or even argued, this requirement was met.

► Further, because the Provider Agreements refer to "all other Caremark Documents," Petitioners' argument leads to absurd and extreme results. Under Petitioners' view, it was ceded unilateral authority to make whatever changes it wished in any document at all, with binding and automatic effect upon the Nation. Courts have deemed such contracts untenable and unconscionable even as applied to private parties—let alone a sovereign tribe.[22]

[22] *See Edwards v. Vemma Nutrition Co.*, 2018 WL 637382, at *4–5 (D. Ariz. Jan. 31, 2018) ("The Court concludes that the unilateral modification provision is, in the context of the arbitration agreement, substantively unconscionable. It purports to grant Vemma an unfettered right to change the terms of arbitration altogether, including requiring Plaintiff to arbitrate a dispute he did not originally agree to arbitrate. Such a modification contradicts the fundamental contract principle that 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (citation omitted); *Batory v. Sears, Roebuck & Co.*, 456 F. Supp. 2d 1137, 1140 (D. Ariz. 2006) ("Defendant has effectively taken away Plaintiff's ability to consider and negotiate the terms of his contract. This is further emphasized by the fact that the [arbitration agreement] was a contract of adhesion in the first place. This provision effectively oppresses Plaintiff and creates an 'overall

► Finally, Petitioners fail to establish any agreement to arbitrate applies to *any* (much less all) the Caremark entities named as defendants in the Oklahoma Action. The Provider Agreements involve "Caremark LLC," "CaremarkPCS LLC," "Caremark Inc.," and "CaremarkPCS." None of these entities is a named defendant in the Oklahoma Action. Petitioners emphasize the 2020 Provider Manual's arbitration provision defines Caremark to include "Caremark's current, future, or former employees, parents, subsidiaries, affiliates, agents and assigns." Mem. at 6, 21. But Petitioners cannot borrow a definition from the *2020* Provider Manual to interpret agreements signed in 2006 and 2010—especially when there is no evidence Respondents ever agreed to the arbitration provision in the 2020 Provider Manual, let alone to the definition of "Caremark" contained therein.

For these reasons, the Provider Agreements do not reflect a clear and unequivocal agreement between the Nation and Petitioners to arbitrate the claims in the Complaint.

ii. Network Enrollment Forms Do Not Establish an Agreement to Arbitrate.

Petitioners submitted no Provider Agreements for the Ardmore Health Clinic, Chickasaw Nation Online Pharmacy Refill Center, Carl Albert Indian Hospital, or Tishomingo Clinic Pharmacy.[23] Instead, Petitioners rely on AdvancePCS Network Enrollment Forms signed in 2003 (*see* Exs. C, D, F to Harris Decl.), which provide even weaker support for their position than the Provider Agreements.

---

imbalance of rights and obligations imposed by the bargain.' The Court therefore finds that the provision of the [arbitration agreement] permitting Defendant to unilaterally modify or terminate the [agreement] is substantively unconscionable.") (citation omitted). *See also Demasse v. ITT Corp.*, 984 P.2d 1138, 1144 (Ariz. 1999) (once a contract is formed, "a party may no longer unilaterally modify the terms" unless there is assent to and consideration for the offer to modify); *Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965) ("A contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party."); *Angus Med. Co. v. Dig. Equip. Corp.*, 840 P.2d 1024, 1029 (Ariz. Ct. App. 1992) ("One party to a written contract cannot unilaterally modify it without the assent of the other party.").

[23] Petitioners' brief misleadingly defines the term "Provider Agreement" to include "[t]he Provider Agreement, Provider Manual, and [Network Enrollment Forms]." *See, e.g.*, Pet. at 7.

► The Network Enrollment Forms make no reference to arbitration, to any Provider Manual, or to any possible addition of an arbitration provision. Thus, Petitioners' argument that the Provider Agreements incorporated by reference the Provider Manual, which contained an arbitration clause, is not available. This is true because the Network Enrollment Forms were signed with Advance PCS, which was later acquired by Caremark, in 2003.

Petitioners also contend that on various dates between 2003 and 2020, the Nation pharmacies that signed the Network Enrollment Forms signed additional network enrollment forms with AdvancePCS or Caremark referencing the terms and conditions in the Advance PCS Provider agreement [or Caremark Provider agreement]." Harris Decl. ¶¶ 26-27, 29. Petitioners' apparent argument is that: (i) the pharmacies agreed to the terms of the Caremark Provider Agreement in a series of addendums and notices, even though those addendums and notices did not actually disclose the terms of the Caremark Provider Agreement and even though there is no documentary evidence that the pharmacies in question actually reviewed the Caremark Provider Agreement; (ii) the Caremark Provider Agreement contained a provision incorporating by reference the Caremark Provider Manual; and (iii) as of 2014,[24] the Caremark Provider Manual contained an arbitration provision.

