UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GILA RIVER INDIAN COMMUNITY and **GILA RIVER HEALTH CARE CORPORATION,** **Plaintiffs,** **v.** **XAVIER BECERRA**, in his official capacity as Secretary, U.S. Department of Health & Human Services; **ELIZABETH A. FOWLER**, in her official capacity as Acting Director, Indian Health Service; **and,** **UNITED STATES OF AMERICA,** **Defendants.**	**CASE NUMBER 1:21-CV-01401-TSC** **ORAL HEARING REQUESTED**

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Gila River Indian Community ("the Community") and Gila River Health Care Corporation ("GRHC") (collectively, "Plaintiffs"), respectfully submit this response in opposition to the Motion to Dismiss filed by Defendants Xavier Becerra, Elizabeth Fowler, and the United States of America (collectively, "Defendants").

Defendants seek dismissal of Plaintiffs' Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, contending the Court is deprived of subject matter jurisdiction by the Veterans Judicial Review Act ("VJRA"), that Plaintiffs lack standing and their claims are unripe, and that Plaintiffs have failed to state a claim for which relief may be granted. Defendants miss the mark on each of these issues.

Defendants' motion is fundamentally based on a false premise. Largely ignoring the specific factual allegations, parties, and cause of action alleged in Plaintiffs' Complaint, Defendants assert the "true dispute" in this case is "a disagreement between Plaintiffs and the" Department of Veterans Affairs ("VA"). ECF No. 22, Mem. in Supp. of Defs.' Mot. to Dismiss ("Def. Br.") at 7-8. Having unilaterally revised Plaintiffs' allegations and claim to suit their argument, Defendants then contend the Court cannot adjudicate Plaintiffs' "true dispute" against the VA because the VJRA bars the Court from reviewing a VA benefits decision; that Plaintiffs' claim is unripe because it has not proceeded through administrative review by the VA; and that Plaintiffs lack standing and fail to state a claim because Defendants supposedly have no contractual duties regarding VA's conduct.

The Court should not be hoodwinked. Plaintiffs do indeed have a disagreement with VA, but it is not before the Court. What is before the Court is Plaintiffs' claim for Defendants' breaches of the Compact of Self Governance between Defendants and the Community. Those

breaches—which include Defendants' failure to consult with and advocate for Plaintiffs in the course of negotiations with VA and a violation of the implied duty of good faith and fair dealing—are based on contractual duties owed directly by Defendants to Plaintiffs under an agreement that the VA is not a party to, and based in part on statutory duties under Title 25 to the United States Code (the Indian Health Care Improvement Act and the Indian Self Determination and Education Assistance Act) that are wholly separate from any obligations the VA may or may not have under other statutory provisions. Defendants' conduct was in violation of their contractual obligations and the federal trust responsibility owed to the Community, and that is true regardless of whether VA's own conduct was ultimately lawful. Plaintiffs' "true dispute" in this case is with Defendants, based on Defendants' own violations of their own obligations, and not with VA, which is not even a party to this case. The Court can adjudicate Plaintiffs' claims without reviewing any issue "necessary to" a VA benefits decision, so the VJRA does not strip the Court of subject matter jurisdiction. Likewise, Plaintiffs' claim is ripe because it is a claim for Defendants' past breaches of the Compact, not an administrative claim for VA benefits. And Plaintiffs have stated a plausible claim for which relief may be granted, having identified specific conduct by Defendants that violated specific contractual obligations, as alleged in the Complaint.

The Court should deny Defendants' motion in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Compact of Self-Governance

Plaintiffs' claims arise under the September 30, 2002 Compact of Self Governance Between the Gila River Indian Community and the United States of America (Compact No. 62G030075) (the "Compact", December 1, 2021 Declaration of Andrew Brantingham Ex. A), executed pursuant to the Indian Self Determination and Education Assistance Act, P.L. 93-638 ("ISDEAA").

The Compact is a "government to government agreement" between the Community and the United States "for the administration and operation of health programs and services in the Community." Compact at 1. By its express terms, the Compact was intended to "uphold the United States' trust responsibility to" the Community, to enable the Community "to provide health programs, functions, services and activities according to the Community's priorities; and to enhance the effectiveness and long-term financial stability of the Community and its health programs." Compact Art. I, §§ 2(a)-(b).

In furtherance of those purposes, the United States, Department of Health and Human Services, ("HHS") and Indian Health Service ("IHS") undertook in the Compact several critical obligations. IHS committed to "allow[] the Community to exercise meaningful authority to plan, conduct, and administer programs, services, functions and activities to meet the health care needs of eligible individuals in the Community's service area." *Id.* § 2(c). The Compact confirms Defendants' obligation to provide funding for such programs, services, functions and activities, and establishes the framework for development of funding agreements periodically negotiated by the parties. *See generally id.* Art. II, §§ 3, 4. The Secretary of HHS "pledge[d]" that "[i]n fulfilling its responsibilities under the Compact," the "IHS will conduct all relations with the Community on a government-to-government basis." Compact Art. I, § 2(c). The Compact also incorporates Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments, which requires consultation with tribes in advance of rulemaking that will affect the tribes. Compact Art. I, § 2(c).

