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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.	Civil Action No. 2:21-cv-00574-SPL

PETITIONERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION TO COMPEL ARBITRATION

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INTRODUCTION[1]

Respondents' arguments set out in their Response in Opposition to the Petitioners' Petition for Arbitration ("Opp.") (ECF No. 20) provide no basis for evading arbitration. The plain terms of the agreement[2] that the Nation's pharmacies entered into—and the Nation itself reviewed—make clear that this dispute is subject to arbitration. Significantly, nowhere in the opposition do Respondents challenge that the contract with Caremark is valid and enforceable. That agreement contains the Arbitration Provision that—pursuant to Supreme Court precedent—clearly and unequivocally waived the Nation's sovereign immunity with respect to arbitration of this dispute. Respondents, however, argue without authority that they can excise from a valid and binding contract a single provision—the Arbitration Provision—while affirming all other beneficial parts. Respondents do not cite a single case in which a court has ever reformed a contract to remove an arbitration provision but leave all of the other contract provisions in place, and Petitioners are unaware of any such case. Respondents further attempt to avoid this conclusion by asserting a hodgepodge of defenses that are meritless and often misplaced. The agreement itself, however, reserves all of these issues to the arbitrator, which Respondents do not challenge. Similarly, Respondents fail to establish that enforcing the Arbitration Provision would prevent the "effective vindication" of their rights. The Nation freely agreed to arbitrate this dispute. Its litigation strategy to rescind the Arbitration Provision provisions while still accepting all of the other benefits of the contract should be rejected.

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[1] Capitalized terms in this reply shall have the same definition as set forth in the Petition (ECF No. 1) and the memorandum of law (ECF No. 13) filed by Petitioners, unless otherwise indicated.

[2] Petitioners refer to an "agreement" or "contract" in the singular because although there are several iterations of the Provider Agreement and Provider Manual that the Nation's pharmacies have been subject to, each version is substantively the same for the purposes of the issues raised by the Petition.

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ARGUMENT

I. The First-to-File Doctrine Does Not Apply and Provides No Basis on Which to Evade Arbitration.

The first-to-file doctrine does not apply for three reasons: (1) the first-to-file issue is for the arbitrator to decide; (2) the issues here are not the same as in the "first-filed" Oklahoma case; and (3) even if it did apply (which it does not), the first-to-file doctrine is discretionary, and for equitable reasons the Court should not apply it here.

A. The First-to-File Issue is for the Arbitrator to Determine.

Under Supreme Court precedent, procedural challenges to arbitration are reserved to the arbitrator unless the parties agree otherwise. *See BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 34-35 (2014). The Nation and Caremark did not agree otherwise—rather, they expressly delegated to an arbitrator all gateway procedural issues by including a valid delegation clause in the Arbitration Provision and by incorporating the AAA Commercial Rules. *See* Petitioner' Memorandum of Law in support of Petition for Order to Compel Arbitration ("Opening Br.") (ECF No. 13), Declaration of Stephanie Harris in support of Petition ("Harris Decl.") (ECF No. 5-1) Ex. M (2020 Provider Manual) § 15.09, p. 91 (ECF No. 9) (sealed exhibits consisting of copies of signed Provider Agreement and NEFs attached to Harris Decl.).

Respondents' first-to-file objection is a procedural challenge to arbitration and thus one that should be decided by the arbitrator. *See Kohn Law Group, Inc. v. Jacobs*, 2018 WL 6118550, at *1-2 (C.D. Cal. Aug. 7, 2018) ("The first-to-file rule is of the procedural variety. Thus, its application here should be determined by the arbitrator as long as the arbitration agreement is valid and encompasses the issue at hand." *Id*. at *2 (citing *Cox v. Ocean View Hotel Corp*., 533 F.3d 1114, 1119 (9th Cir. 2008)). All this Court need resolve on the Petition, in light of the delegation clause, is whether a valid and enforceable arbitration agreement exists, *see Cox*, 533 F.3d at 1119, which it does.

B. The First-to-File Doctrine is Inapplicable by its Own Terms.

Even if the Court were to determine the issue, the first-to-file doctrine is

inapplicable. Contrary to Respondents' assertion, Opp. at 8-9, 12 (ECF No. 20), the issues here and in the Oklahoma case are not and cannot be the same because in the Oklahoma case Petitioners have only moved the court for a stay pending resolution of this Petition to Compel and have expressly asked the Oklahoma court *not* to determine any issues outside the stay.[3] Indeed, under *Ansari v. Qwest Communications*, the Oklahoma court cannot resolve the issues presented in this Petition. 414 F.3d 1214, 1220 (10th Cir. 2005) (district court cannot compel arbitration to occur in a different district). Therefore, the issues involved in the two cases are not even "substantially similar," as required for the first-to-file doctrine to apply. *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss.*, 787 F.3d 1237, 1240 (9th Cir. 2015), cited in Opp. at 12 n.12 (ECF No. 20). Further underscoring the non-identity of issues, the relief available in this Court—an order compelling arbitration—is not available from the Oklahoma district court, which, under *Ansari*, can solely order a stay. *Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (in action to compel arbitration, it would be abuse of discretion for federal court to stay or dismiss federal suit despite already pending state court suit involving same claims if there was substantial doubt whether state court could issue the same remedy sought in federal court).

Applying the first-to-file doctrine would effectively eviscerate *Ansari* because any party seeking to follow the Tenth Circuit's directive would inevitably be met with a first-to-file defense. This cannot be the law.