This extenuated chain cannot possibly satisfy the legal requirement of a clear and unequivocal agreement by the pharmacies to arbitrate the claims in the Complaint. Petitioners essentially admit the pharmacies never signed any document containing an arbitration provision. The cross-references and incorporations by reference nowhere made clear the Chickasaw Nation was agreeing to arbitration. Nor do Petitioners show the

[24] Ms. Harris insists in her declaration that the Provider Agreement contained an arbitration provision as early as 2004, but she provides no documentation to support that assertion and is unable to provide the terms of the supposed 2004 provision. *See, e.g.*, Harris Decl., ¶ 36.

pharmacies clearly and specifically agreed to arbitration with any of the entities named as defendants in the Complaint.

Perhaps because of its inability to show the Nation's pharmacies agreed to arbitrate disputes at all, much less with any named defendant, Petitioners resort to an implied "course of dealing" argument. *See* Mem. at 4 (maintaining the Nation waived immunity by operating as a Provider in Caremark's network). But the pharmacies' dealings with Caremark (1) had nothing to do with arbitration; and (2) could not modify existing agreements explicitly requiring initialed modifications. Moreover, **any waiver of a tribe's immunity must be explicit, not implicit**, in order to constitute a "clear" and "unequivocal" waiver. *See Martinez*, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (citation omitted); *Cosentino*, 637 F. App'x 381 (9th Cir. 2016) (affirming dismissal of petition to compel arbitration because "[a] tribe's waiver of immunity must be 'clear'"); *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999) ("there is 'no place' for the doctrine of constructive waiver in our sovereign-immunity jurisprudence") (citation omitted).

Petitioners maintain the Nation has received benefits under its relationship with Caremark and complains it would be unfair to grant the Tribe immunity. Mem. at 4-5. But Petitioners were well aware of the Nation's sovereign status (and rights under the Recovery Act) when it entered the relationship. Moreover, tribal immunity (like all forms of sovereign immunity) is often "unfair," *Murphy v. Kickapoo Tribe of Oklahoma*, 2007 WL 3392301, *3 (W.D. Okla. Nov. 8, 2007), and can lead to perceived unjust results. *Kiowa Tribe*, 523 U.S. at 758. That provides no basis for ignoring it.

C. THE RECOVERY ACT DISPLACES ANY AGREEMENT TO ARBITRATE THE NATION'S CLAIMS.

Even if the Nation had entered into a valid agreement to arbitrate the claims at issue (and it did not), the Recovery Act would displace such an agreement. The Recovery Act

expressly supplants any contractual provision that has the effect of "prevent[ing] or hinder[ing]" the Nation's right of recovery. 25 U.S.C. § 1621(e).[25]

1. The Federal Government Cannot be Forced to Arbitrate Recovery Act Claims, and the Nation's Rights are Coterminous with the Federal Government's.

The Nation has the same rights of recovery under 25 U.S.C. § 1621e(c) as the United States,[26] and if the United States is not subject to arbitration, then the Nation is not either.

2. The Recovery Act Overrides any Contractual Provision that Prevents or Hinders a Tribe's Ability to Recover Under the Statute.

The Recovery Act's "prevent or hinder" language overrides any contractual commitment that would have the effect of hampering the Nation's right of recovery or making it more difficult to enforce its claims in this case. *See* Webster's Dictionary, https://www.merriam-webster.com/dictionary/hinder (defining "hinder" as "to make slow or difficult the progress of: HAMPER. 'Their journey was hindered by snow and high winds.' 'economic growth hindered by sanctions."). Thus, in common usage, "hindering" a task does not connote making it impossible to perform; "hinder" implies a much more modest degree of interference. *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 283 n.15 (1993) ("hindering" can include "imped[ing]" short of "overwhelm[ing]" or "supplant[ing]"); *United States v. Gwyther*, 431 F.2d 1142, 1144 (9th Cir. 1970) ("'hinder' means to obstruct, hamper, block").