Critically, Defendants expressly acknowledged in the Compact that the "IHS budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians and Alaska Natives and that,

accordingly, the funds provided to the Community" pursuant to the Compact and funding agreements "are inadequate to permit the Community to achieve this goal." Compact Art. V, § 16. Thus, the Secretary agreed in the Compact "to advocate for increases in the IHS budget to further the ability of the Community to provide the full range of services that are the responsibility and obligation of the United States to make available to American Indian and Alaska Native people and meet the goals of the Indian Healthcare Improvement Act." *Id.*

Moreover, in advocating for funds, the Defendants also expressly agreed that they would "interpret all Federal laws, executive orders, regulations, and [the] Compact in a manner that effectuates and facilitates the purposes of [the] Compact and the achievement of the Community's health goals and objectives…." Compact Art. V, § 15. Defendants also agreed that the Compact "shall be liberally construed to achieve its purposes," which include furtherance of national Indian health policies established by Title 25 of the U.S. Code and the ISDEAA. *Id*. Art. I, § 2.

Finally, the Compact provides that "[u]nless expressly agreed to in this Compact, or a funding agreement incorporated herein, the Community is not subject to any agency circular, policy, manual, guidance or rule adopted by the IHS." Compact Art. II, Section 9(a).

II. Defendants Endorse VA's Template Reimbursement Agreements, Contrary to the Interests of Plaintiffs and the Terms of the Compact.

Plaintiffs provide vital healthcare services to native veterans—services for which the Plaintiffs and/or HIS are statutorily entitled to reimbursement from the VA. *See* 25 U.S.C. § 1645(c). VA opposed enactment of this law and has resisted complying with it. ECF No. 1, Plaintiffs' Complaint ("Compl.") ¶ 18. Indeed, although Section 1645(c) took effect in 2010, VA did not begin reimbursing IHS until December 2012, and the Government has not reimbursed Plaintiffs for services provided to veterans over the past decade. *Id*. In this case, however, it is

not VA's resistance that is at issue, it is Defendants' failure to advocate and Defendants' own conduct that resulted in funding delay and shortfalls.

The reason for the delay is that IHS accepted VA's decision to withhold all reimbursements pending the development of "template" reimbursement agreements not called for by the statute, and which VA expected tribes like the Community to accept if endorsed by IHS. Compl. ¶ 19. VA sought to include provisions in these template agreements that were designed to limit tribal reimbursement rights guaranteed by statute, and IHS knew it. Compl. ¶ 20. Despite initially opposing those limitations, and even submitting the dispute to the Department of Justice, ("DOJ"), IHS cast aside tribal funding rights apparently for political gain, and capitulated to VA's reimbursement terms prior to receiving DOJ guidance. *Id*. The template agreement to which IHS agreed limited VA's obligations under Section 1645(c), including, *inter alia*, terms providing that: (a) reimbursement would be limited to prospective services and would not be retroactive to the statute's effective date; (b) reimbursement would be limited to direct care services only and would not include Purchased/Referred Care services, despite the fact that the statute contained no such limitation; (c) reimbursement would not include non-Native veterans receiving care from Plaintiffs; and (d) the Community would be required to submit disputes with VA for resolution by VA's own contracting officer. Compl. ¶ 25.

Moreover, IHS promoted the template agreement they "negotiated" as a good deal for the Community and other tribes, while failing to disclose to tribes any of the reimbursement rights and terms IHS actually thought tribes were entitled to, the rights that were being waived in the template agreement, and the reasons (if any) for IHS's capitulation to VA's unfavorable position. Compl. ¶ 26. Moreover, to get to the positions that IHS agreed to in the templates, IHS had to

construe all possible ambiguity under an Indian-specific statute and Compact duties *against* tribal interests.

Plaintiffs separately opposed many of the limitations in the template agreement, but were undercut by positions that IHS had already conceded without consulting with Plaintiffs or other tribes as IHS was bound to do, and in violation of duties expressly agreed to and owed under the Compact. Because of IHS's actions, VA did not need to negotiate, stating that it had already resolved the scope of reimbursements in its negotiations with IHS. Compl. ¶ 29. It was ultimately IHS's own concessions that hindered Plaintiffs' ability to secure reimbursements and resulted in both delays and funding shortfalls. Compl. ¶ 25.

On January 5, 2021, Congress stepped in again by amending § 1645(c) to "clarify the requirement of the Department of Veterans Affairs and the Department of Defense to reimburse the Indian Health Service" for health services within the scope of the statute. Proper and Reimbursed Care for Native Veterans Act, 116 P.L. 311 (2021). As amended, the statute now expressly clarifies that tribal reimbursement rights do not exclude referral care—something that the statute never excluded, but that IHS agreed to exclude by construing statutory language against tribal interests and contrary to the Compact. Section 1645(c) now provides that IHS, or the relevant tribe or tribal organization, "shall be reimbursed by [VA] where services are provided through [IHS], an Indian tribe, or a tribal organization to beneficiaries eligible for services from [VA], notwithstanding any other provision of law, *regardless of whether such services are provided directly by [IHS], an Indian tribe, or tribal organization, through purchased/referred care, or through a contract for travel described in section 1621l(b) of this title.*" 25 U.S.C. § 1645(c) (emphasis added). Congress's clarifying change was consistent with Plaintiffs' interpretation and IHS's interpretation prior to its compromise, and in substance

represents reimbursement terms for which IHS should have advocated from the start based on its statutory mandate and duties under the Compact.

As a direct result of IHS's wrongful conduct, Plaintiffs were deprived of significant reimbursements that should have been paid in Plaintiffs' fiscal years 2013-2018. The total amount of Plaintiffs' lost reimbursements is at least $2,581,104.62. Compl. ¶ 43.

III. Procedural History

The Community commenced this lawsuit on May 21, 2021, seeking redress for Defendants' failure to advocate for tribal reimbursements for Native-Veteran care, which was contrary to the interests of the Plaintiffs and in violation of Defendants' obligations under the Compact. Plaintiffs allege a single cause of action against Defendants for breach of the Compact.

