UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GILA RIVER INDIAN COMMUNITY, *et al.*, Plaintiffs, v. XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services, *et al.,* Defendants.	Civil Action No. 21-1401 (TSC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

CHANNING D. PHILLIPS, D.C. Bar #415793
Acting United States Attorney

BRIAN P. HUDAK
Acting Chief, Civil Division

DEREK S. HAMMOND
D.C. Bar #1017784
Assistant United States Attorney
555 Fourth Street, NW
Washington, DC 20530
202-252-2511
Derek.hammond@usdoj.gov

Dated: October 18, 2021

Attorneys for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

The present matter involves a dispute between the United States Department of Veterans Affairs ("VA") and Plaintiffs Gila River Indian Community and Gila River Health Care Corporation ("Plaintiffs"), which Plaintiffs have repeatedly failed to address through the appropriate channels. Plaintiffs previously sought to resolve these issues by filing a complaint against the VA in the U.S. District Court for the District of Arizona. The complaint was dismissed for failure to follow the jurisdictionally exclusive process under the Veterans' Judicial Review Act ("VJRA") and the dismissal was affirmed on appeal in 2018. *See Gila River Indian Cmty. v. Dep't of Veterans Affs.*, 899 F.3d 1076 (9th Cir. 2018). Rather than seeking redress through the VJRA's process, Plaintiffs sought yet another improper channel by submitting claims to the Indian Health Service ("IHS").

The dispute between Plaintiffs and the VA is an issue predicate to the present claim. Plaintiffs allege that IHS "enabled VA's unlawful conduct," and in doing so, Plaintiffs are asking this Court to improperly assume that the VA acted unlawfully. Compl. ¶ 19, ECF No. 1. Plaintiffs' present claim cannot proceed without resolution of the predicate matter, which is the underlying dispute between Plaintiffs and the VA. Consistent with the ruling of the Ninth Circuit, Plaintiffs must seek recourse against the VA, if any recourse is warranted, and Plaintiffs must pursue any claim against the VA through the appropriate channels. This Court is not an appropriate channel.

Plaintiffs are foreclosed from arguing the VA's liability before this Court because this issue is a veterans' benefits determination that can only be addressed through the VJRA's jurisdictionally exclusive process. Jurisdiction over this issue was already decided. Plaintiffs are collaterally estopped from attempting to re-litigate it here. Because Plaintiffs have not and cannot establish the VA's liability in the present case, Plaintiffs claim is speculative, at best, and it is not ripe for review. Further, in their attempts to shift the VA's specific authorities to anyone and

everyone else in the federal government, Plaintiffs' have failed to state a claim upon which relief can be granted.

STATUTORY AND REGULATORY BACKGROUND

I. Veterans Judicial Review Act

Congress established a jurisdictionally exclusive process under which questions of law and fact affecting the VA's provision of benefits to veterans must be decided, if at all, by the Court of Appeals for Veterans Claims ("CAVC") and the U.S. Court of Appeals for the Federal Circuit. Under this framework, Congress broadly divested all federal courts other than the CAVC and the Federal Circuit of jurisdiction to review any "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a). The provisions of the VJRA establish Congress's intent to include all issues necessary to a decision affecting benefits in the "exclusive appellate review scheme" created by that statute. *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1370 (8th Cir. 1992); *accord Sugrue v. Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994); *Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992). The VJRA applies to decisions on "all questions of law and fact," as long as the questions decided are "necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a); *see, e.g.*, *Hicks*, 961 F.2d at 1369 (rejecting notion that a First Amendment claim falls outside this scheme of review); *Blue Water Navy Vietnam Veterans Ass'n v. McDonald*, 830 F.3d 570, 574 (D.C. Cir. 2016) (holding that § 511 applies to suit seeking "review of the validity of a VA policy that leads directly to the denial of certain benefits for most, if not all, of the veterans it affects").

The VJRA's jurisdictionally exclusive process is not limited to adjudication of an individual's claim for benefits; it encompasses all VA decisions affecting veterans' benefits, such as those pertaining to the formulation and implementation of policies and procedures related to

veterans' benefits. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1026 (9th Cir. 2012) (en banc) (rejecting notion that a plaintiff could "circumvent this jurisdictional limitation [of § 511] by disavowing relief on behalf of any individual veteran"); *Blue Water*, 830 F.3d at 575 (rejecting argument that section 511(a) encompasses "only challenges to *individual* benefits determinations—not challenges alleging that the VA improperly interpreted its statutory and regulatory obligations" and noting that *Veterans for Common Sense* suggested "just the opposite"). If Section 511(a) were in fact limited to adjudicative decisions, Congress would have had no need to provide an express exception for Federal Circuit review of certain VA actions of general applicability, 38 U.S.C. § 511(b)(1), including "substantive rules of general applicability" and "statements of general policy," 38 U.S.C. § 552(a)(1)(D). *See Blue Water*, 830 F.3d at 574.