Respondents' reliance on *JD Investment Co., LLC v. Agrihouse, Inc.*, 2009 WL 113277 (W.D. Wash. Jan 13, 2009), cited in Opp. at 13 (ECF No. 20), is not well-founded. In that case, unlike here, there was complete identity and overlap between the first case, filed in Colorado, and the case before the Washington district court. The court noted that the petition before it seeking to compel arbitration involved the same operating

[3] Petitioners' Motion to Stay filed in the Oklahoma court is publicly available at ECF No. 61 on the docket of the Oklahoma Action (Civ. No. 20-cv-488-PRW).

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agreement forming the subject of the first-filed Colorado case. *Id*. at *1. Here, the Petition before this Court involves the Arbitration Provision, and the Nation has expressly insisted that its Complaint in the Oklahoma case is *not* based on any contractual provisions. *See* Compl., ¶ 55 n.17 (ECF No. 1-2) ("The Nation does not bring suit under these [Provider Agreements], or any other contract. Rather the Nation brings suit under 25 U.S. § 1621e, which creates a private right of action for the Nation in this regard.").

Further, in *JD Investment Co*., the first-filed case was a declaratory judgment action to declare the parties' agreement unenforceable, underscoring the identity of the issues there. *Id*. at *1. In contrast, in neither this case nor the Oklahoma case have the Nation or Respondents asserted that the entire agreement is unenforceable; instead the Nation has argued that the first-filed Oklahoma case arises from its statutory rights. Finally, the court's analysis in *JD Investment Co*. did not involve the situation here: (1) the Washington district court was not considering a petition to compel that was *necessarily* filed before it under a forum selection clause; and (2) the court in the first-filed case was able to rule on the enforceability of the arbitration provision, unlike the Oklahoma court in this case, which has before it only a motion to stay and is not able to compel arbitration in Arizona under *Ansari*.

C. Applying the First-to-File Doctrine Would be Inequitable.

The Court has discretion to dispense with the first-to-file doctrine for equitable reasons. Indeed, the Ninth Circuit case that Respondents themselves cite emphasizes that "the most basic aspect of the first-to-file rule is that it is discretionary." *Alltrade, Inc. v. Uniweld Prods., Inc*., 946 F.2d 622, 628 (9th Cir. 1991), cited in Opp. at 11 (ECF No. 20). The doctrine "is not a rigid or inflexible rule to be mechanically applied," and so "[c]ircumstances and modern judicial reality . . . may demand that [courts] follow a different approach from time to time." *Pacesetter Sys., Inc. v. Medtronic*, 678 F.2d 93, 95 (9th Cir. 1982) (internal quotation marks and citation omitted). Accordingly, courts can exercise discretion to "dispense with the first-filed principle for reasons of equity."

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Alltrade, 946 F.2d at 628. Here, equity supports setting aside the first-to-file doctrine.

First, the Nation's complaint was filed in a jurisdiction in which the Petitioners cannot obtain an order compelling arbitration in Arizona, as provided for under the parties' agreement. This is because settled Tenth Circuit law mandates that the Oklahoma court cannot compel the parties to arbitrate under those circumstances. *Ansari,* 414 F.3d at 1220 (district court cannot compel arbitration in a different district, or in its own if another is specified in parties' agreement). Given the Arizona arbitral forum specified in the Arbitration Provision, the Oklahoma court cannot compel arbitration in that venue. Therefore, applying the first-to-file doctrine would nullify the bargained-for Arbitration Provision and functionally nullify *Ansari*.

Second, it would be inequitable to permit the Nation to use the first-to-file doctrine to circumvent the Arbitration Provision. *See MEI Tech., Inc. v. Detector Networks Int'l, LLC,* 2009 WL 10665141, at *4 (D.N.M. July 6, 2009) ("[I]f the rule were that a party could circumvent a forum selection clause [in an arbitration agreement] simply by filing a lawsuit in a different forum and then asserting that the first-filed doctrine trumped, forum selection clauses would be rendered meaningless."). The Nation's conduct in disregarding the Arbitration Provision's requirement for arbitration in Scottsdale, Arizona is an attempt to sidestep the Court's jurisdiction in favor of a "shopped forum" in Respondents' preferred home state and render the Arbitration Provision meaningless.

It also would be inequitable to penalize Petitioners as the "second filers" for abiding by the Arbitration Provision, with its Arizona arbitral mandate, when the Nation did not. Rather than "running" to file their Petition to Compel or delaying doing so, Petitioners made a timely arbitration demand, which the Nation rejected, leading to their filing of the Petition here, as necessary under *Ansari*.[4] *See Laver v. Credit Suisse Secs. (USA), LLC*, 2018 WL 306810, at *4 (N.D. Cal. June 21, 2018) (rejecting applicability

[4] *See* Pet. to Compel Arbitration (ECF No. 1) at ¶¶ 34, 37, and Exs. 1, 4 (Dec. 29, 2021 Complaint and Feb. 10, 2021 arbitration demand) (ECF Nos. 1-2 and 1-5).

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of first-filed doctrine because it would be "inequitable to penalize . . . second filer[] for abiding by the arbitration agreement when . . . the first filer[] disregarded its contractual obligation to arbitrate" (quotation marks omitted)).