To the extent Petitioners seek to advance a narrower definition of "hinder," any doubt regarding the construction of the Recovery Act and the definition of "hinder" must be resolved in favor of the Nation. The Supreme Court has instructed that "the standard

---

[25] As compared with the FAA, the Recovery Act is the more specific, later-enacted statute. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

[26] "The 1992 amendments are meant to assure Indian tribes and tribal organizations the *same right of recovery* established by Congress in 1988." *Yukon-Kuskokwim Health Corp., Inc. v. Tr. Ins. Plan for S.W. Alaska*, 884 F. Supp. 1360, 1367 (D. Alaska 1994) (emphasis added); *see also* Conf. Rep., H.R. Rep. No. 102–643, pt. 1, at 75 (1992) ("the Act is amended by this section to allow Indian tribes and tribal organizations the *same rights* as the Secretary to recover reasonable expenses incurred for the provision of health services to any individual through third party reimbursement") (emphasis added).

principles of statutory construction do not have their usual force in cases involving Indian law. . . . The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Accordingly, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*[27]

The special solicitude due to Indian tribes is particularly relevant in light of the purpose of the Recovery Act. "Congress enacted § 1621e as part of an effort to improve health care for Native Americans and Alaska Natives, and specifically to preserve scarce financial resources for their health care by precluding insurers from collecting premiums only to deny coverage for medical services . . . ." *Yukon-Kuskokwim Health Corp., Inc. v. Tr. Ins. Plan for S.W. Alaska*, 884 F. Supp. 1360, 1367 (D. Alaska 1994); *see also McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987) ("Congress has expressed its desire to provide all assistance necessary to enable Indians to take advantage of non-federal sources of health assistance."). This purpose requires the term "prevent or hinder" be interpreted broadly.

3. Enforcing the Alleged Arbitration Provisions Would Prevent or Hinder the Nation's Right of Recovery.

Section 1621e(c) of the Recovery Act bars enforcement of the arbitration provisions Petitioners cite. Enforcement of the provisions would hamper or make more difficult the Nation's enforcement of its Recovery Act rights by (1) depriving the Nation of the benefit of the Act's fee and cost provisions, (2) risking the imposition of a more stringent statute of limitations, (3) restricting the Nation's access to the discovery needed to prove its claims, (4) limiting the Nation's damages, and (5) subjecting the Nation to a confidentiality provision favoring Petitioners.

[27] *See also Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918) (statutes passed for the benefit of Indians "are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Williams v. Babbitt*, 115 F.3d 657, 660 (9th Cir. 1997) ("we are required to construe statutes favoring Native Americans liberally in their favor"); *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir. 1991) ("when congressional intent with respect to an Indian statute is unclear, courts will presume that Congress intended to protect, rather than diminish, Indian rights"), *cert. denied*, 503 U.S. 984 (1992).

Even outside the special context of the Recovery Act, the Ninth Circuit law permits courts to invalidate less burdensome arbitration provisions than the ones at issue here if they would prevent the "effective vindication" of statutory rights—a much lower standard than the one established by the Recovery Act. *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013) ("The 'effective vindication' exception, which permits the invalidation of an arbitration agreement when arbitration would prevent the 'effective vindication' of a federal statute…"). It follows that the Recovery Act bars enforcement of the arbitration provisions Petitioners cited because they would hamper or make more difficult the Nation's enforcement of its statutory rights.[28]

i. Arbitration Will Deprive the Nation of Fees and Costs.

"[T]he existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000). The arbitration provisions Petitioners cite do just that. While the Recovery Act contains a one-way fee- and cost-shifting provision favoring the Nation, 25 U.S.C. § 1621e(g) ("In any action brought to enforce the provisions of this section, a prevailing plaintiff shall be awarded its reasonable attorney's fees and costs of litigation."), the arbitration provisions in the Caremark Provider Manual do not. Rather, the provisions establish exactly the type of prohibitively costly procedures rejected by courts.

[28] *See* Greetham Decl. ¶ 13 ("Unlike a private commercial party, the Chickasaw Nation is a sovereign Tribal nation recognized as such by the United States and operating in accord with a constitution duly ratified by its citizens and a code enacted by the Chickasaw Tribal Legislature. Each day, the Chickasaw Nation must address the needs of its citizens and competing claims on Tribal resources within a governing structure established and operated in accord with Tribal law and which is expressly designed to promote and protect the interests of Tribal citizens. Those factors are present in our considerations every day as we, in Tribal government, make decisions on behalf of or which otherwise affect the Chickasaw Nation. Any attempt to force the Nation to sacrifice Federal statutory rights under the Recovery Act and to incur the risk of proceeding through corporate arbitration unsuited to our governmental structure and prerogatives would impose an unreasonable, unacceptable, and unjustifiable burden on the Chickasaw Nation and its citizens.").