II. Indian Health Service

The principal mission of IHS is the provision of health care to American Indians and Alaska Natives throughout the United States. *See Lincoln v. Vigil*, 508 U.S. 182, 185 (1993). In carrying out that mission, IHS operates under two primary authorizing statutes. The first statute, the Snyder Act, authorizes IHS to expend such moneys as Congress may from time to time appropriate for the conservation of the health of Indians. *See* 25 U.S.C. § 13 (providing that the Bureau of Indian Affairs ("BIA") will expend funds as appropriated for, among other things, the conservation of health of Indians); 42 U.S.C. § 2001(a) (transferring the responsibility for Indian health care from BIA to IHS). The second statute, the Indian Health Care Improvement Act ("IHCIA"), establishes numerous programs to address particular health initiatives, such as alcohol and substance abuse and diabetes. 25 U.S.C. § 1601 *et seq*.

Under these authorities, IHS provides health care services through three separate mechanisms: (1) directly through a nationwide network of federal facilities and clinics; (2) through contracts with Indian tribes and tribal organizations pursuant to the Indian Self-Determination and

Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638 (codified at 25 U.S.C. § 5301, *et seq*.), under which those tribes independently operate health care delivery programs previously provided by IHS; and (3) pursuant to contracts and grants awarded to urban Indian organizations to operate health programs in urban locations. In addition to the three mechanisms described above, the Snyder Act and the Transfer Act authorize IHS to pay for medical care provided to IHS beneficiaries by other public or private providers as purchased/referred care (or "PRC") (formerly known as Contract Health Services or "CHS"). IHS pays for care under purchased/referred care when direct services are unavailable and no alternate resources exist to pay for such care.

III. ISDEAA

The ISDEAA allows a tribe or tribal organization to contract with the Secretary of Health and Human Services ("Secretary"), through IHS, to take over a federal health care program, service, function, or activity (collectively referred to as the "federal program"), or a portion thereof, that IHS would otherwise operate for the tribe's benefit. *See* 25 U.S.C. §§ 5301, 5302, 5321, 5387. Tribes and tribal organizations contract with IHS under Title I of the ISDEAA, 25 U.S.C. §§ 5321-32, or enter "self-governance compacts" under Title V of the ISDEAA, §§ 5381-5399. A "compact" under Title V is a more advanced form of contracting achievable after three years of successful contracting under Title I. The compact sets forth the general terms of the nation-to-nation relationship between the tribe or tribal organization and the Secretary and is accompanied by an annual or multi-year funding agreement that generally identifies the federal program to be performed or administered by the ISDEAA contractor, the financial terms and conditions, and the responsibilities of the Secretary. There is no model compact, but the ISDEAA requires mandatory provisions. *See* 25 U.S.C. §§ 5384-5385; 42 C.F.R. §§ 137.30-46.

IV. Sharing Arrangements with Federal Agencies

Plaintiffs' claim focuses on the provision of the IHCIA codified at 25 U.S.C. § 1645, which is titled "Sharing Arrangements with Federal Agencies." That section is divided into four subsections. Subsection (a) grants the Secretary the authority to "enter into (or expand) arrangements for the sharing of medical facilities and services between the [Indian Health] Service, Indian tribes, and tribal organizations and the Department of Veterans Affairs and the Department of Defense," after consulting with Indian tribes "significantly affected by the arrangement." 25 U.S.C. § 1645(a)[1]. Subsection (b) imposes certain limitations on the Secretary of HHS, preventing him from taking any action that would impair "the quality of health care services" provided through IHS or the VA, among other things. *Id.* § 1645(b). Subsection (c) concerns reimbursements. For the years at issue in Plaintiffs' claim, subsection (c) stated in full:

> (c) REIMBURSEMENT.—The Service, Indian tribe, or tribal organization shall be reimbursed by the Department of Veterans Affairs or the Department of Defense (as the case may be) where services are provided through the Service, an Indian tribe, or a tribal organization to beneficiaries eligible for services from either such Department, notwithstanding any other provision of law.

Id. § 1645(c)[2]. Finally, subsection (d) advises that the statute does not "creat[e] any right of a non-Indian veteran to obtain health services" from IHS. *Id.* § 1645(d).

---

[1] On December 27, 2020, subsection (a) was amended by Section 1113 of the Consolidated Appropriations Act of 2021, Public Law No. 116-260, to add "urban Indian organizations" between "Indian Tribes . . . and tribal organizations."

[2] On December 27, 2020, subsection (c) was amended by Section 1113 of the Consolidated Appropriations Act of 2021, Public Law No. 116-260, to add two references to "[an] urban Indian organization[s]" between "Indian Tribes . . . or [a] tribal organization[s]." On January 5, 2021, subsection (c) was further amended by the PRC for Native Veterans Act, Public Law No. 116-311, to add the following at the end before the period: ", regardless of whether such services are provided directly by the Service, an Indian tribe, or tribal organization, through purchased/referred care, or through a contract for travel described in section 213(b)."