II. Sovereign Immunity Does Not Preclude a Stay.

A. The Contract Is Valid and Enforceable.

Respondents do not contest that the contract is valid and enforceable. Nor could they credibly do so, given that the contract has been in place for some pharmacies for at least ten years, and almost twenty years for others, and the Nation's pharmacies have submitted over $173 million in claims pursuant to that contract just from January 1, 2014 to December 31, 2020. Harris Decl., ¶ 45 (ECF No. 5-1). Respondents also do not contend that their signatories to the Provider Agreement, Chris Anoatubby and Michelle R. Sparks, were unauthorized to sign any contract or to bind the Nation, the Nation's Department of Health, or the Nation's pharmacies to the contract. ECF No. 9 (sealed exhibits consisting of copies of signed Provider Agreement and NEFs attached to Harris Decl.). Indeed, the Nation has admitted in its Oklahoma Complaint that it is subject to the contract. *See* Compl., ¶ 55 n.17 (ECF No. 1-2) ("Since 2005, the Chickasaw Nation Department of Health has acted under a Provider Agreement with Defendants' various PBM entities.").

Respondents nevertheless contend that, despite their admission that the remainder of the contract is valid, they are not bound by the Arbitration Provision contained therein. Respondents take the novel and unsupportable position that they can pick one specific provision of a valid and binding contract—the Arbitration Provision—and excise it while affirming all the other economically beneficial parts of the contract. Respondents do not cite a single case in which a court has ever engaged in this sort of selective reformation, and Petitioners are unaware of any such case. The Court should reject Respondents' position because they do not dispute that they operate under an enforceable contract with Caremark through the Provider Agreement and the Provider Manual—documents the Nation has admitted reviewing, notwithstanding any suggestion otherwise.

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1. The Arbitration Provision Constitutes a Clear and Unequivocal Waiver of Sovereign Immunity.

Petitioners agree that a tribal waiver of sovereign immunity "must be unequivocally expressed." Opp. at 15 (ECF No. 20) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); *see* Opening Br. at 26-28 (ECF No. 13).[5] But under controlling Supreme Court precedent, the Arbitration Provision in the Provider Manuals meets this requirement. 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 incorporating the rules of the American Arbitration Association, including the rule that "the arbitration award may be entered in any federal or state court having jurisdiction" into the agreement. *C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19 (2001) (citation and internal quotation marks omitted). Similarly, the Ninth Circuit has interpreted *C & L Enterprises* as holding that a clear and unequivocal 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 quotation marks omitted).

The Arbitration Provision here—the version in the 2020 Provider Manual and all prior applicable ones—falls squarely within the holding of *C & L Enterprises* and is a clear and unequivocal waiver of sovereign immunity. Opening Br. at 27-28 (ECF No. 13). Respondents make several arguments to avoid this inescapable conclusion, but none of them has merit.

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[5] Petitioners are not arguing that the Nation's action in bringing suit "automatically waive[s] immunity" for arbitration. Opp. at 15 (ECF No. 20).

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2. The Arbitration Provision in all Provider Manuals Establishes a Waiver.

Respondents complain that Petitioners did not submit all versions of the Provider Manual since 2003 with the Petition. Opp. at 21, 23 & n.24 (ECF No. 20). As explained *infra*, the Nation has received these documents, and they are all substantively identical to the 2020 Provider Manual. Nevertheless, because Respondents have called into question in their opposition whether the earlier documents are consistent (which they are), and as a matter of completing the record before the Court, Petitioners submit these additional documents now. *See* Supplemental Declaration of Stephanie Harris ("Harris Supp. Decl.") and exhibits attached thereto, annexed as an exhibit to this reply.

Each Provider Manual meets the requirements for a waiver of sovereign immunity under *C&L Enterprises*. Specifically, (1) each Arbitration Provision in the Provider Manuals clearly requires that all disputes be settled in arbitration; (2) each Arbitration Provision incorporates the AAA Rules, 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-53(c);[6] and (3) each 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." *See* Harris Supp. Decl., ¶¶ 5, 8, 10, 11, 12 & Exs. 1, 3 to 6 (Provider Manual versions from 2003 through 2011, and relevant portions of respective Arbitration Provision therein); *see also* Harris Decl., Ex. M (2020 Provider Manual) (ECF No. 9).

Respondents further contend that the Network Enrollment Forms do not establish an agreement to arbitrate because they were signed with AdvancePCS, which was later acquired by Caremark. Opp. at 23 (ECF No. 20). But as Respondents acknowledge, *id.*

[6] *Available at* https://adr.org/sites/default/files/Commercial%20Rules.pdf. Petitioners have reviewed all versions of the AAA Commercial Rules going back to January 1, 2003, as archived on the AAA's website. *See* AAA, Rules, Forms Fees, https://adr.org/ArchiveRules. Each version of these rules contains identical language.

at 23, the Network Enrollment Forms incorporate both the Provider Agreement and the Provider Manual. Harris Decl., ¶ 11 (ECF No. 5-1). Petitioners submit with this reply the 2003 AdvancePCS Provider Manual, which contains an arbitration provision. As with the other Provider Manuals, the 2003 AdvancePCS Provider Manual (1) clearly requires that all disputes be settled in arbitration; (2) incorporates the AAA Rules; and (3) 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 Suppl. Decl., ¶ 5 & Ex. 1 at 47. Petitioners also submit the notice that was sent to all pharmacies in 2004 informing them that following the acquisition of AdvancePCS by CaremarkRx, the AdvancePCS Provider Agreement would continue to apply as the "Caremark Provider Agreement." Harris Suppl. Decl., ¶ 6 & Ex. 2.

3. The Nation Reviewed the Provider Agreement and the Provider Manual.

Respondents' assertion that "there is no documentary evidence that the pharmacies in question actually reviewed the Caremark Provider Agreement," Opp. at 23 (ECF No. 20), is demonstrably inaccurate. Petitioners submitted proofs of delivery of the Provider Manual and its Supplements from 2014 to 2020 to the Nation's pharmacies. Harris Decl. ¶ 37 (ECF No. 5-1). Additionally, on April 19, 2016, Debra Gee, General Counsel and Executive Officer of the Nation, wrote a letter to CVS Health on the letterhead of **the Chickasaw Nation Legal Division, Bill Anoatubby, Governor** stating in part:

> This letter is regarding the failure by CVS Caremark to process certain claims submitted by the pharmacy at the Chickasaw Nation Department of Health.
>
> * * *
>
> ***Since 2005, the Chickasaw Nation Department of Health has acted under a Provider Agreement with Caremark, now a part of CVS Health, allowing our tribal pharmacy to submit claims for clients covered by Caremark. Our Provider Agreement was renewed in 2010 under***

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> ***substantially the same terms and said renewal was to continue until formally terminated by one of the parties.***
>
> This arrangement appeared to be beneficial for all parties involved and we have received no indication that Caremark or CVS Health intended to terminate this Provider Agreement. Beginning in January 2015, however, our pharmacy began experiencing numerous claim rejections for clients whose claims had until then been processed without issue.
>
> * * *
>
> ***We have found nothing in the correspondence record, Provider Agreement, or CVS Caremark's Pharmacy Payment Provider Manual explaining the sudden denial of claims or changing of claim practices.***
>
> * * *

ECF No. 1-4, Ex. 3 (April 19, 2016 Letter) (emphasis added).[7]

On June 17, 2016, Carolyn Romberg, Deputy General Counsel/Director of the Nation, wrote a second letter to CVS Health, also on the on the letterhead of **the Chickasaw Nation Legal Division, Bill Anoatubby, Governor**, attaching the April 19, 2016 letter and restating the request. ECF No. 1-4, Ex. 3.

Thus, the letters demonstrate: (1) the Nation had carefully reviewed both the Provider Agreement and the Provider Manual; and (2) the Nation understood, and agreed that it was subject to, the Provider Agreement and the Provider Manual. The letters, coupled with the Arbitration Provision, establish a clear waiver of sovereign immunity.

B. Respondents' Challenges to the Arbitration Provision Are Meritless.

Respondents' remaining arguments fail to avoid the inescapable conclusion that the Arbitration Provision binds them and that they can be compelled to arbitrate.

Contrary to Respondents' position, there is no requirement that an arbitration provision must be signed. *See* Opp. at 20-21 (ECF No. 20). Respondents admit that they entered into the Provider Agreement and that the Provider Agreement incorporates the Provider Manual. *Id.* At least ten courts interpreting the Caremark Provider Manual

[7] Petitioners submitted these letters only to establish that the Nation reviewed the relevant documents and acknowledged it was bound by its agreement with Caremark.

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have concluded that the Arbitration Provision in the Provider Manual is incorporated by reference into the Provider Agreement and binds the parties to that contract. *See, e.g.*, *Bowie's Priority Care Pharmacy, L.L.C. v. CaremarkPCS, L.L.C.*, 2018 WL 1964596, at *5 (N.D. Ala. Apr. 26, 2018) (rejecting argument that Provider Manual must be signed to be enforceable, particularly where, as here, "[t]here is no dispute that Plaintiff received copies of the Provider Manual, that Plaintiff submitted claims for payment under the Provider Manual, allowed Defendant to conduct audits of Plaintiff's premises according to the Provider Manual, wrote a demand letter premised on the Provider Manual, requested relief in 'accordance with the terms of the Provider Manual'" (citation omitted)); *W. Va. CVS Pharm., LLC v. McDowell Pharm., Inc.*, 238 W. Va. 465, 474 (2017) ("[U]nder Arizona law, the arbitration agreement [in the Provider Manual] was incorporated by reference [into the Provider Agreement]."); *see also* Opening Br. at 12-13 (collecting cases) (ECF No. 13).[8] Respondents point to no contrary authority.[9]

The fact that Respondents did not draft the Arbitration Provision, Opp. at 16-17 (ECF No. 20), is irrelevant. Respondents cite no case that holds that an arbitration provision must have been drafted by a tribe to establish a waiver. In *C&L Enterprises*, the arbitration provision was not drafted by the tribe, but rather was a form agreement from the American Institute of Architects. 532 U.S. at 415. Respondents' assertion that

[8] As explained *supra*, Petitioners have submitted evidence that the Nation actually reviewed the Provider Manual. Under Arizona law, however, "[i]f a party consents to the incorporation by reference, the party 'is presumed to know its full purport and meaning.'" *Edwards v. Vemma Nutrition*, 2018 WL 637382, at *3 (D. Ariz. Jan. 30, 2018) (quoting *Indus. Comm'n v. Ariz. Power Co.*, 295 P. 305, 307 (Ariz. 1931)). "A contracting party, therefore, need not see the incorporated document if the document is easily available." *See Weatherguard Roofing Co. v. D.R. Ward Constr. Co.*, 152 P.3d 1227, 1230 (Ariz. Ct. App. 2007) (concluding that the arbitration clause was incorporated by reference even though the extrinsic document was not attached to the contract).

[9] Respondents do not dispute that all Petitioners fall under the language in the Arbitration Provision applying it to "Caremark's current, future or former employees, parents, subsidiaries, agents and assigns." Harris Decl., Ex. F at 91 (ECF No. 9). Nor do Respondents dispute that all Petitioners can enforce the arbitration provision under equitable estoppel principles. *See* Opening Br. at 22-26 (ECF No. 13).

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the Supreme Court found a waiver in *C&L Enterprises* "primarily because—unlike the Nation here—the tribe there prepared the contract containing the arbitration provision," Opp. at 19 n.19 (ECF No. 20), is incorrect. The holding of *C & L Enterprises* is not dependent on who drafted the agreement; there is no language in the decision limiting the holding to contracts proposed by a tribe. *Star Tickets v. Chumash Casino Resort*, 2015 WL 6438110, at *4 (Mich. Ct. App. Oct. 22, 2015) ("Although the Supreme Court mentioned that the tribe had proposed, prepared, and tendered the contract, we find no language in the opinion indicating or suggesting that this fact had any ultimate bearing on the Court's holding that the relevant contractual provision constituted a clear waiver of sovereign immunity."). The court in *Star Tickets* succinctly explained the import of this fact in the *C & L Enterprises* decision: "The Supreme Court, in alluding to the tribe's tendering of the contract, was merely commenting on principles related to ambiguous adhesion contracts before concluding that the contract was not ambiguous on the issue of waiver, nor foisted upon the tribe." *Id.* The *Star Tickets* court rejected an argument similar to the one advanced by Respondents, because there, as here, the court was "addressing a clear and unambiguous waiver of sovereign immunity, and there is no indication of unequal bargaining power or that [the tribe] was forced into the agreement." *Id.* Moreover, although Respondents argue that unambiguous language in the Arbitration Provision should be construed in their favor, they identify no ambiguity. *See, e.g.*, Opp. at 17-18 & n.16 (ECF No. 20).

The cases following *C&L Enterprises* cited by Respondents, Opp. at 18 (ECF No. 20), are distinguishable. *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah* did not involve an arbitration provision at all, and one of the agreements, unlike here, contained a section stating, "No Waiver of Sovereignty or Jurisdiction Intended." 700 F.3d 1000, 1009 (10th Cir. 2015). Similarly, *Allen v. Gold Country Casino* involved an employment application and an employee orientation booklet—not an arbitration provision—and neither document contained the language that *C&L Enterprises* holds

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was sufficient to establish a waiver. 464 F.3d 1044, 1047 (9th Cir. 2006). Further, the issue in *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.* was whether the tribe actually agreed to the contract containing the arbitration provision because the signatory was not authorized to sign the contract on the tribe's behalf, which is not at issue here. 2011 WL 400108, *5 (W.D. Wash. Sept. 7, 2011). Finally, the cases cited in footnote 18 of the opposition, Opp. at 18-19 n.18 (ECF No. 20), either did not involve an arbitration provision,[10] or the language in the arbitration provision did not include the language that *C&L Enterprises* held was sufficient or are otherwise distinguishable.[11]

Respondents also briefly assert that the Nation has the same rights of recovery as the United States "and if the United States is not subject to arbitration, then the Nation is not either." Opp. at 25 (ECF No. 20). Respondents do not explain why the United States is not subject to arbitration.[12] In its consolidated opposition to the Defendants' Motions

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[10] *See Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1151 (10th Cir. 2011) ("In this case we are called upon to decide whether an Indian tribe's agreement to comply with the provisions of Title VII effects a waiver of the tribe's sovereign immunity from suit."); *Bruner v. Creek Nation Casino*, 2007 WL 9782751, *4 (N.D. Okla. Feb. 28, 2007) (plaintiff's argument was based on FMLA, not any arbitration clause, and the federal FMLA was not even incorporated into agreement), *adopted by, dismissed by, motion denied by*, 2007 WL 9782755 (N.D. Okla. Mar. 20, 2007); *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 170 (N.D.N.Y. 2006) (plaintiff relied on FMLA and there was no arbitration clause).

[11] *See Cosentino v. Pechanga Band of Luiseno Mission Indians*, 637 F. App'x 381, 169 (9th Cir. 2016) (compact between tribe and State of California did not waive tribe's immunity from certain suits); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 688 n.9 (8th Cir. 2011) (stating that non-binding arbitration provision in agreement "is readily distinguishable from the arbitration provisions that operated as express waivers of tribal immunity in *C & L Enterprises*"); *Attorney's Process and Investigation Servs., Inc. v. Sac and Fox Tribe of The Mississippi In Iowa*, 401 F. Supp. 2d 952, 963 (N.D. Iowa 2005) (stating that the very validity of the agreement was in dispute and the court could not rule on whether the arbitration clause waived immunity until the tribe determined the validity of the contract as a whole).

[12] The Nation quotes from *Yukon-Kuskokwim Health Corp., Inc. v. Tr. Ins. Plan for S.W. Alaska*, 884 F. Supp. 1360, 1367 (D. Alaska 1994)). Opp. at 25 n.26 (ECF 20). But that case did not involve arbitration and, in any event, does not hold that the Recovery Act precludes an agreement to arbitrate disputes over reimbursement.

to Stay, publicly available at ECF No. 81 at pp. 23-24 on the docket of the Oklahoma Action (Civil No. 20-cv-488-PRW), the Nation relied on an addendum to a UnitedHealth pharmacy network agreement exempting the Indian Health Service from an obligation to arbitrate to support this argument. That reliance is misplaced. That document, by its terms, applies to the Indian Health Service—not the Nation. There is a similar Indian Health Addendum to the Caremark Provider Agreement regarding terms of participation in Medicare Part D. Harris Supp. Decl., ¶ 14. That addendum applies only to Caremark networks of clients that are Medicare Part D plan sponsors. *Id.* The Nation has alleged that claims for Medicare Part D members are not within the scope of its lawsuit. Compl., ¶ 108 (ECF No. 1-2). The Network Enrollment Forms signed by the Nation apply to all other Caremark networks. Harris Supp. Decl., ¶ 14; Harris Decl., ¶¶ 26-30 (ECF No. 5-1). Moreover, the fact this language is found in the IHS addendum but not in the Provider Agreement shows that the Nation did ***not*** expressly disclaim arbitration in its contract with Caremark.

Respondents' assertion that they were "forced" to enter into contracts with Caremark or "forego all rights to any recovery," Opp. at 20 n.20 (ECF No. 20), is factually inaccurate. Caremark does not require any government pharmacy, including those operated by the Indian Health Service, an Indian tribe or tribal organization, or an urban Indian organization, to enter into a Caremark Provider Agreement to process and pay claims submitted by that government pharmacy. Harris Suppl. Decl., ¶ 15.

Finally, Respondents' reliance on language in the Provider Agreement stating that "any changes to this agreement must be initialed," Opp. at 21 (ECF No. 20), is a red herring. Each Provider Agreement expressly incorporates the Provider Manual, as Respondents acknowledge. Each of the Provider Manuals going back to 2003 contains a provision stating that from time to time, Caremark may amend the Provider Manual by giving notice to the pharmacy of the terms of the amendment and specifying the date the

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amendment becomes effective.[13] Each of the Provider Manuals since 2003 further provides that if the pharmacy submits claims to Caremark after the effective date of any notice or amendment, the terms of the notice or amendment will be deemed accepted by the pharmacy and will be considered part of the Caremark Provider Agreement. *Id.*

C. The Amendment Provision Is Not Unconscionable.

Respondents' contention that the amendment provision is unconscionable, Opp. at 21 (ECF No. 20), is meritless. As a threshold matter, this argument has nothing to do with the enforceability of the arbitration provision: "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). "[A] provision permitting the unilateral amendment of any term of contract does not, without more, render a separate provision, such as an arbitration provision, unenforceable on procedural grounds." *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 417 (E.D.N.Y. 2014) (analyzing Caremark Provider Agreement). Moreover, because the Arbitration Provision contains a valid and enforceable delegation provision, *see* Opening Br. at 13-15 (ECF No. 13), one which Respondents do not specifically challenge, the question of unconscionability is to be decided by the arbitrator. *Brumley v. Austin Ctrs. for Exceptional Students Inc.*, 2019 WL 1077683, at *3 (D. Ariz. Mar. 6, 2019). Finally, even if this challenge were properly before this Court, Respondents' unconscionability argument fails because "there is no allegation or evidence that the contents of the document were misrepresented directly or indirectly to [them] and consequently the elements of . . . unconscionability are absent." *Roberson v. SMF, LLC*, 2020 WL 6585586, at *2 (D. Ariz. Nov. 10, 2020) (Logan J.).

In any event, numerous courts interpreting the Provider Agreement have analyzed similar attacks on the Provider Agreement and Provider Manual and have concluded that

[13] *See* Harris Supp. Decl., Ex. 1 at 42, Ex. 3 at 47 and Ex. 4 at 37.

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the provision permitting amendment is not unconscionable.[14] *See Paduano*, 55 F. Supp. 3d at 417-8 (holding that the arbitration provision was not procedurally unconscionable under Arizona law because Caremark reserved the right to unilaterally modify any provision of the Provider Agreement); *Uptown Drug Co. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1181-82 (N.D. Cal. 2013) (rejecting unconscionability argument under California law because "Uptown has submitted no evidence to show that it could not have negotiated to alter the terms of the proposed amendments, or that it could not have terminated its business relationship with Caremark and established a relationship with an alternative partner in the event that Caremark refused to negotiate"); *W. Va. CVS Pharmacy*, 238 W. Va. at 475 (holding that the provision permitting amendments "is enforceable under Arizona law"); *see also Hopkinton Drug, Inc. v. CaremarkPCS, L.L.C.*, 77 F. Supp. 3d 237, 244 (D. Mass. 2015) (holding that under Arizona law, "the course of performance and subsequent conduct of the parties is particularly useful" to showing that parties are operating under an agreement despite amendments).[15]

III. The Recovery Act Does Not Preclude Arbitration.

A. Neither the Statute nor any Case Precludes Arbitration of Recovery Act Claims.

Respondents' argument that the Recovery Act "displaces" arbitration, Opp. at 24 (ECF No. 20), is not supported by the statute or caselaw. Nothing in the statutory text precludes arbitration; indeed, the Recovery Act does not mention arbitration. Where a statute is silent as to arbitrability, the Supreme Court has held that arbitration of the

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[14] Courts have also rejected the argument that the amendment provision renders the contract illusory under Arizona law. *Grasso Enters., LLC v. CVS Health Corp.*, 143 F. Supp. 3d 530, 538-39 (W.D. Tex. 2015).

[15] The cases cited by the Nation in footnote 22 of the opposition, Opp. at 21 n.22 (ECF No. 20), are not to the contrary. The decision in *Edwards* is factually distinguishable because the provision at issue was amended unilaterally to encompass the plaintiff in that case after he had signed the earlier version; there was no such amendment here. 2018 WL 637382, at *7. And the other cited cases involve individual employment contracts and issues under the Fair Labor Standards Act—neither of which is applicable to commercial contracts between two sophisticated entities represented by counsel.

statutory claim is permissible. *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) ("Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced . . . ."); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018) ("Congress has likewise shown that it knows how to override the Arbitration Act when it—by explaining, for example, that, '[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if' certain conditions are met, or that '[n]o predispute arbitration agreement shall be valid or enforceable' in other circumstances, or that requiring a party to arbitrate is 'unlawful' in other circumstances yet." (citations omitted)).