The arbitration provision Petitioners cited states both prevailing defendants and prevailing plaintiffs are entitled to reasonable attorneys' fees and costs. Ex. M to Harris Decl., at § 15.09 ("The expenses of arbitration, including reasonable attorney's fees, will be paid for by the party against whom the final award of the arbitrator(s) is rendered, except as otherwise required by Law."). Moreover, the provision states a party initiating arbitration shall place funds in escrow up front to cover estimated arbitration costs and even the potential attorneys' fees of the opposing party. *Id.* These costs are likely to be substantial, and they—together with the requirement of an initial deposit—are likely to deter many tribes and tribal organizations from bringing suit. Critically, the Recovery Act requires no such deposit.

The Ninth Circuit has reasoned with respect to a fee-shifting arbitration provision that "[b]y itself, the fact that an employee could be held liable for Circuit City's share of the arbitration costs should she fail to vindicate employment-related claims renders this provision substantively unconscionable." *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003) (citing *Blair v. Scott Specialty Gases*, 283 F.3d 595, 605–06 (3rd Cir. 2002) (holding that an arbitration agreement "would undermine Congress's intent" in enacting civil rights statutes if it prevented "employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require[d] them to pay for a judge in court") (quotations omitted); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (noting in the context of an arbitration agreement that the court was "unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case")).

The Ninth Circuit has also held that arbitration provisions preclude effective validation of statutory rights where they undercut statutory mandates that prevailing plaintiffs receive costs and fees. *See, e.g.*, *Graham Oil Co. v. ARCO Products Co., a Div. of A. Richfield Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994), *as amended* (9th Cir. Mar. 13,

1995) (stripping plaintiffs of statutory right to attorneys' fees, which is designed to deter defendants from "improperly contesting meritorious claims," violates purpose and terms of statute).[29]

ii. Arbitration Will Subject the Nation to a More Stringent Statute of Limitations.

The arbitration provisions also "prevent or hinder" the Nation's rights under the Recovery Act with respect to the statute of limitations. While the Recovery Act guarantees a limitations period of "six years and ninety days" after a cause of action accrues,[30] the arbitration provisions Petitioners cite are much more limited. Caremark's arbitration provision purports to require a party to file a dispute (a) "within . . . six (6) months from the date on which the facts giving rise to the dispute first arose," or (b) "within six (6) months from the date of the issuance of the Dispute Notice." Ex. M to Harris Decl., at § 15.09. Thus, the Caremark Provider Manual does not provide the Nation the same benefits of the Recovery Act.

[29] *See also Perez v. Globe Airport Sec. Services, Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *vacated sub nom. Perez v. Globe Airport Sec. Serv., Inc*, 294 F.3d 1275 (11th Cir. 2002) (explaining that by denial of a cost and fee shifting "remedy Congress made available to ensure violations of the statute are effectively remedied and deterred, the Agreement eroded the ability of arbitration to serve those purposes as effectively as litigation"); *Paladino v. Avnet Comp. Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (arbitration provision prevented effective vindication of Title VII claims); *Anderson v. Regis Corp.*, 2006 WL 8457208, at *4 (N.D. Okla. Apr. 26, 2006) (limitation on right to attorneys' fees prevents effective vindication of rights); *Grigsby v. Income Prop. USA, LLC*, 2018 WL 4621766, at *7 (D. Utah Sept. 26, 2018) (cost-splitting would prevent effective vindication of right to attorneys' fees under RICO even if arbitration rules created potential for an award of fees); *Slatten v. Jim Glover Chevrolet Lawton, LLC*, 2016 WL 3633435, at *4 (W.D. Okla. June 29, 2016) (possibility that arbitrator could reduce or shift fees in case of financial hardship is insufficient to permit effective vindication of statutory claims under Magnuson-Moss statute).

[30] Section 1621e(j) of the Recovery Act states that "[t]he provisions of section 2415 of Title 28" (a provision governing limitations periods in actions by the United States) "shall apply to all actions commenced under this section." Section 2415 in turn provides that an action for money damages "shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued." 28 U.S.C. § 2415.

Even under the "effective vindication" standard, courts routinely invalidate arbitration provisions that purport to reduce statutorily prescribed limitations periods.[31] Given the higher "prevent and hinder" standard applicable here, Petitioners' attempt to force the Nation into arbitration should be rejected.

iii. Arbitration Will Restrict the Nation's Access to Discovery.

Under the Recovery Act, the Nation has the right to sue Petitioners in federal court and access the fulsome discovery procedures established by the Federal Rule of Civil Procedures. Enforcing the arbitration provisions cited by Petitioners would further "prevent or hinder" the Nation's rights under the Recovery Act by failing to guarantee the Nation access to the same, necessary discovery.

For example, Petitioners' arbitration provision permits requests for documents and information only when "there is a direct, substantial, and demonstrable need and where such documents and information can be located and produced at a cost that is reasonable in the context of all surrounding facts and circumstances." Ex. M to Harris Decl., at § 15.09. It states "[a]bsent a showing of exceptional circumstances, as determined by the arbitrator(s), the parties shall be limited to one corporate representative deposition per party with each deposition subject to a four-hour time limit." *Id.*

These provisions are stricter than even the AAA Commercial Dispute Procedures.[32] Their impact is also one-sided, as tribes and tribal organizations are far more likely to need

[31] *E.g., Graham Oil Co.*, 43 F.3d at 1248, as amended (9th Cir. Mar. 13, 1995) (reducing limitations period strips franchisees of statutory right to seek relief for a reasonable time); *Anderson v. Comcast Corp.*, 500 F.3d 66, 77 (1st Cir. 2007) ("If that statute of limitations can be reduced from four years to one by agreement, the consumer loses a protection that is basic to all other consumer remedies. And here, Congress made express that the statutory period may not be reduced.").

[32] AAA Commercial Dispute Procedure Rule 22(b) provides that "[t]he arbitrator may, on application of a party or on the arbitrator's own initiative: i. require the parties to exchange documents in their possession or custody on which they intend to rely; ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them; iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding

discovery to make their case than Petitioners. Courts have routinely found discovery limits like those in the agreements at issue here to be invalid under the "effective vindication" standard, which is itself more difficult to meet than the "prevent or hinder" standard under which the Nation's case must be evaluated.[33]

---

party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues. . . . ."

[33] *Domingo v. Ameriquest Mortg. Co.*, 70 F. App'x 919, 920 (9th Cir. 2003) (arbitration provision voided in part because of limits on discovery); *Effio v. FedEx Ground Package*, 2009 WL 775408, at *5 (D. Ariz. Mar. 20, 2009) (explaining that substantive unconscionability has been found where there are severe restrictions on discovery and holding limitations on discovery (access to documents and depositions) that would provide greater problem for employee plaintiffs than defendant were unconscionable); *Walker v Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005) ("[T]he limited discovery that the ... forum provides could significantly prejudice employees or applicants.") (citation omitted); *Penn v. Ryan's Family Steak Houses, Inc*., 269 F.3d 753, 757 (7th Cir. 2001) (citing "very restrictive discovery provisions, allowing each side only one deposition in most cases," as basis for finding arbitration provision unenforceable); *Ostroff v. Alterra Healthcare Corp*., 433 F. Supp. 2d 538, 546 (E.D. Pa. 2006) (preclusion of fact depositions is unconscionable because it will have one-sided effect and make it difficult for plaintiff to determine necessary facts); *Smeck v. Comcast Cable Commun. Mgt., LLC*, 2020 WL 6940011, at *6 (E.D. Pa. Nov. 25, 2020) (citing *Ostroff* for proposition that severe restrictions on discovery can make agreement unconscionable); *Geiger v. Ryan's Family Steak Houses, Inc*., 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001) (arbitration provision voided in part because discovery only allowed one deposition as of right); *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 103 (D.D.C. 2004) ("Thus, one requirement for an enforceable arbitration agreement is more than minimal discovery be permitted."); *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (arbitration provision voided in part because of limits on discovery); *Hoffman v. Cargill, Inc.*, 968 F. Supp. 465, 475 (N.D. Iowa 1997) ("Although arbitration proceedings may, and often do, provide much more limited discovery procedures than is common in regular court proceedings, a party must be provided a fair opportunity to present its claims."); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 106 (2000) (holding that employees are at least "entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s)") (emphasis added); *Estate of Anna Ruszala, ex rel. Mizerak v. Brookdale Living Cmts., Inc.*, 1 A.3d 806, 821 (N.J. Super. Ct. App. Div. 2010) (holding discovery provisions that did not allow nursing home residents to depose any nursing home staff involved in their day-to-day care "palpably egregious because they are clearly intended to thwart [the] plaintiffs' ability to prosecute a case involving resident abuse").

iv. Arbitration Will Limit the Nation's Damages.

Forcing the Nation into arbitration would impermissibly limit its recovery of (1) actual damages, as defined by the Recovery Act; and (2) punitive damages, which the Nation seeks.

The Recovery Act permits the Nation to recover either "the reasonable charges billed by . . . an Indian tribe, or tribal organization in providing health services" "or, if higher, the highest amount the third party would pay for care and services furnished by providers other than governmental entities." 25 U.S.C. § 1621e(a). Petitioners' arbitration provision does not contain the "higher of" formulation nor does it permit recovery of punitive damages. Instead, Petitioners' arbitration provision provides: "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." Ex. M to Harris Decl., at § 15.09.

Courts have held similar damages limitations in arbitration provisions prevent the "effective vindication" of statutory rights.[34] The same reasoning applies here: the Nation's

[34] *E.g.*, *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478-79 (5th Cir. 2003) (arbitration provision's "ban on punitive damages" violated effective vindication doctrine in Title VII case); *Kristian v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir. 2006) (same for treble damages in Sherman Act case); *In re Zetia (Ezetimibe) Antitrust Litig.*, 2018 WL 4677830, at *7–8 (E.D. Va. Sept. 6, 2018) (finding that arbitration provision providing that arbitrator is "not empowered to award damages in excess of compensatory damages" was invalid where antitrust statute provided for treble damages); *Gorman v. S/W Tax Loans, Inc.*, 2015 WL 12751710, *5 (D. Colo. Mar. 17, 2015) (arbitration agreement violated "effective vindication" doctrine where it limited damages that arbitrator could award to "actual compensatory, economic damages" and Truth in Lending Act allowed plaintiff to recover actual damages and "twice the amount of any finance charge in connection" with loan).

exercise of its rights under the Recovery Act, including the right to damages calculated via the "higher of" formulation, cannot be hindered in any way.

v. Arbitration Will Subject the Nation to a Confidentiality Provision Favoring Defendants.

Petitioners' arbitration provision requires confidentiality of "the existence, content or results of any dispute or arbitration hereunder" except as required by law. Ex. M to Harris Decl., at § 15.09. This restriction precludes the Nation from learning the results of other proceedings involving similar claims and contracts. And it favors Petitioners because, as repeat players, they know the results of all prior decisions, while tribes and tribal organizations are kept in the dark. Such confidentiality provisions are invalid under the "effective vindication" test[35] and, as such, are precluded by the Recovery Act and its "prevent or hinder" standard.

V. CONCLUSION

Respondents respectfully request that the Court deny the Petition for the foregoing reasons. Alternatively, Respondents request the Court stay this Action until the court in the Oklahoma Action rules on Petitioners' motion to stay currently pending there.

Dated: June 7, 2021

By: s/ Ty D. Frankel
Ty D. Frankel
BONNETT FAIRBOURN FRIEDMAN & BALINT, PC
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
tfrankel@bffb.com

Michael Burrage
(admitted *pro hac vice*)
Patricia Sawyer

[35] *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014) (deeming confidentiality provision unconscionable because it would have one-sided effect by permitting defendant, who was repeat player, information on prior arbitrations, but denying that information to plaintiffs); *Anderson v. Regis Corp.*, 2006 WL 8457208, at *6 (N.D. Okla. Apr. 26, 2006) (citing *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166, 1180–81 (W.D. Wash. 2002)); *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

(admitted *pro hac vice*)
Reggie Whitten
(*pro hac vice* application forthcoming)
WHITTEN BURRAGE
512 North Broadway Avenue, Suite 300
Oklahoma City, Oklahoma 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
mburrage@whittenburragelaw.com
psawyer@whittenburragelaw.com
rwhitten@whittenburragelaw.com

Michael B. Angelovich
(*pro hac vice* application forthcoming)
Chad E. Ihrig
(*pro hac vice* application forthcoming)
Bradley W. Beskin
(*pro hac vice* application forthcoming)
Nicholas W. Shodrok
(*pro hac vice* application forthcoming)
Nix Patterson, LLP
3600 N. Capital of Texas Highway #B350
Austin, Texas 78746
Telephone: (512) 328-5333
Facsimile: (512) 328-5335
mangelovich@nixlaw.com
cihrig@nixlaw.com
bbeskin@nixlaw.com
nshodrok@nixlaw.com

Attorneys for Respondents