FACTUAL AND PROCEDURAL BACKGROUND

The present case stems from a dispute between Plaintiffs and the VA concerning the VA Secretary's obligation to pay for certain health care services to veterans under 25 U.S.C. § 1645(c). On August 15, 2018, the U.S. Court of Appeals for Ninth Circuit issued a unanimous opinion affirming the dismissal of the Plaintiffs' claims against the VA for lack of subject matter jurisdiction. *See Gila River Indian Cmty. v. Dep't of Veterans Affs.*, 899 F.3d 1076 (9th Cir. 2018). Plaintiffs had filed suit against the VA, alleging that the VA failed to reimburse Plaintiffs for the care they provide to Veterans. *See id.* at 1076-78. Plaintiffs argued that 25 U.S.C. §§ 1623(b) and 1645 require the VA to reimburse the Plaintiffs with or without a signed reimbursement agreement. *See id.* The District Court had dismissed the Plaintiffs' suit for lack of jurisdiction, after determining the VJRA, 38 U.S.C. § 511(a), applied. *Id.* at 1078. In affirming the dismissal, the Ninth Circuit confirmed that the VJRA's jurisdictionally exclusive process applies to this type of dispute and the Plaintiffs had not followed it. *Id.* at 1079-80. Plaintiffs' recourse, if any, was through the VA system, the CAVC, and the Federal Circuit. Plaintiffs subsequently petitioned the Ninth Circuit for a rehearing or rehearing *en banc*, which was denied.

On September 27, 2019, IHS received Plaintiffs' request for an awarding official's decision under the Contract Disputes Act ("CDA"). *See* Compl. Ex. A, ECF No. 1-1. While the claim letter did not identify the compact number for which the claims were being submitted, IHS identified the compact number for FYs 2013-2018 as 62G030075, which is dated October 1, 2002 (the "Compact"). Under the Compact with IHS, Plaintiff Gila River Indian Community (the "Community") assumed responsibility for certain programs, functions, services, and activities under the ISDEAA. The claim letter alleged that IHS had violated the Compact "by entering [into] the reimbursement agreement with VA and endorsing the template agreements for reimbursing tribal providers." Compl. Ex. A at 4. Plaintiffs claimed that the "IHS enabled VA's unlawful

conduct" and these actions "drastically limit[ed]" their right to reimbursement from the VA under 25 U.S.C. § 1645(c). Compl. Ex. A at 3, 4. Plaintiffs noted their unsuccessful attempt to litigate these issues against the VA, and the appeal Plaintiffs lost in 2018. Compl. Ex. A at 6; *see also Gila River*, 899 F.3d at 1076. The claim letter sought "$2,581,104.62 in reimbursements" that the VA allegedly should have paid Plaintiffs pursuant to 25 U.S.C. § 1645(c) for fiscal years ("FYs") 2013-2018. Compl. Ex. A at 6.

On May 22, 2020, IHS issued a decision letter denying Plaintiffs' claims as groundless and unsupported by either fact or law. *See* Compl. Ex. B, ECF No. 1-2. More specifically, IHS denied the claims for FY 2013 through FY 2018 for the following reasons: (1) IHS lacks jurisdiction over Plaintiffs' dispute with the VA, and Plaintiffs failed to state a cognizable claim against IHS; (2) IHS met its contractual responsibilities in FYs 2013 to 2018; (3) IHS did not violate an "implied duty of good faith and fair dealing" or an "implied duty to not interfere"; (4) the damages/expectancy claims were unsupported by fact or law; (5) and Plaintiffs were not entitled to equitable relief from IHS. Compl. Ex. B at 8-13.

In the decision letter, IHS described the extensive tribal consultation IHS conducted on the reimbursement agreement between IHS and the VA. Compl. Ex. B at 5-6. IHS also noted the fact that Tribal health programs are free to negotiate different terms with the VA, as confirmed by a U.S. Government Accountability Office report. Compl. Ex. B at 7. Because Plaintiffs failed to establish that IHS violated any responsibilities/duties to Plaintiffs or that IHS had jurisdiction over Plaintiffs' dispute with VA, IHS denied Plaintiffs' claims.

Plaintiffs appealed IHS's decision to this Court. Plaintiffs assert that this Court has jurisdiction to review IHS's decision under the CDA and the ISDEAA. Compl. ¶ 5. Plaintiffs then turn to the true dispute in the present matter, which is a disagreement between Plaintiffs and

the VA. Compl. ¶ 17-18. Despite the Ninth Circuit's decision concerning this very same disagreement, Plaintiffs have not resolved their dispute with the VA nor sought proper review under the VJRA. Despite not having received any decisions establishing VA's wrongdoing, Plaintiffs represent that the VA has engaged in unlawful conduct and allege that IHS somehow enabled such unlawful conduct. Compl. ¶ 19. While Plaintiffs chose not to name the VA as a party in this matter, Plaintiffs have named the entire federal government and assert that "[t]he United States acts through both IHS and the Department of Veterans Affairs ('VA') with regard to the matters alleged in this Complaint." Compl. ¶ 12.

Plaintiffs' sole cause of action in their Complaint alleges breach of contract against IHS. The only contract identified by Plaintiffs in their Complaint is the Compact between the Community and IHS. The VA is not a party to the Compact. The Compact is separate and distinct from the type of agreement Plaintiffs sought to negotiate with the VA under 25 U.S.C. § 1645(c). While Plaintiffs seek damages from IHS under a breach of contract theory, Plaintiffs have not challenged the amounts promised and paid by IHS under the Compact. Plaintiffs have not even alleged that such damages should have been promised and paid under the Compact.

STANDARDS

A. Motion to Dismiss Under Rule 12(b)(1)

Federal Rule of Civil Procedure ("Rule") 12(b)(1) provides that a federal court must dismiss a case when it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Generally, "'[b]efore a court may address the merits of a complaint, it must assure that it has jurisdiction to entertain the claims.'" *Cornish v. Dudas*, 715 F. Supp. 2d 56, 60 (D.D.C. 2010) (quoting *Marshall v. Honeywell Tech. Sols., Inc.*, 675 F. Supp. 2d 22, 24 (D.D.C. 2009)). It is the plaintiff's burden to demonstrate subject matter jurisdiction. *Shulter v. United States*, 531 F.3d 930, 932 (D.C. Cir. 2008). If the plaintiff cannot meet this burden, the court must dismiss the action. *Steel Co. v.*

Citizens for a Better Env't., 523 U.S. 83, 94 (1998) (citing *Ex parte McCardle*, 74 U.S. 506 (1868)). In considering a motion to dismiss for lack of subject matter jurisdiction, a court "'treat[s] the complaint's factual allegations as true'" and "'grant[s] plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 40, 44 (D.D.C. 2012) (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal quotation omitted)). However, "[b]ecause subject matter jurisdiction focuses on the court's power to hear the claim, . . . the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion[.]" *Aref v. Holder*, 774 F. Supp. 2d 147, 159 (D.D.C. 2011). In resolving the issue of subject matter jurisdiction, the Court may also "consider matters outside the pleadings." *Lewis v. Schafer*, 571 F. Supp. 2d 54, 57-58 (D.D.C. 2008).

B. Motion to Dismiss Under Rule 12(b)(6)

Motions to dismiss under Rule 12(b)(6) test the sufficiency of a complaint. *Smith Thompson v. District of Columbia*, 657 F. Supp. 2d 123, 129 (D.D.C. 2009). "'A complaint can be dismissed under Rule 12(b)(6) when a plaintiff fails to state a claim upon which relief can be granted.'" *Howard Univ. v. Watkins*, 857 F. Supp. 2d 67, 71 (D.D.C. 2012) (quoting *Peavey v. Holder*, 657 F. Supp. 2d 180, 195 (D.D.C. 2009) (citing Fed. R. Civ. P. 12(b)(6))). To survive a motion to dismiss, a complaint must contain sufficient factual matter, acceptable 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 566, 570 (2007)).

On a motion to dismiss, under Rule 12(b)(6), the Court may consider, in addition to the facts alleged in the complaint, documents either attached to, or incorporated into the complaint by reference, as well as matters of which it may take judicial notice. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 (D.C. Cir. 1997); *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C.

Cir. 2004); *Harris v. Amalgamated Transit Union Local*, 689, 825 F. Supp. 2d 82, 85 (D.D.C. 2011) (courts may consider "facts alleged in the complaint, documents attached to or incorporated in the complaint, matters of which courts may take judicial notice, and documents appended to a motion to dismiss whose authenticity is not disputed, if they are referred to in the complaint and integral to a claim."); *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001) ("[T]he court may consider the defendant's supplementary material without converting the motion to dismiss into one for summary judgment. This Court has held that 'where a document is referred' to in the complaint and is central to plaintiff's claims, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.'").

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Action Because Judicial Review Would Require This Court To Impermissibly Pass Judgment On A VA Benefits Determination.

This action represents yet another attempt by Plaintiffs to sidestep the VJRA's unambiguous and exclusive jurisdictional bar. The DC Circuit has interpreted the VJRA as unequivocally barring Article III courts from reviewing VA benefit determinations. *See United States. v. Price*, 228 F.3d 420 (D.C. Cir. 2000). This includes both direct and indirect attempts to seek "medical expense reimbursement," as well as matters where a VA determination is a "necessary predicate" question to a secondary cause of action. *Id*. at 421-422. Plaintiffs' present claim is predicated on Plaintiffs' own representation that the VA acted wrongfully. More specifically, Plaintiffs ask this Court to assume the VA "unlawfully" denied reimbursement for medical services provided to veterans, which is a veterans' benefits determination. *See, e.g.* Compl. ¶ 19 ("IHS has enabled VA's unlawful conduct through IHS' dealings with the VA and the Community."); *id.* ¶ 25 ("IHS's complicity in VA's wrongful conduct directly affected the Community's ability to vindicate its rights under § 1645(c).").

The VJRA's jurisdictional bar is sweeping. The statutory text provides that, once the VA has decided a question of benefits, its decision is "final and conclusive." It may not be reviewed by any other official or by any court." *Id.* The only relevant inquiry under Section 511(a) is whether a suit "require[s] the district court to review VA decisions that *relate* to benefits determination," including any decisions made by the Secretary "in the course of making benefits decisions." *See Gila River*, 899 F.3d at 1080 (quoting *Veterans for Common Sense v. Shinseki*, 679 F.3d 1013, 1025 (9th Cir. 2012)) (emphasis in original). Under VA regulations, a "benefit" is defined as "any payment, service, . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." 38 C.F.R. § 20.3(e). Plaintiffs allege they are owed reimbursement "for [health] services the Tribal Plaintiffs provided to veterans" under Section 1645(c). Compl. ¶ 18; *see also id.* ¶ 33. Such payment is plainly included in the regulatory definition of a "benefit." Thus, any question of law or fact that "affects the provision" of this payment by the VA Secretary falls within the ambit of Section 511. 38 U.S.C. § 511(a); *see also Price*, 228 F.3d at 421-22.

Since the VA's conduct here is a necessary predicate to the present claim and since it necessarily involves veterans' benefit determinations, this action falls within VJRA's jurisdictional bar. This is not the first time Plaintiffs have sought to impermissibly bypass this jurisdictional bar. As stated above, the Ninth Circuit has already decided that Plaintiffs' dispute with the VA is covered by the VJRA's jurisdictional bar. *See Gila River*, 899 F.3d at 1079. In that case, the Ninth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction under the VJRA, noting that the case required the court to impermissibly pass judgment on "questions of law . . . necessary to a decision by the Secretary" to grant or deny a request for reimbursements. *Id.*

The D.C. Circuit has echoed the Ninth Circuit's broad reading of the VJRA. *See Price*, 228 F.3d at 422. ("[T]he courts have consistently held that a federal district court may not entertain constitutional or statutory claims whose resolution would require the court to intrude upon the VA's exclusive jurisdiction.") Under D.C. Circuit precedent, the VJRA's jurisdictional bar extends to causes of action where a judgment about the VA conduct is a predicate question. *Id.* at 422 ("Here, the propriety of the VA's purported refusal to reimburse Price has not yet been established. Because a determination whether the VA acted in bad faith or with negligence would require the district court to determine first whether the VA acted properly in handling Price's request for reimbursement, judicial review is foreclosed by 38 U.S.C. § 511(a)."). The jurisdictional bar also prevents a district court from considering any "indirect challenge" to veterans' benefits determinations, including those related to medical expense reimbursement. *Id.*

Here, Plaintiffs' claim requires this Court to determine the predicate question of whether the VA acted "unlawfully" before determining whether IHS is liable. The Plaintiffs' claim in the present matter pre-supposes that the VA acted "unlawfully." The alleged misconduct relates to a benefits decision as already determined by the Ninth Circuit. The VJRA therefore barred Plaintiffs from submitting their CDA claims to IHS. IHS has no authority over the VA and IHS does not play a role in the VJRA's jurisdictionally exclusive process. Furthermore, since Plaintiffs' present claim is inextricably tied to a VA benefits determination, the VJRA's jurisdictional bar applies. For these reasons, this Court lacks subject matter jurisdiction under the VJRA, and the claim should be dismissed.

II. Plaintiffs Cannot Re-Litigate Jurisdiction Over The Predicate Issue Of VA's Liability, Which Cannot Be Decided In This Court.

Plaintiffs improperly attempt to re-litigate jurisdiction over their dispute with the VA through the present matter. The Ninth Circuit already decided that district courts do not have

jurisdiction over the dispute between Plaintiffs and the VA. Plaintiffs chose not to name the VA as a defendant in this matter, even though Plaintiffs' claims against the VA are the basis for the present action. Plaintiffs named the United States of America, instead, and argue that the federal government at large is responsible for the actions of the VA. Compl. ¶ 12. Plaintiffs' practice is a baseless attempt at circumventing jurisdictional bars.

Plaintiffs improperly attempt to shift VA's responsibility under Section 1645(c) to IHS. Plaintiffs' dispute is undeniably with the VA, and Plaintiffs have intentionally chosen not to pursue their claims against the VA through the appropriate channels. Plaintiffs also attempt to spread VA's authority across the entire federal government, in a misguided effort to re-litigate jurisdiction. Plaintiffs have already lost this issue and they are barred by the doctrine of collateral estoppel from re-litigating jurisdiction over Section 1645(c).

The doctrine of collateral estoppel, or issue preclusion, prevents a party from re-litigating an issue that has already been decided, whether or not there has been a judgment on the merits. *See Jackson v. Off. of the Mayor of D.C.*, 911 F.3d 1167, 1171 (D.C. Cir. 2018). Under this doctrine and D.C. Circuit precedent, "a dismissal for lack of jurisdiction *does* 'preclude relitigation of the precise issue of jurisdiction that led to the initial dismissal.'" *Id*. (quoting *GAF Corp v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987)) (emphasis in original). The doctrine "applies if a later argument 'is related to the subject-matter and relevant to the issues that were litigated and adjudicated previously, so that it *could* have been raised.'" *GSS Grp. Ltd. v. Nat'l Port Auth. of Liber. & Republic of Liber*., 822 F.3d 598, 608 (D.C. Cir. 2016) (quoting *Hall v. Clinton*, 285 F.3d 74, 81 (D.C. Cir. 2002)). "Furthermore, once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (emphasis in original).

This Court should not permit Plaintiffs to shop for a more favorable decision on the issue of jurisdiction. This practice is barred by the doctrine of collateral estoppel. Jurisdiction over the predicate issue here has already been decided. The Ninth Circuit held that Plaintiffs' claims against the VA under 25 U.S.C. § 1645(c) cannot be heard in any district court. The issue has been raised and determined, meaning Plaintiffs cannot address their allegations against the VA under Section 1645(c) in this Court. That decision applies equally to the allegations Plaintiffs assert against the federal government as a whole under Section 1645(c). *See* Compl. ¶ 18 ("VA did not begin reimbursing IHS until December 2012, and the Government has not reimbursed the Community for services the Tribal Plaintiffs provided to veterans over the past decade.") Plaintiffs plainly acknowledge that they have named the entire United States of America as a party, as it acts through IHS and through the VA. Compl. ¶ 12. Plaintiffs' dispute with the VA under Section 1645(c) is a predicate issue to Plaintiffs' claim against IHS, HHS, and the federal government as a whole. For example, the Defendants could not be involved in "VA's unlawful conduct" if the VA acted lawfully and there can be no injury if the VA fulfilled its responsibilities. Compl. ¶ 19. Plaintiffs are attempting to game the jurisdictional system, but their dispute with the VA is a predicate issue that cannot be decided in this Court, and Plaintiffs are estopped from attempting to re-litigate that jurisdiction here.

III. Given the Unresolved Claim For VA Benefits, Plaintiffs' Claim Is Not Ripe For Review.

Before pursuing a cause of action against Defendants in this matter, Plaintiffs must pursue a remedy through the VJRA's jurisdictionally exclusive process. As further explained above, the VJRA bars plaintiffs from litigating its claims under 25 U.S.C. § 1645(c) in this Court. Plaintiffs' sole claim in this matter presumes an adverse determination against the VA under Section 1645(c). Since the VA's liability under Section 1645(c) cannot be resolved in this Court, and because this

issue is a necessary predicate to Plaintiffs claim against Defendants, this matter is not ripe for review.

Plaintiffs blame IHS for Plaintiffs' own failure to reach an understanding or agreement with the VA concerning Section 1645(c). IHS is not responsible for those negotiations. IHS is not a party to those negotiations either, so it has no reason to believe that the VA acted improperly. As a Tribal health program, Community is responsible for its own negotiations with the VA. Moreover, as a Title V Compactor, the Community has a greater level of responsibility for the administration of the compacted programs, functions, services, and activities. The statute at issue, Section 1645(c), does not shift this responsibility from the Community to IHS. Nor does the statute shift any responsibility from the VA to IHS.

Plaintiffs will need to seek recourse against the VA through the proper channels *and* Plaintiffs will need to prevail through those channels before the present issue will be ripe for determination. While a court can raise the issue of ripeness *sua sponte*, "a motion to dismiss for ripeness is governed by Federal Rules of Civil Procedure 12(b)(1) because questions of ripeness go to the Court's subject-matter jurisdiction." *Beach TV Props., Inc. v. Solomon*, 254 F. Supp. 3d 118, 131 (D.D.C. 2017) (citing *Exxon Mobil Corp. v. FERC*, 501 F.3d 204, 207 (D.C. Cir. 2007); *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359 (D.C. Cir. 2005)); *see also Conf. of State Bank Supervisors v. Off. of the Comptroller of the Currency*, 313 F. Supp. 3d 285, 294 (D.D.C. 2018). Furthermore, the D.C. Circuit has held that courts must "let the administrative process run its course" before intervening in a matter where an administrative remedy would be more appropriate. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) ("[W]aiting to resolve this case allows EPA to apply its expertise and correct any errors, preserves the integrity of the administrative process, and prevents piecemeal and unnecessary judicial review.").

The VJRA explicitly outlines an appeal mechanism for the dispute between Plaintiffs and the VA. Congress provided jurisdictionally exclusive grants to the Veterans Court and the Federal Circuit court to review benefit determinations. *See* 38 U.S.C. §§ 7252(a), 7292(c). This not only preserves the integrity of the administrative process and prevents unnecessary judicial review, but it also allows the VA an opportunity to consider issues such as the recent changes to 25 U.S.C. § 1645(c).

Plaintiffs must pursue a remedy under the VJRA before assigning any "complicity" to IHS or the other defendants. This is strengthened by recent changes in the law. The statutory amendments did not shift any part of the VA's responsibility to IHS or anyone else in the federal government. Nor did it alter the jurisdictional issue already decided between the VA and Plaintiffs. Congress had an opportunity to change these aspects of the law following the Ninth Circuit's decision, but it did not. If Plaintiffs wish to pursue a remedy to their claim, under the previous or amended statute, they must follow the process set forth in the VJRA.

As the D.C. Circuit held in *Price*, the VJRA's jurisdictionally exclusive process extends to matters where the propriety of VA's conduct is a predicate question. *See Price*, 228 F.3d at 422. Plaintiffs have not yet exhausted their remedies under the VJRA, nor has the VA acknowledged any type of improper conduct. This matter cannot be reviewed under the CDA or the ISDEAA, given the predicate nature of Plaintiffs' dispute with the VA. If Plaintiffs wish to challenge the VA's benefits determinations, those matters must be resolved through the VJRA. Because they have not, the question of IHS's "complicity" is not ripe for review, and this matter must be dismissed for lack of subject matter jurisdiction.

IV. Even If Plaintiffs' Claim for VA Benefits Had Been Decided, Plaintiffs Lack Standing Because They Have Failed To Demonstrate That IHS's Actions Were The Cause Of Plaintiffs' Injury, If Any.

Plaintiffs standing under Article III of the Constitution must be determined before a federal court has jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104, 118 S. Ct. 1003 (1998). The three elements of standing include an injury in fact, causation, and redressability. *Id*. For causation, a plaintiff must show that the defendant's alleged behavior is "fairly traceable" to plaintiff's injury; there must be more than a speculative or tenuous link between defendant's offense and the plaintiff's injury. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

In the present matter, Plaintiffs' claim does not arise under or relate to funding promised under the Compact between IHS and the Plaintiff Gila River Indian Community. Instead, Plaintiffs allege they have been injured through the VA's denial of reimbursements under 25 U.S.C. § 1645(c). Plaintiffs have chosen not to name the VA as a party, although they have named the federal government as a whole. Plaintiffs are undoubtedly attempting to force IHS to intercede in the dispute between Plaintiffs and the VA. In doing so, Plaintiffs have failed, again, to properly address any purported claims with the VA. Two federal courts decided that the Plaintiffs' only remedy is through the jurisdictionally exclusive process set forth in the VJRA, 38 U.S.C. § 511(a). Plaintiffs ignored those decisions when they presented claims to IHS.

There is no causal link between Plaintiffs' alleged injuries and IHS's performance under the Compact. Plaintiffs have not even alleged that IHS failed to pay any amounts promised under the Compact. Nor have Plaintiffs alleged that IHS received the amounts allegedly due to Plaintiffs from the VA. Instead, Plaintiffs make overly tenuous allegations about IHS's involvement in the "VA's unlawful conduct." Compl. ¶ 19. Plaintiffs' claim in the present matter is no more than baseless assumptions and speculation.

Plaintiffs are asking this Court to engage in impermissible speculation about the VA's conduct and the role, if any, that IHS played in the VA's decisions. Plaintiffs' theory requires the Court to make an analytical leap over the VA's decisions and whether those decisions were proper. Such speculation is prohibited under existing precedent and it does not establish Plaintiffs' standing to assert their present claim. This Court therefore lacks jurisdiction over the Complaint.

V. Even If Plaintiffs' Claim For VA Benefits Had Been Decided, Plaintiffs' Complaint Fails To State A Claim Upon Which Relief Can Be Granted.

Plaintiffs cannot overcome all the assumptions and jurisdictional issues related to the VA's liability, thereby establishing subject matter jurisdiction in the present case, but even if they could, Plaintiffs have failed to state a claim upon which relief can be granted here and this matter should be dismissed.

The present dispute concerns Plaintiffs' failure to reach an agreement or understanding with the VA under Section 1645(c). Those negotiations did not include IHS or HHS, nor did they depend upon IHS's actions under the Compact. IHS did not promise to pay Plaintiffs any funding under Section 1645(c) and nor could they, because IHS is not responsible for any payments under that authority. Yet, the "damages" Plaintiffs seek from IHS are amounts allegedly due from the VA under Section 1645(c).

Plaintiffs have no basis to assert that the Defendants violated any contractual duties to them under the ISDEAA. IHS and HHS lack any duties related to an agreement between Plaintiffs and the VA, either under the Compact or otherwise. The purported duties asserted by Plaintiffs have no relationship to 25 U.S.C. § 1645(c) and the provisions Plaintiffs point to in the Compact have no bearing on the dispute, with or without Plaintiffs' mischaracterizations. *See* Compl. ¶¶ 36-40. Plaintiffs alone are responsible for their actions and inactions here. This includes the Plaintiffs' failure to negotiate an agreement with the VA and more significantly, Plaintiffs failure to seek

redress through proper channels. Clearly, Plaintiffs are failing to take responsibility for their own actions, and they are baselessly attempting to shift blame to IHS, HHS, or the federal government as a whole.

IHS and HHS are not responsible for the VA's actions under the Compact or otherwise. IHS and HHS also have no reason to believe that the VA acted improperly during negotiations with Plaintiffs. Neither IHS nor HHS are authorized to make a determination on the VA's responsibilities in any case. Moreover, IHS and HHS are not responsible for payments under 25 U.S.C. § 1645(c), and IHS/HHS appropriation is not available to pay costs allocable to another Federal program. *See, e.g.*, Pub. L. No. 105-277, Sec. 101(e) (1998) (codified at 25 U.S.C. § 450j-2); *see also Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008) ("[T]he only plausible interpretation of § 450j-2 is . . . that the [ISDEAA] prevents the IHS from paying more than its pro rata share of the indirect costs incurred by contracting tribes and tribal organizations. Section 450j-2 explicitly prohibits the funding of indirect costs 'associated with' non-IHS entities[.]").

The VA is not a party to the Compact, but Plaintiffs allege the Compact was breached through the VA's conduct. Plaintiffs also assert conflicting IHS responsibilities related to the VA's conduct. On the one hand, Plaintiffs assert that IHS should not interfere with the dispute between Plaintiffs and the VA. Compl. ¶¶ 1, 42, 45. On the other hand, Plaintiffs assert that IHS should be doing more to assist Plaintiffs in the same dispute. Compl. ¶¶ 19, 30. Neither of these conflicting assertions is a responsibility under the Compact. Plaintiffs are attempting to shift their dispute from the VA to IHS, in an attempt to circumvent jurisdictional requirements. Their dispute is not about the Compact with IHS. Their dispute concerns an agreement under 25 U.S.C.

§ 1645(c), which is separate and distinct from the Compact. Plaintiffs have not even challenged the amounts promised and paid by IHS under the Compact in this matter.

Plaintiffs make repeated references to "federal trust responsibilities" in their Complaint, but this case does not involve federal fiduciary obligations in managing Indian property or trust assets. *See United States v. Mitchell*, 463 U.S. 206 (1983). The Plaintiffs have previously sought to allege breach of trust against the federal government in the U.S. District Court for Arizona. *Gila River Indian Cmty. v. Burwell*, Civ. A. No. 14-0943, 2015 U.S. Dist. LEXIS 27595 (D. Ariz. Mar. 6, 2015). In that matter, Plaintiffs alleged breach-of-trust against the Secretary of HHS and the Director of IHS, claiming IHS violated certain fiduciary duties when it rejected the Tribe's final offer to amend its funding agreement. *Id*. at *3-4, 8. The court rejected the Plaintiffs' argument for two reasons. First, the court found that the statutes and regulations did not show that the United States had accepted trust responsibilities for the healthcare related duties the tribe sought to enforce. *Id*. at *12-13. Second, the court found that "the general appropriation for IHS are public moneys belonging to the government, not funds set aside in trust for the Community." *Id*. at *17. The court further recognized that "the ISDEAA does not 'convert the underlying statutory programs into entitlements fairly analogized to a trust corpus.'" *Id*. at *18 (citing *Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005)). The court dismissed the Plaintiffs' breach-of-trust claim, concluding that they "failed to identify the kind of elaborate, full-control statutes and regulations that were held necessary for a breach-of-trust claim" and it failed to identify "an underlying corpus to support its trust claim." *Id*. at *18. The present case represents another attempt by Plaintiffs to re-litigate matters already decided between the parties.

Similarly, Plaintiffs have failed to state a claim related to consultation. Plaintiffs cite to Executive Order 13,175 and argue that IHS failed to carry out its consultation duties under that

Executive Order. However, section 10 of the Executive Order, entitled "Judicial Review," plainly states: "This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." E.O. 13,175 of Nov 6, 2000, Sec. 10; 65 Fed. Reg. 67,249[3]. IHS did not create a judicially enforceable right or duty by incorporating a reference to the Executive Order in the Compact, but IHS did hold extensive consultation on IHS-VA agreement. Plaintiffs further allege that consultation is required by 25 U.S.C. § 1645(a), but Plaintiffs' claim relates to a reimbursement agreement under Section 1645(c) and not a sharing arrangement under Section 1645(a). These provisions are independent clauses; a sharing arrangement under Section 1645(a) is not a predicate or requirement for reimbursement under Section 1645(c).

Plaintiffs have failed to state a claim upon which relief can be granted in the present case, because they have merely repackaged the claims they previously asserted against the VA under 25 U.S.C. § 1645(c). Plaintiffs are estopped from litigating their claims under Section 1645(c) in this Court, as more fully explained above. There is nothing left to decide in the present case, because it is not possible for Defendants to breach the Compact through the VA's actions under Section 1645(c). In an attempt to draw a threadbare connection between the Compact and Section 1645(c), Plaintiffs' complaint relies upon unsupported inferences and legal conclusions presented as fact. These mere inferences are not entitled to an assumption of truth and they do not form the basis for a legally sufficient claim. The law simply does not support the breach of contract claim asserted by Plaintiffs in the present case. The Defendants could not violate the Compact

[3] Available online through the Federal Register, https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments

under Section 1645(c), regardless of what the Compact may or may not state. As a result, Plaintiffs' Complaint fails to state a claim upon which relief can be granted and it must be dismissed.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' Motion and dismiss Plaintiffs' Complaint.

Dated: October 18, 2021
Washington, DC

Respectfully submitted,

CHANNING D. PHILLIPS, D.C. Bar #415793
Acting United States Attorney

BRIAN P. HUDAK
Acting Chief, Civil Division

By: */s/ Derek S. Hammond*
DEREK S. HAMMOND
D.C. Bar # 1017784
Assistant United States Attorney
555 Fourth Street, NW
Washington, DC 20530
202-252-2511
Derek.Hammond@usdoj.gov

Attorneys for the United States of America