Likewise, there is no case—identified by Respondents or otherwise—holding that claims brought under the Recovery Act cannot be arbitrated. Nor do Respondents dispute that the Arbitration Provision encompasses its claims under the Recovery Act.[16] Respondents have not carried their burden of "show[ing] that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 227 (1987), thus, the presumption of arbitration stands. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1063 (9th Cir. 2020) (FAA creates a "presumption in favor of arbitration"), *petition for certiorari filed* Mar. 17, 2021. Contrary to Respondents' position, the Supreme Court has not carved out a special rule for tribes with respect to the arbitration of federal statutory claims. Opp. at 26-27 & n.28 (ECF No. 20). Rather, the Supreme Court has made clear that federal statutory claims can be arbitrated unless the statute expressly prohibits arbitration. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see*

[16] Likewise, as noted, Respondents do not dispute that the Arbitration Provision contains a valid delegation clause, which requires the arbitrator, not the Court, to decide all issues of arbitrability. *See* Opening Br. at 13-15 (ECF No. 13) (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015)).

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also Opening Br. at 19 (ECF No. 13) (collecting cases). Nothing in the cases cited by Respondents supplants that well-settled rule.

Finally, although Respondents emphasize the terms "prevent" and "hinder" in the Recovery Act to argue that the statute precludes arbitration, Respondents have not identified a single case involving the Recovery Act or any other statute containing those terms that support their argument. To the contrary, *CompuCredit* and *Epic Systems* make clear that when Congress wishes to preclude arbitration, it explicitly says so by using the word "arbitration." The Recovery Act contains no such explicit prohibition. Nor have Respondents pointed to anything in the legislative history that would demonstrate that Congress intended to preclude arbitration of Recovery Act claims or, more importantly, void arbitration provisions to which tribes had previously agreed. None of the scant legislative history Respondents cite concerns arbitration, and thus is insufficient to establish a Congressional command to categorically preclude arbitration of these statutory claims. In order to avoid the plain language of their agreement, Respondents are asking the Court to write into the Recovery Act a prohibition on arbitration—something Congress did not do, and something the Supreme Court has never done to any federal statute despite being asked to do so many times. *Epic Sys.*, 138 S. Ct. at 1627 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, *this Court has rejected every such effort to date* . . . ." (emphasis added)).

B. Arbitration Does not Prevent Effective Vindication of Respondents' Recovery Act Claims.

Respondents argue that certain specific terms of the Arbitration Provision would prevent the "effective vindication" of the Nation's rights. Opp. at 25-33 (ECF No. 20). As a threshold matter, the Court should reject Respondents' contention that "the 'effective vindication' standard . . . is itself more difficult to meet than the 'prevent or hinder' standard under which the Nation's case must be evaluated." *Id.* at 31; *see also id.* at 27, 30, 33. Again, Respondents cite no authority supporting their position, let alone

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that the terms "prevent or hinder" in the statute have anything to do with arbitration. Moreover, courts have on occasion analyzed the "effective vindication" principle using the terms "prevent" or "hinder"—indicating that these terms are, at most, synonymous. *See, e.g.*, *Badinelli v. The Tuxedo Club*, 183 F. Supp. 3d 450, 457 (S.D.N.Y. 2016) ("The Court therefore rejects plaintiff's argument that the cost of arbitration would hinder plaintiff from vindicating his rights.").

It is Respondents' burden to show that the statutory claim should not be arbitrated. *McMahon*, 482 U.S. at 227. But Respondents do not argue that the requirements of the Arbitration Provision, including the costs, escrow and fee provisions, are prohibitive or will prevent them from arbitrating. Respondents do not say that they cannot afford to, or will otherwise be prevented from, arbitrating if the Court grants the Petition. Indeed, the Nation is a sophisticated entity that has a "strong tradition of organized self-government," "has developed a comprehensive healthcare system," Compl., ¶ 8 (ECF No. 1-2), and is being represented by two firms in this case and two firms in the litigation in Oklahoma. And Respondents did not submit evidence on their inability to pay for arbitration, which itself is fatal to their argument. *See, e.g.*, *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 252 (Ariz. Ct. App. 2005) (rejecting argument that arbitration clause was substantively unconscionable because the opposing party failed to present "individualized evidence to establish that the costs of arbitration [were] prohibitive").

Instead, without evidence, Respondents argue that "many" other unspecified tribes and tribal organizations may be deterred from bringing suit. Opp. at 28 (ECF No. 20). Such an argument is insufficient to defeat arbitration. *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (holding that the mere "risk that [a litigant] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement"). The Fifth Circuit explicitly rejected this argument in a challenge to arbitration under a substantively similar provider agreement. *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 267 (5th Cir. 2014) (rejecting plaintiffs'

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attempt to avoid arbitration based on fees and cost shifting terms in substantively identical agreement because "plaintiffs failed to present any *specific, individualized evidence* that they were likely to face prohibitive costs if forced to arbitrate their underlying claims" (emphasis added)); *accord Burton's Pharmacy, Inc. v. CVS Caremark Corp.*, 2015 WL 5430354, at *7 (M.D.N.C. Sept. 15, 2015); *see also Clark v. Renaissance W., LLC*, 307 P.3d 77, 80 (Ariz. Ct. App. 2013) ("The party seeking to invalidate an arbitration agreement on [the] grounds [of fees or costs] has the burden of proving that arbitration would be prohibitively expensive.").

Respondents' reliance on *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003) *cited in* Opp. at 28, is misplaced. *Ingle* involved an employment dispute, not a commercial dispute, and an arbitration agreement that required the employee to bear arbitration costs even if she were successful. *Id.* The court found the cost-splitting provision unconscionable because it "blatantly offends basic principles of fairness." *Id.* Thus, even assuming *Ingle*'s holding applied outside of the employment context, the case is inapposite because the Arbitration Provision does not require as successful party to share costs. *See* Harris Decl. Ex. M, Provider Manual, § 15.09, at 91 (ECF No. 9).

Respondents likewise fail to demonstrate, as is their burden, how the other provisions in the Arbitration Provision will hinder them specifically from pursuing their Recovery Act claims. Respondents do not explain how the dispute notice requirement displaces the statute of limitations in the Recovery Act. *See* Opp. at 29-30 (ECF No. 20). That is because there is no conflict between the two. The notice requirement applies to the process envisioned by the Provider Agreement; it does not purport to create a separate statute of limitations for claims. And, regardless, this is a question for the arbitrator.

Nor do Respondents specify how the discovery provisions set forth in the Arbitration Provision will prevent them from obtaining necessary discovery; they do not even identify what discovery they will be prevented from seeking. *See id.* at 30-31. The Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, rejected an almost identical

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challenge to an arbitration agreement because the challenging party, an employee, failed to specify what discovery was needed from the employer to effectively litigate his claims. 500 U.S. 20, 31 (1991). In doing so, the Supreme Court emphasized that arbitration agreements "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* (quotation marks and citation omitted). This is precisely what Respondents agreed to here. Moreover, Respondents' cases are readily distinguishable because they involve individual employee-plaintiffs; they are cases in which the plaintiff's claims could only be supported by information in the possession of the employer. This is not an employment case, and Respondents by their own admissions have access to the information allegedly supporting their claims.

Respondents also do not explain how preserving confidentiality will prevent the Nation from pursuing its Recovery Act claims. Respondents assert that the Nation will be prevented "from learning the results of other proceedings involving similar claims and contracts," Opp. at 33 (ECF No. 20), but do not explain how this will hinder their rights. Regardless, in rejecting a similar challenge to a Caremark provider agreement, a court explained that "Arizona cases have routinely found that confidentiality provisions contained in arbitration clauses are not unconscionable." *Grasso Enters.*, 143 F. Supp. 3d at 540 (collecting cases). The decision in *Longnecker v. American Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014), cited in footnote 35 of the opposition, is distinguishable (like many other cases cited by Respondents) because it was based on California law and involved a dispute between an employee and employer with unequal power. *See Grasso Enters.*, 143 F. Supp. 3d at 540 (distinguishing *Longnecker* while upholding confidentiality provision in provider agreement).

Nor have Respondents carried their burden of demonstrating that the Arbitration Provision impermissibly limits their recovery. Contrary to Respondents' argument, there is no conflict between the Recovery Act and the Arbitration Provision, because the latter expressly permits the arbitrator to award damages "as required by law." *See* Harris Decl.

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Ex. M, Provider Manual, § 15.09, at 91 (ECF No. 9). Thus, should Respondents prevail in arbitration, nothing prevents them from seeking all damages they are entitled to under the Recovery Act. And several district courts analyzing this same provision in other Provider Agreements have concluded that it is not unconscionable. *See, e.g.*, *Paduano*, 55 F. Supp. 3d at 419; *Hopkinton Drug*, 77 F. Supp. 3d at 247; *see also Burton's*, 2015 WL 5430354, at *7 (rejecting challenge to arbitration provision because party failed to show that provision limited statutory damages).

Respondents further argue the limitation on damages is impermissible because they are seeking punitive damages. Opp. at 32 (ECF No. 20). The Recovery Act does not permit punitive damages. To the extent Respondents rely on their state law negligence claim as the basis for punitive damages, that reliance is misplaced in an effective vindication challenge. The effective vindication doctrine only applies to federal statutory rights. *See Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006).

Finally, no other case cited by Respondents in footnotes has relevance. *See* Opp. at nn.29, 33, 35 (ECF No. 20). Virtually all of these cases are employment cases under the FLSA or Title VII, and involve an individual employee claimant, often with scant resources; in contrast, the Nation runs its own healthcare system and has its own Legal Division that reviews contracts. No case that Respondents cite supports applying the limited exception to the arbitrability of statutory claims here.[17]

CONCLUSION

For the reasons set forth herein and in all prior filed, accompanying and referenced papers, Petitioners respectfully request the Court grant its Petition to Compel Arbitration.

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[17] Even if Respondents were to demonstrate that any portion of the Arbitration Provision should not be enforced, that still would not preclude arbitration because any legally objectionable terms can be severed. The Provider Manual expressly provides that unenforceable terms can be severed while still leaving intact the Arbitration Provision. *See* Harris Decl. Ex. M, Provider Manual, § 15.09, at 91 (ECF No. 9). And courts applying Arizona law have concluded the same. *See, e.g.*, *Paduano*, 55 F. Supp. 3d at 422; *see also Edwards*, 2018 WL 637382, at *5.

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Respectfully submitted,

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