Defendants filed the present motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending the Court is deprived of subject matter jurisdiction by the VJRA, that Plaintiffs' claims are unripe and Plaintiffs lack standing, and that the Complaint fails to state a claim for which relief may be granted. Plaintiffs oppose the motion.

LEGAL STANDARDS

In reviewing a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (citing *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)).

To establish standing, a plaintiff must show (1) that it "suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical," (2) causation, and (3) that "it is likely, as opposed to merely speculative, that [its] injury will be redressed by a favorable decision." *AFGE v. OPM*, 928 F.3d 42, 54 (D.C. Cir. 2019) (internal

citations omitted). "Where, as here, defendants challenge standing at the pleading stage without disputing the facts alleged in the complaint," the Court must "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor…." *Id*. The plaintiff "need not yet establish each element of standing by a preponderance of the evidence." *Id*. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the plaintiff must allege "a plausible entitlement to relief," by setting forth "any set of facts consistent with the allegations." *Bouknight v. District of Columbia*, 2008 U.S. District LEXIS 17678, *6 (D.D.C. March 10, 2008), *quoting Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1967, 1969 (2007). The Court must treat the complaint's factual allegations—including mixed questions of law and fact—as true and draw all reasonable inferences in the plaintiff's favor. *Id.* (citing *Macharia v. United States*, 334 F.3d 61, 64 (D.C. Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)).

ARGUMENT

Defendants' motion to dismiss largely rests on a core false premise: that judicial review of Plaintiffs' claim against Defendants would require the Court to review a VA benefits determination. Def. Br. at 10. Relying on this false premise, Defendants argue that "VA's conduct here is a necessary predicate to the present claim" and the claim "necessarily involves veterans' benefit determinations," meaning the Complaint should be dismissed because the VJRA precludes this Court from reviewing such a VA benefits determination. Def. Br. at 11. But Defendants' premise is faulty. Plaintiffs allege one cause of action in this case for breach of

contract, stemming from the actions of IHS—not VA—in violation of Plaintiffs' rights and Defendants' obligations under the Compact. Plaintiffs do not allege any cause of action against VA. And while Plaintiffs believe VA's conduct described in the Complaint was wrongful and contrary to law, this Court need not decide or assume that to be true in order to provide Plaintiffs a remedy against IHS and the other Defendants for their own wrongful conduct.

Put simply, the issue before the Court is not the lawfulness of VA's conduct, but whether Defendants violated their own contractual obligations owed to Plaintiffs through IHS's dealings with VA, which harmed Plaintiffs. The VJRA does not govern that issue and does not divest the Court of subject matter jurisdiction over Plaintiffs' claim for breach of the Compact.

I. The Court Has Subject Matter Jurisdiction Because No VA Benefits Determination is Required to Resolve this Case.

a. The VJRA's jurisdictional bar precludes judicial review only of VA decisions "necessary to" a VA benefits determination.

The VJRA provides that the VA Secretary "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits" to veterans, and that the Secretary's decision "as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court." 38 U.S.C. § 511(a). Defendants characterize this jurisdictional bar as "sweeping," but the U.S. Court of Appeals for the D.C. Circuit has made clear the statute has its limits: the VJRA bars judicial review only where adjudication of the plaintiff's claim would require the district court to "determin[e] first whether [the plaintiff] was entitled to a certain level of benefits" from VA. *Thomas*, 394 F.3d at 974. Judicial review is *not* precluded, and the Court has subject matter jurisdiction, where resolution of the "'raised questions of law and fact' . . . is not 'necessary' to the benefits determination." *Id.* (quoting 38 U.S.C. § 511(a)); *see also Price v. United States*, 228 F.3d 420, 422 (D.C. Cir. 2000)

(VJRA jurisdictional bar applies where propriety of VA's conduct is "a necessary predicate of" the cause of action).

In *Thomas*, the plaintiff alleged a tort claim against VA for intentional infliction of emotional distress, claiming VA withheld a diagnoses from him for several years. *Id*. at 972. VA contended the court lacked subject matter jurisdiction because a benefits determination was necessary to the case. *Id*. The D.C. Circuit rejected that position, explaining that "[b]ecause none of these claims alleges that the VA failed to pay for treatment (or even to provide for treatment), they raise no questions of law or fact necessary to a decision by the Secretary under a law that affects the provision of benefits." *Id*. at 974 (citing 38 U.S.C. § 511) (internal quotations omitted). The court went on to explain that the raised "questions of law and fact" related instead to whether the alleged withholding of the diagnosis stated a tort claim, and resolution of those questions was not "necessary" to the benefits determination. *Id*. In other words, the court determined, "no denial of benefits underlies Thomas's failure-to-inform allegations." *Id*. at 974-75.

This case is analogous to *Thomas*. As in *Thomas*, resolution of Plaintiffs' claim does not require the Court to determine whether Plaintiffs were entitled to a specific level of reimbursement for healthcare services. Instead, Plaintiffs' claim is premised on IHS's failure to advocate on behalf of and consult with Plaintiffs. To decide that claim, it is not necessary to determine whether VA's own conduct was legal, meaning Plaintiffs' claim "raise[s] no 'questions of law or fact necessary to a decision by the Secretary under a law that affects the provision of benefits," and the VJRA does not bar jurisdiction. *Id.* at 974 (quoting 38 U.S.C. § 511). In fact, even if VA's position on tribal reimbursements was correct—which Congress has

confirmed not to be the case—it would not have excused IHS from its own independent duty to *advocate* for tribal funding under the Compact.

Defendants emphasize *Price v. United States*, but that case is readily distinguishable. First, the plaintiff in that case sued VA—unlike Plaintiffs here—and his core claim was that VA "wrongfully failed to reimburse him for certain medical expenses." *Price*, 228 F.3d at 421. The plaintiff attempted to characterize his claim as a tort to avoid administrative exhaustion requirements, but the court determined the VA's denial of benefits was the underlying issue, so it dismissed for lack of subject matter jurisdiction. *Id*. at 422. Here, in contrast, Plaintiffs' claim is asserted against VA, and it is not that VA illegally refused to pay a specific amount of benefits, but rather that IHS's conduct breached Defendants' Compact obligations.

Defendants advocate a broader reading of the VJRA's jurisdictional bar, contending it precludes review of "any question of law or fact that 'affects the provision'" of VA benefits. Def. Br. 11. But this is a misreading of the statute. As stated above, the statute only precludes review of the Secretary's decisions regarding "questions of law and fact *necessary* to" a benefits decision. 38 U.S.C. § 511(a) (emphasis added). By the plain language of the statute, the phrase "affects the provision of benefits" modifies the "law[s]" under which the Secretary's decisions of law or fact may arise; it does not modify the category of "decisions" the statute insulates from judicial review. *See id.* Defendants' broader interpretation would require the Court to effectively revise the words of the statute; this the Court cannot do. *See Allegheny Def. Project v. FERC*, 964 F.3d 1, 18 (D.C. Cir. 2020) ("Supreme Court precedent emphatically establishes that courts must take statutory language at its word.") (citing *Intel Corp. Investment Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776, 206 L. Ed. 2d 103 (2020)). As the plain language of the law indicates, it precludes only judicial review of decisions "*necessary* to" a VA benefits decision—

not all issues that may "affect" such a decision—which is why the D.C. Circuit has applied the jurisdictional bar only where deciding the legality of VA's conduct is "a *necessary* predicate of" the plaintiff's claim. *Price*, 228 F.3d at 422 (emphasis added).[1]

As further explained below, section 511(a) does not divest this Court of subject matter jurisdiction because adjudication of Plaintiffs' claim in this case does not require the Court to review any VA decision "necessary to" a benefits determination.

b. Defendants' breaches of the Compact are the basis for Plaintiffs' cause of action, regardless of the independent legal status of VA's actions.

In seeking to support application of the VJRA, Defendants extensively recharacterize the allegations in the Complaint, purporting to identify the "true dispute" in this case as "a disagreement between Plaintiffs and the VA." Def. Br. 7-8. But Defendants may not rewrite Plaintiffs' Complaint or substitute their preferred account of the supposed "true" dispute as a means to divest the Court of jurisdiction. They concede, as they must, that "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." Def. Br. at 8. Defendants concede the sole cause of action, and thus the only questions to be adjudicated in this case are (i) whether Defendants breached the Compact, and if so, (ii) whether and to what extent Plaintiffs were damaged. As explained below, in

[1] Defendants cite the Ninth Circuit's decision in *Gila River Indian Community v. United States VA*, 899 F.3d 1076 (9th Cir. 2018) for the proposition that the VJRA precludes review of "VA decisions that *relate* to [a] benefits determination," and state that the D.C. Circuit "has echoed the Ninth Circuit's broad reading of the VJRA." Def. Br. 11-12. But the D.C. Circuit in *Price* and *Thomas* neither endorsed nor "echoed" the Ninth Circuit's reading—the two D.C. Circuit cases were decided over a decade before the cited Ninth Circuit decision, and neither case supports Defendants' broad reading of the statute. Of course, to the extent the Ninth Circuit's interpretation of the statute departs from that of the D.C. Circuit, this Court is bound to follow the D.C. Circuit.

addressing the Plaintiffs' theories of relief, the Court need not review any decision of the VA Secretary "necessary to" a benefits determination; for this reason, the VJRA does not apply. 38 U.S.C. § 511(a).

i. IHS breached specific duties under Compact, damaging Plaintiffs.

IHS had contractual duties under the Compact to consult with and advocate for the Plaintiffs, and it breached those duties. To prevail on a claim of breach of contract, "a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach." *World Class Constr. Mgmt. Grp. v. Baylor*, 962 F. Supp. 2d 296, 299 (D.D.C. 2013). There is no dispute the Compact is a valid contract between the parties; only the remaining elements are contested. Critically, no element of Plaintiffs' breach of contract claim requires adjudication of the legality of VA's position regarding reimbursement.

Multiple provisions in the Compact establish IHS's duties to advocate on behalf of the Plaintiffs in furtherance of the purposes of the Compact and the ISDEAA. As a preliminary matter, the Compact includes several overarching provisions that clarify its specific clauses and, when read in concert with the more specific clauses, demonstrate that IHS had a duty to advocate for and consult with Plaintiffs in regard to VA. The Compact provides that it "shall be liberally construed to achieve its purposes," which include furtherance of national Indian health policies established by Title 25 of the U.S. Code and the ISDEAA. Compact Art. I, § 2. IHS also committed through the Compact to "allow the Community to exercise meaningful authority to plan, conduct, and administer programs, services, functions and activities to meet the health care needs of eligible individuals in the Community's service area." Art. I, § 2(c). IHS is required by the Compact to "interpret all Federal laws, executive orders, regulations, and [the] Compact in a

manner that effectuates and facilitates the purposes of [the] Compact and the achievement of the Community's health goals and objectives." Art. V, Section 15.

Read in the light of these overarching terms, specific provisions of the Compact imposed upon Defendants a responsibility to advocate for and consult with Plaintiffs in IHS's dealings with VA.

First, the Compact provides that "[u]nless expressly agreed to in this Compact, or a funding agreement incorporated herein, the Community is not subject to any agency circular, policy, manual, guidance or rule adopted by the IHS." Art. II, § 9(a). By endorsing VA's template agreements, IHS adopted a policy in regard to Section 1645(c) and effectively forced the Community to adhere to it, which is a breach of the Compact. Compl. ¶ 38.

Second, IHS committed in the Compact "to advocate for increases in the IHS budget to further the ability of the Community to provide the full range of services that are the responsibility and obligation of the United States to make available to American Indian and Alaska Native people and meet the goals of the Indian Healthcare Improvement Act." Art. V, § 16. IHS breached this obligation and commitment by failing to negotiate in good faith on behalf of tribal funding and interpreting Section 1645(c) against tribal interests, which was contrary to Plaintiffs' health goals and objectives and contrary to the express obligation to seek to increase IHS's budget. Compl. ¶ 40. Under this provision of the Compact, the ultimate legality of VA's funding position is irrelevant. The critical issue is whether IHS breached the Compact by failing to advocate on behalf of Plaintiffs, and by capitulating to VA's position, which *impeded* Plaintiffs' ability to obtain supplemental funding from VA in direct contravention of the stated purposes of the Compact.

Third, IHS was obligated to consult with Plaintiffs prior to making any decisions that would affect them. The Compact incorporates Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments, which requires IHS to engage in meaningful consultation with tribes before it embraces "policies that have tribal implications," including any "policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes." E.O. 13175, Section 1(a). Incorporation of Executive Order 13175 into the Compact made its terms binding upon the parties. *See, e.g., United States ex rel. DOL v. Insurance Co. of N. Am.,* 131 F.3d 1037, 1042 (D.C. Cir. 1997) ("When a contract incorporates a regulation by reference, that regulation becomes a part of the contract for the indicated purposes as if the words of that regulation were set out in full in the contract.") (citing *Washington Metro. Area Transit Auth. v. Mergentime Corp.,* 200 U.S. App. D.C. 95, 626 F.2d 959, 962 n.3 (D.C. Cir. 1980)).[2] Similarly, the Secretary of HHS, through the Compact, "pledge[d] that HHS will conduct all relations with the Community on a government-to-government basis." Art. I, Section 2(c). Defendants did not adequately consult with Plaintiffs before agreeing to VA's position and endorsing VA's template agreement, thereby breaching these duties. Compl. ¶ 37.

[2] Defendants contend that "IHS did not create a judicially enforceable right" by incorporating Executive Order 13175 into the Compact because the Executive Order standing alone does not create enforceable rights. *See* Def. Br. 20-21. This is wrong, as further explained below in Plaintiffs' response to Defendants' Rule 12(b)(6) motion. Even assuming *arguendo* that the Executive Order does not independently give any party legally enforceable rights, by incorporating the Order into the Compact, Defendants undertook enforceable contractual obligations defined by the incorporated language.

ii. IHS breached the duty of good faith and fair dealing inherent in the Compact.

In addition to the foregoing breaches, Defendants violated the duty of good faith and fair dealing implied in the Compact as a matter of law. "[A]ll contracts contain" the implied duty of good faith and fair dealing. *Camarda v. Certified Fin. Planner Bd. of Standards, Inc.*, 672 F. App'x 28, 29 (D.C. Cir. 2016); *see also Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1383-84 (Fed. Cir. 2017) ("An implied duty of good faith and fair dealing exists in government contracts and applies to the government just as it does to private parties."). A "party might breach this implied duty by interfering with another party's performance or acting in such a way as to destroy the reasonable expectations of the other party regarding the benefits provided by the contract." *Id.* at 1384. Conduct that may constitute a breach of the implied duty includes "'evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.'" *Id.* (quoting Restatement (Second) of Contracts § 205 cmt. d). In addition, "[f]air dealing means reasonable conduct that is not arbitrary and capricious. To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege either bad faith or conduct that is arbitrary and capricious." *Camarda*, 672 F. App'x at 29.

IHS's failure to consult with Plaintiffs is a breach of the duty of good faith and fair dealing because the "spirit of the bargain" requires IHS to consult in good faith before entering into agreements or embracing policies that will substantially affect Plaintiffs' ability to provide healthcare. *See* Compact Art. I, § 2(c). The stated purpose of the Compact is to "promote the autonomy of the Community in the area of health care," which cannot be accomplished if the Community is frozen out of discussions with VA over reimbursement and forced to accept the

deal created by VA and IHS. Compact Art. I, § 2(a). As a result, IHS's failure to consult with the Plaintiffs is a violation of the spirit and purpose of the Compact, injuring Plaintiffs' right to receive the expected benefits of the contract as explained above. *See Mattis*, 852 F.3d at 1384.

The same is true for IHS's duty to advocate for the Community found in Article V, Section 16, which requires IHS "to advocate for increases in the IHS budget to further the ability of the Community to provide the full range of services that are the responsibility and obligation of the United States to make available to American Indian and Alaska Native people and meet the goals of the Indian Healthcare Improvement Act." Similarly, the Compact states its overall goal is to "enhance the effectiveness and long-term financial stability of the Community and its health programs." *See* Compact Art. I, § 2(c). Yet IHS's conduct alleged in the Complaint was contrary to these stated goals.

As alleged in the Complaint, IHS's actions at best constituted a "lack of diligence" in performing under the Compact, and at worst were undertaken in bad faith—rendering them a breach of the duty of good faith and fair dealing. *Mattis*, 852 F.3d at 1384. Plaintiffs sufficiently alleged that IHS's actions evaded the spirit of the compact, frustrated Plaintiffs' reasonable expectations, and lacked a rational basis. Indeed, the Complaint alleges that "IHS initially opposed" the Section 1645(c) regime proposed by the VA, and "even submitted the dispute over interpretation of § 1645(c) to the DOJ, but IHS capitulated to VA's reimbursement terms before receiving guidance from DOJ." Compl. ¶ 20. IHS articulated no basis for its course reversal, much less a rational one. Moreover, by accepting VA's interpretation, "IHS compromised its own rights and budget," an action which lacks a rational basis and is contrary to the express obligation of advocacy stated in Article V, Section 16 of the Compact. Compl. ¶ 21.

IHS's surrender to VA's template agreement decision, therefore, is a violation of the Compact that frustrated Plaintiffs "reasonable expectations . . . regarding the benefits provided by the contract." *Mattis*, 852 F.3d at 1384. This is true regardless of whether VA's ultimate decision was independently legal. The Compact was intended to require IHS to consult with and advocate for the Community, and IHS failed and did not provide a rational basis for its actions. The Court can (and should) reach that conclusion without "determining first" whether VA acted unlawfully or whether the Community was entitled to a "certain level of benefits" from VA. *Thomas*, 394 F.3d at 974. The VJRA accordingly does not preclude jurisdiction.

iii. Defendants' breaches of the Compact were in violation of the trust responsibility owed to the Community.

Defendants' obligations to Plaintiffs under the Compact, and Defendants' corresponding breaches, are augmented by Defendants' trust responsibility to the Community—a responsibility the Compact itself incorporates and reaffirms.

The Supreme Court has consistently reaffirmed the "undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (internal quotations omitted). In discharging that responsibility, the "Government, following a humane and self imposed policy, has charged itself with moral obligations of the highest responsibility and trust, obligations to the fulfillment of which the national honor has been committed." *Id.* The Court has explained that the nature and particular scope of the trust relationship as applied to particular scenarios is defined by statute and regulation. *Id.* at 177 ("[T]he applicable statutes and regulations 'establish the fiduciary relationship and define the contours of the United States' fiduciary responsibilities.'") (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983)).

Here, both the ISDEAA and the Compact expressly incorporate and embrace the federal trust responsibility. Congress declared in the ISDEAA "that it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians," to, *inter alia*, "(1) ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy;" "(5) to require that all actions under [the ISDEAA] shall be carried out with active and meaningful consultation with Indian tribes and tribal organizations;" and "(6) to ensure that the United States and Indian tribes work in a government-to-government relationship to ensure quality health care for all tribal members." 25 U.S.C. § 1602. The Compact, in turn, is designed to be the agreement through which Defendants and the Community effectuate Title V of the ISDEAA. *See* Compact Art. I, § 2(a). That same section clarifies that Title V is "intended to strengthen the government-to-government relationship and *uphold the United States' trust responsibility to Indian Tribes*, including the Gila River Indian Community." Compact Art. I, § 2(a) (emphasis added); *see also id.* Art. IV, § 1. The Court should give these provisions effect according to their plain terms; they cannot be read out of the Compact. *See United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 56 (D.D.C. 2006) (explaining that contracts must be construed "in a manner that gives effect to the words used by the parties, and assumes that the parties intend every part of a contract to mean something, so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory.") (internal quotations omitted).

Defendants' trust responsibility augments Defendants' duties under the Compact and require Defendants to faithfully and effectively discharge their obligations to the Community. At minimum, the trust responsibility requires the Court to construe the Compact liberally in favor of Plaintiffs, and in furtherance of its stated purposes. *See, e.g., Ramah Navajo Chapter v. Salazar*,

644 F.3d 1054, 1062 (10th Cir. 2011) (stating the canon of construction favoring Indian tribes, "grounded in the trust relationship between the federal government and Indian tribes, applies with equal force to interpretation of contracts."), *aff'd*, 567 U.S. 182 (2012); *see also Hopi Tribe v. United States*, 2000 US App. LEXIS 6690 at *4 (9th Cir. 2000) (per curiam) ("At most, the agency has a trust obligation to construe ambiguous contract provisions for the benefit of the tribe.").

iv. Plaintiffs' claim does not require judicial review of any VA decision "necessary to" a benefits decision.

While Defendants contend the "true" dispute in this case is between Plaintiffs and VA, VA is not a party, and Plaintiffs' sole cause of action runs against Defendants. And as the foregoing explanation of Defendants' breaches makes clear, none of the questions or law or fact raised by Plaintiffs' claim is "necessary to a decision by the Secretary" of VA regarding a VA benefits determination. *Thomas*, 394 F.3d at 974. Instead, the gravamen of Plaintiffs' claim is that Defendants violated contractual obligations to consult with and advocate for Plaintiffs in their dealings with VA. Those violations occurred regardless of whether VA's position was ultimately lawful, and regardless of whether Plaintiffs are legally entitled to a specific level of benefits from VA. Because the Court need not review a VA benefits determination in order to adjudicate Plaintiffs' claim, the VJRA jurisdictional bar does not apply. *Id.* The Court has subject matter jurisdiction and should deny Defendants' motion accordingly.

II. Plaintiffs' Claim is Ripe.

Defendants contend Plaintiffs' claim is not ripe because "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." Def. Br. at 14-15. Defendants' ripeness argument thus rests upon the same false premise as their argument under the VJRA, and it fails for the same

reasons: Plaintiffs' cause of action is against IHS and the other Defendants—not VA—and there is no need to decide the legality of the VA's conduct before reaching and resolving the presently existing dispute between Plaintiffs and Defendants.

The ripeness doctrine is meant to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Assoc. of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1281 (D.C. Cir. 2005). In assessing ripeness, the Court must "consider the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration." *Id.* (internal quotations omitted). Fitness of an issue for judicial review "depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Id.* Plaintiffs' claim plainly is ripe under this standard. It is fit for judicial review because Plaintiffs seek redress for Defendants' breach of the Compact—wrongful conduct that already occurred and caused Plaintiffs injury. And as Defendants acknowledge, Plaintiffs presented their claim to IHS pursuant to the Contract Disputes Act, and IHS issued a decision denying the claim. Def. Br. 7; Compl. ¶¶ 3-5. This is final agency action on the issue giving rise to a right of review in this Court. 41 U.S.C. § 7104(b); 25 U.S.C. §§ 5331(a), (d). There is no need for (or expectation of) further agency action or development of an administrative record.

Likewise, Plaintiffs would suffer hardship if the Court were to withhold consideration of its claim. Plaintiffs have suffered damages and are entitled to seek a remedy at this time. Defendants do not allege that any further agency action might change these facts.

Put simply, Defendants' ripeness argument wrongly assumes Plaintiffs' "real" claim for relief in this case is against the VA, such that the claim must first proceed through the VA administrative review process. For the reasons explained above, this is not the case. Plaintiffs' claim is against IHS and the other Defendants, and it is ripe for adjudication now.

III. Collateral Estoppel is Inapplicable Because the Claim in this Case is not Identical to the Issue Decided by the Ninth Circuit.

Defendants argue that Plaintiffs are collaterally estopped from "re-litigat[ing]" the court's jurisdiction over Plaintiffs' "dispute with the VA." (Def. Br. 12-14.) Defendants are wrong because the issue of the Court's subject matter jurisdiction, and the underlying claim on which it turns, is not identical to the jurisdictional issue and claims brought before the Ninth Circuit.

In determining whether collateral estoppel applies, the "District of Columbia applies a four-part standard, barring relitigation (1) of an identical issue (2) that was fully and fairly litigated and (3) determined by a valid judgment on the merits (4) in which the issue was essential." *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 169 (D.D.C. 2006) (internal quotations omitted). "To determine whether the issues here are identical to issues already adjudicated in prior proceedings between plaintiff and defendant, the Court must look beyond the labels of the claims and examine the single, certain and material points arising out of the allegations and contentions of the parties." *Id.* The Ninth Circuit explained the Community's prior claims as follows:

> The Community alleged that the VA had violated § 1623(b) by "forcing GRHC into a primary payer position on all services for which VA has refused to provide reimbursements." The Community further alleged that the VA violated 25 U.S.C. § 1645(c) by refusing to process reimbursement requests and by conditioning reimbursement on entering into an agreement with the VA.

Gila River Indian Cmty., 899 F.3d at 1078. In short, the prior claims were against VA, alleging that VA violated § 1623(b) and § 1645(c). Defendants acknowledge that this description of the

prior claims is correct, arguing the "Ninth Circuit held that Plaintiffs' claims against the VA under 25 U.S.C. § 1645(c) cannot be heard in any district court." Def. Br. at 14.

In contrast, Plaintiffs' claim here (1) is not against VA and (2) does not allege violation of § 1623(b) and § 1645(c). And as Defendants acknowledge, Plaintiffs "chose not to name the VA as a party in this matter," Def. Br. at 8—the dispute is not even between the same parties.

In sum, in this case Plaintiffs assert a different cause of action against different parties than were before the Ninth Circuit. The jurisdictional issue under the VJRA is subject to a different analysis, for all the reasons explained above. Defendants' conclusory assertion that "Plaintiffs' dispute is undeniably with the VA," and that "[j]urisdiction over the predicate issue here has already been decided," Def. Br. at 13-14, simply ignores Plaintiffs' factual allegations and claim for relief in this case. The jurisdictional issue here is not "identical" to the issue addressed by the Ninth Circuit, and collateral estoppel accordingly does not apply. *Rogers*, 466 F. Supp. 2d at 169.

IV. Plaintiffs Have Standing Because Defendants' Breaches of the Compact Caused Harm Fairly Traceable to Defendants' Conduct.

Defendants next argue Plaintiffs lack standing, exclusively challenging whether they can show causation. To establish standing, Plaintiffs must show "that their claimed injury is fairly traceable to the challenged conduct of the defendant." *AFGE*, 928 F.3d at 54 (internal quotations omitted). At the initial pleading stage of the case, Plaintiffs do not bear an evidentiary burden to prove this or any other element of standing. The Court must accept as true the material allegations of the Complaint at this stage, so "general factual allegations of injury resulting from [Defendants'] conduct" are sufficient to satisfy the standing requirement. *Cmty. Fin. Servs. Assoc. of Am. v. FDIC*, 132 F. Supp. 3d 98, 108 (D.D.C. 2015).

Defendants assert "[t]here is no causal link between Plaintiffs' alleged injuries and IHS's performance under the Compact," Def. Br. at 17, but this naked assertion does not defeat Plaintiffs' allegations of causation, which must be taken as true at this stage. Plaintiffs allege in the Complaint that "[a]s a direct result of IHS's breaches, the Tribal Plaintiffs have been wrongfully deprived of reimbursements in an amount to be determined at trial…." Compl. ¶ 47. In other words, and as explained throughout the Complaint and in this memorandum, Plaintiffs allege that IHS failed to advocate for and consult with Plaintiffs before accepting VA's template agreement which, legal or not, was contrary to Plaintiffs' interests. Plaintiffs were thus deprived of reimbursements they likely would have otherwise received, because IHS embraced a position vis-a-vis VA that was contrary to Plaintiffs' interests. *See* Factual Background § II, *supra*. Defendants may disagree as a matter of fact but the Court must take Plaintiffs' allegations as true and cannot simply embrace Defendants' naked factual assertions at this stage in the case. Plaintiffs' allegations articulate breaches of the Compact that the trier of fact rationally may conclude caused Plaintiffs' damages: put simply, Defendants' conduct placed Plaintiffs in a worse position in regard to VA than Plaintiffs would have enjoyed if Defendants had honored their contractual commitments, which caused Plaintiffs financial injury regardless of whether VA's conduct was legal. This is enough to show Plaintiffs' "injury is fairly traceable" to Defendants' conduct.

Plaintiffs need not show the exact nature and scope of the damages to establish standing, as those are fact issues for discovery and trial, not for the motion-to-dismiss stage. Indeed, "even where monetary damages cannot be proved, a plaintiff who can establish a breach of contract is entitled to an award of nominal damages." *Alston v. Flagstar Bank, FSB,* 609 F. App'x 2, 3 (D.C. Cir. 2015) (internal quotations omitted).

Finally, Defendants assert that "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." Def. Br. at 18. This not only misreads the Complaint, but impermissibly leaps to the merits. Plaintiffs have adequately alleged breach, causation, and damages, and are entitled to discovery and the opportunity to marshal evidence in support of their allegations. At this preliminary stage in the case, Plaintiffs are not asking the Court to "speculate" or adjudicate the merits of their claims. Plaintiffs have sufficiently alleged that IHS failed to meet its duties under the Compact and, as a result, Plaintiffs were damaged. That is sufficient to show causation, which Plaintiffs "need not yet establish [] by a preponderance of the evidence." *AFGE*, 928 F.3d at 54 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

V. Plaintiffs State a Plausible Claim for Relief.

Defendants seek dismissal under Rule 12(b)(6), contending Plaintiffs fail to state a claim for which relief may be granted. Defendants offer three arguments in support of their position: (1) Plaintiffs cannot point to a contractual duty that was violated; (2) Defendants had no trust responsibilities to Plaintiffs; and (3) Defendants had no responsibility to consult with the Plaintiffs. As explained below, each of these arguments fails.

a. Violation of contractual duty.

Defendants first argue that the Complaint, at its core, "concerns Plaintiffs' failure to reach an agreement or understanding with the VA under Section 1645(c)." Def. Br. at 18. According to Defendants, Plaintiffs' negotiations with VA "did not include IHS or HHS" and "IHS and HHS lack any duties related to an agreement between Plaintiffs and the VA," therefore

IHS is not responsible for the Community's agreement with VA under Section 1645(c). *Id*. But as explained above, Defendants bore multiple obligations under the Compact that Plaintiffs allege Defendants violated in their dealings with VA. *See* Argument § I.b.i, *supra*. At minimum, IHS had a duty to consult with the Community, *see* Compact Art. I, Section 2(c); Executive Order 13175, a duty to advocate for increases in IHS's budget to further the purposes of the Compact and Plaintiffs' ability to provide adequate healthcare to Community members, *see* Compact Art. V, § 16, and the implied covenant of good and fair dealing. Plaintiffs allege Defendants violated these duties in specific ways, including the following:

- "IHS negotiated with VA on the terms of reimbursement under § 1645(c), without appropriately consulting with the Community and other tribal governments regarding the interpretation of § 1645(c), the scope of reimbursement it requires, or the content of the template agreements." Compl. ¶ 19.

- "VA sought to include provisions in its template agreements specifically designed to limit tribal reimbursement rights guaranteed by the statute. Upon information and belief, IHS initially opposed such limitations, and even submitted the dispute over interpretation of § 1645(c) to the Department of Justice ("DOJ"), but IHS capitulated to VA's reimbursement terms before receiving guidance from DOJ." Compl. ¶ 20.

- "IHS endorsed template agreements VA sought to impose on tribes in violation of their statutory reimbursement rights." Compl. ¶ 21.

- "Once IHS had already agreed to VA's 'national template agreement,' VA insisted that the Community enter into the same compromise IHS had endorsed." Compl. ¶ 25.

As shown here, Plaintiffs allege that IHS's actions directly contributed to Plaintiffs' disadvantaged position vis-à-vis VA. In contending otherwise, Defendants do not seriously grapple with the language of the Compact and do not even address the implied covenant of good faith and fair dealing. They resort instead to improperly recharacterizing Plaintiffs' claim as a statutory dispute with VA, and raising factual assertions about the parties' respective roles in negotiations with VA. *See* Def. Br. 18. These arguments are unavailing, as factual disputes must

be resolved in Plaintiffs' favor and cannot be the basis for dismissal under Rule 12(b)(6). *See Holy Land Found.*, 333 F.3d at 165.

Defendants go on to argue that "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." Def. Br. at 19. First, this argument is irrelevant because VA is not a party to the Compact. *See* Compact Preamble. Thus, VA can take no "actions under the Compact." Second, again, Plaintiffs' claim is not dependent on VA acting illegally; it is dependent on Defendants wrongful conduct that disadvantaged Plaintiffs in negotiating with VA. Defendants' arguments to the contrary are a contortion of the Complaint to fit Defendants' overarching theory that this dispute is between the Community and VA. Plaintiffs do not claim Defendants are responsible for VA's conduct under the Compact. Rather, Defendants are responsible for *their own* conduct under the Compact, and Plaintiffs have plausibly alleged Defendants breached their obligations for the reasons set forth above.

b. