EXHIBIT A

Case No. 20-CV-242-NDF

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

CARLEY CLAUSEN, Plaintiff, vs. EASTERN SHOSHONE TRIBE HEALTH CARE PLAN, EASTERN SHOSHONE TRIBE, FIRST NATION, aka FIRST NATION HEALTHCARE, LLC Defendants.	)	Case No. 20-CV-242-NDF

DEFENDANT FIRSTNATION HEALTHCARE, LLC's BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

In accordance with Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) Defendant FirstNation Healthcare, LLC, ("FirstNation") brings this Motion to Dismiss Plaintiff Carly Clausen's ("Plaintiff") claims against FirstNation. Plaintiff's claims fail for a number of reasons, namely, lack of jurisdiction, failure to exhaust tribal court remedies, and inability to join an indispensable party. Alternatively, if she *does* have valid claims under the Employee Retirement Security Income Act ("ERISA"), 29 U.S.C. § 1001 et seq., which she does not, then her state law claims (Counts Four through Seven) are categorically pre-empted.

II. ARGUMENT

a. This Court Lacks Jurisdiction over Plaintiff's Claims against FirstNation

Courts have "repeatedly characterized standing as an element of subject matter jurisdiction." *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1224 (10th Cir. 2012). The Tenth Circuit has held that under Fed. R. Civ. P. 12(b)(1), "a party may move to dismiss a

claim for lack of subject-matter jurisdiction, mounting either a facial or factual attack." *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020) (holding district court properly dismissed Plaintiff's claims under 12(b)(1)). A "factual attack goes beyond the allegations in the complaint and adduces evidence to contest jurisdiction." *Id*. (citation omitted) (citing *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995)). As a result, the court "has wide discretion to allow documentary and even testimonial evidence under Rule 12(b)(1)." *Paper, Allied-Indus., Chem. And Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005); *see also* 2 Moore's Federal Practice - Civil § 12.30[4] (2020) (quoting *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458, 464 (3d Cir. 2013)) ("…when a court reviews a complaint under a factual attack, the allegations have 'no presumptive truthfulness.'").

1. Plaintiff Lacks Article III Standing for her Claims against FirstNation

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 537 U.S. 149, 157 (2014). If Plaintiff cannot establish jurisdiction, then the Court has "no business deciding" the case. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The Tenth Circuit has instructed:

> To establish Article III standing, a plaintiff must demonstrate that [s]he has satisfied each of three 'irreducible constitutional' elements. Specifically, the plaintiff must show that: (1) [s]he has suffered an 'injury in fact'; (2) the injury is 'fairly traceable' to the complained-of conduct; and (3) it is 'likely as opposed to merely speculative that the injury will be redressed by a favorable decision.'

United States v. Ramos, 695 F.3d 1035, 1046 (10th Cir. 2012) (citation omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Demonstrating that an injury is fairly traceable further "require[s] proof of a substantial likelihood that *the defendant's* conduct caused plaintiff's injury in fact." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (emphasis added). Consequently, injuries that are "the result of the independent action of some third party not before the court" do not confer

Article III jurisdiction. *Lujan*, 504 U.S. at 559. Further, "[i]f speculative inferences are necessary to connect a plaintiff's injury to the challenged action, [the plaintiff's] burden has not been met." *Habecker v. Town of Estes Park, Colo*., 518 F.3d 1217, 1225 (10th Cir. 2008) (internal quotation and citation omitted). Plaintiff's claims must be dismissed because her injury is not "fairly traceable" to FirstNation, but rather "the independent action of [a] third party not before the court."[1] *Id*.

When Plaintiff's allegations against FirstNation are cleared of speculation and legal conclusions, the facts are these:

> (1) Plaintiff received medical services covered by the Eastern Shoshone Tribe's Health Care Plan ("Plan"). Compl. ¶¶ 23-26; *see* Silverstein Decl., Ex. B ¶ 3; Silverstein Decl., Ex. B-1 (Eastern Shoshone Tribe Health Care Plan, as amended).[2]
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> (2) FirstNation, as the Eastern Shoshone Tribe's Claims Processor for the Plan, processed and approved payment for the health care services that Plaintiff received in accordance with the Plan's participating provider organization ("PPO") benefits and the agreement with PPO administrator First Health Group Corp ("First Health").[3] Compl. ¶¶ 27-28, 45, Dkt. 1 at 131-137, *see* Silverstein Decl., Ex. B-1.
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> (3) A dispute arose with SageWest Health Care ("SageWest"), a hospital that provided services to Plaintiff, regarding the amount billed for Plaintiff's medical services. Compl. ¶¶ 33-34, Dkt. 1 at 139-40 and 145-46.
>
> (4) SageWest demanded payment from Plaintiff and may have turned her account over to collections. Compl. ¶¶ 31, 35, 38; *see* Dkt. 1, 152-53.

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[1] For purposes of this motion only, FirstNation does not challenge Plaintiff's ability to demonstrate an "injury in fact."

[2] Plaintiff did not provide the version of the Plan in place during the relevant time. *See* Dkt. 1, 27-108. Therefore, FirstNation provides the relevant version of the Plan complete with amendments at Silverstein Decl., Ex. B-1.

[3] Plaintiff alleges that "FirstNation caused EST to replace First Health with FirstNation as the Plan's Third Party Administrator." Compl. ¶ 40. This is factually incorrect. First Health Group Corp. was added to the Plan in 2014 as a participating provider network ("PPO") and continued as such throughout the time Plaintiff received the medical services at issue. Silverstein Decl. ¶¶ 4, 6; *see id.* Ex. B-1 at 86-94; Compl. ¶ 17.

> (5) Plaintiff, the Eastern Shoshone Tribe ("Tribe"), and FirstNation have not resolved the dispute with SageWest about the rates SageWest charged for Plaintiff's care. Compl. ¶¶ 33-34, Dkt. 1 at 139-40 and 145-46.

Central to Plaintiff's allegations is speculation that FirstNation is lying about the Plan rates and that FirstNation has a practice of allowing claims for "non-eligible individuals" to go to collection. *See* Compl. ¶¶ 45-46. Plaintiff is incorrect. As was represented to Plaintiff and documented in her exhibits, FirstNation, in its role as the Tribe's Claims Processor for the Plan, has sought to resolve billing disputes with SageWest now for years. Compl. ¶¶ 33-34, Dkt. 1 at 139-40 and 145-46. As reflected in the Explanations of Benefits ("EOBs") Plaintiff submitted with her Complaint, FirstNation approved Plaintiff's claims in accordance with the rates agreed to by SageWest and First Health. Compl. ¶¶ 33-34, Dkt. 1 at 139-40.

On the other hand, there is clear "proof of a substantial likelihood" that SageWest's conduct caused Plaintiff's injury in fact. *Gandy*, 416 F.3d at 1156. Had SageWest not engaged in dramatic overbilling for health care services and *not* sent harassing bill collection notices for disputed claims, Plaintiff would not have suffered the injuries she now claims. *See* Compl. ¶ 35. Therefore, Plaintiff's injuries are "fairly traceable" to SageWest; and, thus, it is "likely, as opposed to merely speculative," that her injuries are "redressable" by SageWest, not FirstNation. *Petrella v. Brownback*, 697 F.3d 1285, 1294 (10th Cir. 2012) (quoting *Lujan*, 504 U.S. at 561).

Plaintiff has failed to demonstrate that her alleged injury was caused by the challenged action of FirstNation and not the result of an "independent action of some third party not before the court," specifically, SageWest. *Id.* at 1158. "Without this link, [Plaintiff's] asserted injury cannot be said to be fairly traceable" to FirstNation and "does not give rise to standing to pursue Plaintiff's claims." *Habecker*, 518 F.3d at 1226. Therefore, Article III does not permit this Court

to decide the merits of Plaintiff's claims against FirstNation. *Gandy*, 416 F.3d at 1158. Plaintiff's claims against FirstNation must be dismissed.

2. Plaintiff's Claims Must be Dismissed for Failure to Exhaust Tribal Court Remedies

Plaintiff's Complaint alleges misconduct by FirstNation predicated, in part, on the false allegation that "FirstNation caused EST to replace First Health . . . as the Plan's Third Party Administrator," Compl. ¶ 40, and that "FirstNation did not successfully negotiate the discounted rates that it promised to obtain but . . . began falsely representing that new, more substantial discounts had been negotiated." Compl. ¶ 42. Plaintiff's fraud allegations do not merely call into question the rates to be paid for services accessed through First Health PPO, they question the validity of the Plan and related agreements. Because the threshold question regarding the Plan's validity can only be answered by an Eastern Shoshone Tribal Court applying Eastern Shoshone Tribal law, federal law dictates that Plaintiff must exhaust her Tribal Court remedies before proceeding in this Court with any claims she might assert under ERISA.

The Tenth Circuit has concluded that "as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." *Tillett v. Lujan,* 931 F.2d 636, 640 (10th Cir.1991). This doctrine is "based on strong policy interests recognizing tribal sovereignty, including (1) furthering congressional policy of supporting self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1237 (10th Cir. 2014) (citing *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997)) (internal quotations omitted). Federal courts recognize that "tribal courts are best qualified to

interpret and apply tribal law." *Iowa Mut. Inc. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (internal citations and quotations omitted). As such, exceptions to the doctrine typically will not apply as long as there is "a colorable claim that [tribal courts] have jurisdiction." *Stidham*, 762 F.3d at 1238.

Cases involving ERISA claims are no different. Courts defer to a Tribal Court's interpretation of tribal law where the case implicates questions of tribal governance. *Koopman v. Forest County Potawatomi Member Ben. Plan*, No. 06-C-163, 2006 WL 1785769 at * 2 (E.D.Wisc. Jun. 26, 2006) (interpretation of the tribal constitution, role of the tribal council, and powers of tribal authorities are "matters best left to the Tribe's courts themselves"). This includes cases where the validity of a Tribe's employee benefits plan is at issue. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1222 (D. Minn. 1995) (dismissing federal suit and holding that district court could not exercise jurisdiction until tribal remedies were exhausted).

Here, Plaintiff's claims attack the lawful legitimacy of the Plan itself, as she alleges not simply that the Plan was administered improperly, but that the Plan rates FirstNation negotiated, and potentially the entire agreement with First Health, do not exist. *See, e.g.*, Compl. ¶ 42 ("FirstNation did not successfully negotiate the discounted rates that it promised . . ."); ¶ 44 ("FirstNation . . . issu[ed] EOBs purporting to allow claims on the basis of new discounted rates"); ¶ 81 ("FirstNation . . . falsely represented . . . that it had negotiated discount rates . . . and that it had, or would, fully pay medical benefits according to the negotiated rates."). Such allegations, if true, would have serious implications for any related agreements the Tribe entered into, directly affecting the ability of the Tribe to provide for the welfare of all its employees and citizens who are enrolled under the Plan. In other words, an "ostensibly [] simple suit about a health benefit plan [] has the potential to blossom into a wide-ranging case about . . . the powers

of tribal authorities." *Koopman*, 2006 WL 1785769 at * 2. As such, it is within the Tribal court's jurisdiction to determine whether a valid and enforceable Plan was in effect and, if so, what the terms of that Plan were.

Finally, Plaintiff's own actions demonstrate that she understands Tribal law governs her claims concerning any alleged nonpayment for her health care services. Plaintiff first filed claims against FirstNation related to the Plan on November 27, 2018, in Tribal Court. Compl. ¶ 1, Dkt. 1 at 2, n. 1. She voluntarily dismissed her claims about five months later after the case was stayed pending settlement negotiations, *id*., and because those claims were dismissed without prejudice, there was no final adjudication, *see id*. Plaintiff cannot voluntarily dismiss her own claims in Tribal Court and thereby avoid her lawful obligation to exhaust those remedies before running to federal court. Until Tribal Court review is complete, the Eastern Shoshone Tribal Courts "have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987).

In sum, questions regarding the validity and enforceability of the Plan necessarily implicate issues of Tribal governance and sovereignty and must be answered in Tribal Court before this Court can determine whether Plaintiff has cognizable claims under ERISA. This would not only conform to the Tenth Circuit's clear mandate that plaintiffs exhaust tribal court remedies before bringing claims that sound in tribal law to a federal court, but also save this Court from expending judicial time and resources to adjudicate a case that, if addressed first in Eastern Shoshone courts, could alleviate the need for this Court to address the alleged ERISA claims altogether. *See, e.g., Prescott v. Little Six, Inc.* 387 F.3d. 753, 757 (8th Cir. 2004) ("Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply.").

Plaintiff's claims should be dismissed for failure to exhaust her Tribal court remedies.

3. FirstNation Functions as an Arm of the Tribe and Therefore is Shielded by the Tribe's Sovereign Immunity

As an arm of the Tribe, FirstNation is shielded from the Court's jurisdiction by the Tribe's sovereign immunity. It is well settled in federal courts that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers[,]" and that "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal citations and quotations omitted). Without "unequivocally expressed" congressional authorization or express waiver by the Tribe, Tribes are immune from suit. *Id.*; *see also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) ("Among the core aspects of [inherent] sovereignty that tribes possess— subject to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers.") (internal quotations omitted).

Nothing in Plaintiff's Complaint asserts or alleges that the Tribe's sovereign immunity has been waived. The Plan itself contains *no* language indicating the Eastern Shoshone Tribe voluntarily waived its sovereign immunity. Instead, the Plan makes clear that "the Eastern Shoshone Tribe health plan is not governed by ERISA," Silverstein Decl., Ex. B-1 at 61, Dkt. 1 at 87, but instead is governed by applicable tribal law and regulations. Without any language to waive the Tribe's sovereign immunity, that immunity remains intact. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.").

This is especially true here where the Tribe's involvement in the issues that allegedly gave rise to the Plaintiff's claims—namely the Tribe's role as the Plan Administrator and

Fiduciary—constitute both an essential and "necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014). The Eastern Shoshone Tribe sponsors a self-funded employee welfare benefit plan through which it makes available a program of health care benefits to its Tribal citizen and non-Tribal citizen employees. The Plan is funded from the general assets of the Tribe or from a separate trust funded through salary reductions and/or other Plan or Tribal assets. *See* Silverstein Decl., Ex. B-1, 5. The Plan is also funded in part by a 638 contract with the Indian Health Service pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq*. (formerly codified as 25 U.S.C. § 450 *et seq*.). The Tribe's use of federal IHS funding to fund its Plan is an act of sovereignty and self-governance, shielded from suit by sovereign immunity.

Further, the Tribe's sovereign immunity extends to shield FirstNation from suit because—within the context of claims related to the Plan—FirstNation functions purely as an "arm of the Tribe." To determine whether an entity is entitled to a tribe's sovereign immunity, the Tenth Circuit has articulated a six-factor test to determine whether the tribal entity functions as an "arm of the tribe." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010). Accordingly, the Tenth Circuit considers:

(1) their method of creation;
(2) their purpose;
(3) their structure, ownership, and management, including the amount of control the Tribe has over the entities;
(4) whether the Tribe intended for the entities to have tribal sovereign immunity;
(5) the financial relationship between the tribe and the entities; and
(6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities.

Id. at 1181.[4]

In articulating the "arm of the Tribe" test, courts analogize federal and state immunity with tribal sovereign immunity. *See, e.g., United States v. U. S. Fid. & Guar. Co*., 309 U.S. 506, 512-13 (1940) (analogizing sovereign immunity of federal government to immunity of Indian Tribes); *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) ("There is no reason to depart from these general rules [of federal and state sovereign immunity] in the context of tribal sovereign immunity."); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) (Indian tribes "have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution."). Thus, just as independent contractors with federal and state governments may receive the protections of immunity "derived" from the sovereign that is directing its operations, *see, e.g., Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940), so should independent contractors with tribal governments.

Federal courts have concluded that third-party health insurance contractors, like FirstNation, have been entitled to derivative sovereign immunity in similar circumstances. In *Pine View Gardens, Inc. v. Mut. of Omaha Ins. Co.*, 485 F.2d 1073 (D.C. Cir. 1973), the D.C. Circuit Court of Appeals concluded that a health insurance provider, which served as a fiduciary intermediary of the United States under the Medicare Act, was protected by federal sovereign immunity in a suit for unpaid claims. The Court determined that the lawsuit for payment of

[4] Other Circuits have adopted nearly identical "arm of the Tribe" tests. *See, e.g*., *United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939 (9th Cir. 2017) (turning to several factors to determine whether an entity is an arm of the Tribe, "including: (1) the method of creation of the [entity]; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of control the tribe has over the entit[y]; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entit[y]") (internal quotations omitted); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287 (11th Cir. 2015) ("[W]e agree with our sister circuits that have concluded that an entity that functions as an arm of a tribe shares in the tribe's immunity.").

unpaid claims "is seeking, indirectly . . . payment by the Government . . . [and therefore] is an attempt to compel the Government to act." *Id*. at 1074-75. In that instance, the Court concluded the federal government was the real party in interest, and the insurer was entitled to the government's derivative immunity.

Here, the Tribe's immunity encompasses FirstNation because:

- The Eastern Shoshone Tribe exercises authority and control over the administration of the Plan. Silverstein Decl., Ex. B-1, 6 (naming the Tribe as Plan Administrator and stating "[t]he decision of the Plan Administrator will be final and binding on all interested parties").

- The Plan states that FirstNation's role is to serve as the Tribe's "Claims Processor." Silverstein Decl., Ex. B-1, 94.

- As Claims Processor, FirstNation has no authority to pay any claims made for health care services provided, absent the Tribe's decision to pay. Silverstein Decl., Ex. B-1, 6 (naming the Tribe as Plan Administrator and stating "[t]he decision of the Plan Administrator will be final and binding on all interested parties").

- All payments for health care services come directly from the Tribe and not FirstNation. Silverstein Decl., Ex. B-1, (identifying "Funding of the Plan" as "Eastern Shoshone Tribe and Employee Contributions"); Administrative Services Agreement between the Eastern Shoshone Tribe and FirstNation ("ASA"), Ex. C § 4.4 (the Tribe will "fund the Claims Payment Account" and "deposit amounts necessary to pay [adjudicated] claims"), § 4.5 (FirstNation not required to "issue payment for Claims . . . unless the Plan Sponsor has previously deposited sufficient funds to cover such payment"), *id.* at Ex. III § 3.5 (the Tribe "shall fund claims payable for the provision of medical services on behalf of Covered Individuals"); *id*. at § 3.7 (the Tribe "shall be . . . the payer for network agreement purposes, and will be responsible for abiding by the terms of the applicable network agreement(s)"); *id*. ("Payment, and costs incurred by virtue of provider services, dispute resolution, and conflicts due to network agreements shall be borne solely by the Plan Sponsor.").

- The doctrinal purposes of sovereign immunity are served by the doctrine's extension to FirstNation in this instance since the Plan itself exemplifies sovereignty and tribal self-governance.

In particular, the extension of sovereign immunity to FirstNation is essential because it "directly protecs the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Breakthrough Mgmt. Grp., Inc*., 629 F.3d at 1195 (quoting

Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006). Under the ASA's plain language, and the Plan, any judgment against FirstNation in Plaintiff's favor would ultimately be paid by the Plan Fiduciary, the Tribe. The ASA specifies that FirstNation "shall not be obligated to disburse more in payment under this Agreement than the [Tribe] shall have made available in the Claims Payment Account," and FirstNation "has no responsibility, and the [Tribe] has total responsibility, for payment of claims arising under the Plan and all expenses incidental to the Plan." ASA, Ex. C at § 2.2(b)–(c). This fact alone supports the extension of the Tribe's sovereign immunity to FirstNation. *See United States ex rel. Cain v. Salish Kootenai Coll., Inc*., 862 F.3d 939, 944 (9th Cir. 2017) ("The most crucial question ... is whether the named defendant has such independent status that a judgment against the defendant would not impact the [Tribe's] treasury."). Because Plaintiff's claims against FirstNation are actually claims against the Tribe's treasury, sovereign immunity applies. *Breakthrough Mgmt.*, 629 F.3d at 1195 (the fact that "an adverse judgment against [the defendant] would therefore reduce the Tribe's income" weighs heavily in favor of extending derivative sovereign immunity).

In sum, the Tribe's sovereign immunity precludes the exercise of jurisdiction over FirstNation in Plaintiff's complaint and compels the dismissal of any and all claims against FirstNation. *See Fletcher v. United States*, 116 F.3d 1315, 1323-26 (10th Cir. 1997).

b. In the Alternative, Plaintiff's State Law Claims are Pre-empted by ERISA

Alternatively, if this Court were to conclude Plaintiff's claims are fairly traceable to FirstNation's role as Claims Processor under the Plan, *and* that the Eastern Shoshone Tribe's sovereign immunity has been waived, *and* that somehow an exception applies and Plaintiff need not exhaust her tribal court remedies concerning the interpretation of Tribal law governing the Plan, *and* that the Tribe is not an indispensable party to an adjudication of what the Tribe, as the

Plan Administrator, must pay for Plaintiff's claims, then, in the alternative and at the very least, Plaintiff's state law claims—specifically Causes of Action Four through Seven—must be dismissed pursuant to Rule 12(b)(6) because they are preempted by ERISA.

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In other words, the Court must take into consideration "whether [the] factual allegations 'plausibly give rise to an entitlement to relief.'" *Chapman v. Wyoming Dep't of Corr.*, No. 13-CV-226-J, 2014 WL 11352900, at *5 (D. Wyo. June 12, 2014), aff'd, 603 F. App'x 710 (10th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 679).

ERISA's civil enforcement provisions mandate that, except under certain circumstances identified in § 1144(b), "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a). The Supreme Court has stated that:

> [T]he detailed provisions of § 502(a) [§ 1144(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) [§ 1144(a)] of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

Aetna Health Inc. v. Davila, 542 U.S. 200, 208-209 (2005) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). "The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee

benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)).

In *Lind v. Aetna Health, Inc.*, the Tenth Circuit held that ERISA preempted state common law tort claims, explaining that "[b]oth the language of the statute and its legislative history indicate that Congress intended ERISA to sweep with broad force." 466 F.3d 1195, 1198 (10th Cir. 2006). The Tenth Circuit went on to state that "the Supreme Court has found ERISA to preempt *nearly all* state claims relating causes of action against covered health insurers, even when 'the elements of the state cause of action [do] not precisely duplicate the elements of an ERISA claim.'" *Id*. (quoting *Davila,* 542 U.S. at 216) (emphasis added).

This Court has further held that "clear congressional intent [demonstrates] that ERISA's civil enforcement scheme is exclusive and displaces all state laws that conflict with that comprehensive civil enforcement scheme of ERISA." *Baker*, 2011 WL 13079074, at *8. Plaintiff's Complaint sets forth four state common law claims (Causes of Action Four through Seven), all of which relate to an employee benefit plan. Compl., Dkt. 1 at 18-22. To allow Plaintiff's state law claims to proceed would violate Congress's intent and policy decisions and undermine the "careful balancing" of interests discussed in *Pilot Life*, 481 U.S. at 54.

Furthermore, "the Tenth Circuit has recognized four categories of state laws that are preempted by ERISA:

> (1) laws regulating the type of benefits or terms of ERISA plans;
> (2) laws creating reporting, disclosure, funding or vesting requirements for such plans;
> (3) laws providing rules for calculating the amount of benefits to be paid under such plans; and
> (4) laws and common-law rules providing remedies for misconduct growing out of the administration of such plans.

David P. Coldesina D.D.S. v. Estate of Simper, 407 F.3d 1126, 1136 (10th Cir. 2005) (citing *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 990 (10th Cir.1999)). Here, Plaintiff's state common law claims, which seek remedies for alleged misconduct growing out of the administration of the Plan, clearly fall within the fourth category of state laws preempted by ERISA in the Tenth Circuit, and are, therefore, preempted.

Additionally, the U.S. Supreme Court and the Tenth Circuit have explicitly held in previous cases that the class of state common law claims the Plaintiff has brought here (breach of a covenant of good faith and fair dealing implied by contract, fraud, and infliction of emotional distress) are preempted by ERISA pursuant to 29 U.S.C. § 1144(a).The cases include **bad faith** (*Kidneigh v. Unum Life Ins. Co. of America*, 345 F.3d 1183 (10th Cir. 2003)); (*Kelley v. Sears, Roebuck and Co.*, 882 F.2d 453 (10th Cir. 1989)), **infliction of mental and emotional distress** (*Pilot Life*, 481 U.S. 41), **breach of contract** (*Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); (*Pilot Life*, 481 U.S. 41), **fraud** (*Felix v. Lucent Tech., Inc.*, 387 F.3d 1146 (10th Cir. 2004)), wrongful denial of benefits (*Davila*, 542 U.S. 200), unlawful discharge to prevent attainment of benefits under an ERISA plan (*Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990)), retaliatory discharge (*Metro. Life Ins. Co.*, 481 U.S. 58), loss of consortium (*Kidneigh*, 345 F.3d 1138), and wrongful termination of benefits (*id*.).

ERISA preempts the above-described state common law claims "because they conflict with ERISA's remedial scheme . . . insofar as they provide an 'additional claim' to plaintiffs . . . and [therefore] 'fit within the category of state laws [the U.S. Supreme Court,] in *Pilot Life*[,] had held to be incompatible with ERISA's enforcement scheme . . . .'" *Kidneigh*, 345 F.3d at 1185. "Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) [29 U.S.C. § 1132(a)]

remedies were permitted, even if the elements of the state causes of action did not precisely duplicate the elements of an ERISA claim." *Davila*, 542 U.S. at 216. Plaintiff's state law causes of action cannot be permitted by this Court to supplement the remedies provided by ERISA and must be dismissed.

Similarly, Plaintiff's request for "exemplary damages" must be denied because "[n]owhere does [ERISA] allow consequential or punitive damages." *Conover v. Aetna US Health Care, Inc.*, 320 F.3d 1076, 1080 (10th Cir. 2003). "Where such damages are available, they 'provide[ ] a cause of action excluded from [ERISA's] civil enforcement scheme and would therefore pose an obstacle to the purposes and objectives of Congress.'" *Kidneigh*, 345 F.3d at 1185 (quoting *Conover*, 320 F.3d at 1080). Plaintiff's claim for exemplary damages must be dismissed because 29 U.S.C. § 1132(a)(3) limits relief under ERISA actions to equitable relief. Plaintiff seeks exemplary damages not "'to restore to the plaintiff particular funds or property in the defendant's possession,' but rather, 'to impose personal liability.' As such, [exemplary damages] fall squarely within the category of *legal* remedies and cannot be entertained in this action under [§ 1132(a)(3)]." *Lind*, 466 F.3d at 1200 (quoting *Great-West Life & Annuity Ins. v. Knudsen*, 534 U.S. 2014, 214 (2002)) (emphasis added).

Finally, Plaintiff's Cause of Action Eight must be dismissed for failure to state a claim upon which relief can be granted because it does not state any claim. *See* Compl., Dkt. 1 at 22-23. Exemplary damages are not an independent legal theory; rather, they are a remedy. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) ("A punitive damage claim is not an independent cause of action."). This purported "cause of action" merely repeats various allegations previously asserted in the Complaint – it does not, itself, allege a cause of action upon which the

Court can grant relief. Therefore, Plaintiff's purported "cause of action" for exemplary damages must be dismissed.

c. Should the Eastern Shoshone Tribe's Motion to Dismiss be Granted, Plaintiff's Claims must be Dismissed for Failure to Join an Indispensable Party

As discussed in the Eastern Shoshone Tribe's Motion to Dismiss, Dkt. 50, and described above, the Eastern Shoshone Tribe's sovereign immunity shields the Tribe from Plaintiff's claims, therefore this Court is without jurisdiction to adjudicate Plaintiff's claims against the Tribe. Because the Tribe, as the Plan Fiduciary and Plan Administrator, *see* Silverstein Decl., Ex. B-1 at 5, constitutes a required and indispensable party to the Court's adjudication of Plaintiff's claims against FirstNation, the Court must dismiss Plaintiff's claims against FirstNation for failure to join a party under Fed. R. Civ. P. Rule 12(b)(7) should the Tribe's Motion to Dismiss be granted.

"The proponent of a motion to dismiss under 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994). An action "should be dismissed" pursuant to 12(b)(7) if the party is found indispensable under Fed. R. Civ. P. 19(b). *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278-79 (10th Cir. 2012). A court will find a party indispensable under Fed. R. Civ. P. 19(b) if: 1) the allegedly indispensable party "is 'required to be joined' under Rule 19(a)," 2) that party "cannot feasibly be joined," and 3) "the required-but-not-feasibly-joined party is so important to the action that the action cannot 'in equity and good conscience' proceed in that person's absence." *Id*. (quoting Fed. R. Civ. P. 19(b)).

With respect to the first prong of this test, pursuant to Fed. R. Civ. P. 19(a), a party is required to be joined if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Regarding the second prong of the test, a party that possesses sovereign immunity cannot feasibly be joined if that party's sovereign immunity has not been waived. *See Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (finding that Indian tribes possess inherent sovereign immunity, and that, "[a]s an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978)). Thus, a Tribal Nation cannot be feasibly joined, and the second prong of the test be met, unless its sovereignty has been unequivocally and expressly waived by the Tribal Nation or abrogated by Congress.

Finally, in determining whether the third prong of the test is met, rendering the party "indispensable,"

> the court must weigh the extent to which a judgment rendered in the person's absence might be prejudicial to the person or those already parties; the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; whether a judgment rendered in the person's absence will be adequate; and whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder.

Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 1000 (10th Cir. 2001).

Because the Eastern Shoshone Tribe, a federally recognized Indian tribe possessing sovereign immunity, is required to be joined pursuant to 19(a), and cannot be joined because neither the Tribe nor Congress has waived the Tribe's sovereign immunity, and is indispensable under 19(b), this matter should be dismissed pursuant to 12(b)(7).

1. The Eastern Shoshone Tribe has an Interest Relating to the Subject of this Action

The Tribe is a required party under the first prong of the above test because the Tribe has "an interest relating to the subject of the action." Fed. R. Civ. P. 19(a)(1)(B). Specifically, the Tribe is the Payor for Plaintiff's employee benefit plan. ASA, Ex. C § 2.2(c) (FirstNation "has no responsibility, and the Plan Sponsor has total responsibility, for payment of claims arising under the Plan"); *see, e.g.,* Silverstein Decl., Ex. B-1, 5 (Plan "fund established by Eastern Shoshone Tribe); *id.* (listing the Tribe as the Plan's Sponsor); ASA, Ex. C at Ex. III § 3.7 ("Plan Sponsor shall be deemed to be the payer for network agreement purposes"); *cf.* § 3.8 ("Claims Administrator will never be called upon to advance its own funds towards the payment of any provider."). Thus, any determination regarding Plaintiff's rights under the employee benefit plan absent the Tribe would, "as a practical matter[,] impair or impede" the Tribe's ability to protect the Tribe's interests—specifically, the lawful right the Tribe has to challenge the hospital's attempt to fraudulently charge more for the services Plaintiff received than the law allows. Fed. R. Civ. P. 19(a)(1)(B)(i). Therefore, under Rule 19(a), the Tribe is a required party

2. Joinder of the Eastern Shoshone Tribe is not Feasible

The second prong is feasibility of joining the Tribe. As discussed in greater detail above, the Eastern Shoshone Tribe is a federally recognized Indian Tribe, *see* 75 Fed. Reg. at 60812, and as such, the Tribe maintains sovereign immunity rendering it immune from suit in United States federal court. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,*

498 U.S. 505, 509 (1991). Joinder of a Tribal Nation, therefore, is not "feasible" on account of sovereign immunity. *See Citizen Potawatomi Nation*, 248 F.3d at 997.

Because "joinder is not feasible, the court must decide whether the absent person is 'indispensable,' i.e., whether in 'equity and good conscience' the action can continue in his absence." *Id.* Rule 19(b)(1) requires the Court to consider "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Fed.R.Civ.P. 19(b)(1). This essentially asks the same question as Rule 19(a)(1)(B)(i)—"whether continuing the action without a person will, as a practical matter, impair that person's ability to protect his interest relating to the subject of the lawsuit." *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1283 (10th Cir. 2012) (internal citations omitted). For the same reasons explained in reference to Rule 19(a)(1)(B)(i), this factor weighs in favor of dismissal.

3. Proceeding without the Tribe would be Prejudicial to the Tribe and FirstNation

Finally, the Court must consider "the extent to which any prejudice could be lessened or avoided . . ." through altering the judgment or relief. Fed. R. Civ. P. 19(b)(2). This factor also weighs in favor of dismissing the suit. The Tribe's interests are directly tied to any judgment, regardless of whose favor it is in, as the matters brought by the Plaintiff hinge on the benefit plan administered by the Tribe. *See* Silverstein Decl., Ex. B-1, 6. The Tribe, and the Tribe alone, is the entity responsible for paying the claims submitted by Plaintiff's healthcare provider pursuant to the Plan. Compl. ¶ 21 (noting that according to the Plan, "payment of benefits or claims under the Plan and any and all other matters arising under the Plan" is the duty and legal obligation of the Plan's Fiduciary and Plan Administrator) (quoting Dkt. 1 at 32); *see also* Silverstein Decl., Ex. B-1, 6 (noting the Tribe is the Plan's Fiduciary and Plan Administrator); ASA, Ex. C at Ex. III § 3.7 ("Payment, and costs incurred by virtue of provider services, dispute resolution, and

conflicts due to network agreements shall be borne solely by the Plan Sponsor."). Because the Tribe's sovereign status precludes this Court from exercising jurisdiction over claims brought against the sovereign, this factor also supports dismissal.

In weighing the third factor, the Court first asks whether a "judgment rendered in the person's absence would be adequate." Fed. R. Civ. P. 19(b)(3). This question is not meant to address the adequacy of the judgment, but the adequacy of dispute resolution. *Northern Arapaho Tribe*, 697 F.3d at 1283 (internal citations omitted). Allowing this case to proceed absent the Tribe would not settle the underlying dispute, which is over the distribution of benefits from the Tribe's self-funded Plan. Proceeding without the Tribe would result in a judgment for payment of claims that cannot be lawfully enforced, opening the door to re-litigation which could result in a different outcome. Such a judgment is not "adequate," and accordingly, this factor weighs in favor of dismissal.

The Court then asks whether the Plaintiff would have an "adequate remedy" if the suit were dismissed. Fed. R. Civ. P. 19(b)(4). While availability of an adequate remedy is not dispositive, especially "in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors," in this case, the Plaintiff *does* have an adequate remedy. *Northern Arapaho Tribe*, 697 F.3d at 1283 (citing *Davis ex rel. Davis v. United States,* 343 F.3d 1282, 1294 (10th Cir.2003)). Specifically, Plaintiff's remedy lies in Tribal Court. As detailed above, the Plaintiff has not exhausted her Tribal Court remedies. Because this factor is not dispositive and because the Plaintiff still has an adequate path to remedies, this factor likewise supports dismissal.

Under Rule 19, the Tribe clearly constitutes a required party, but is protected from this Court's jurisdiction due to the Tribe's sovereign immunity. Because of this, and because Rule

19(b) factors weigh in favor of dismissal, the Tribe is an indispensable party. For these reasons, Plaintiff's claims should be dismissed.

III. CONCLUSION

For the reasons stated above, FirstNation respectfully requests that its Motion to Dismiss be granted and that Plaintiff's claims be dismissed.

Respectfully submitted by:

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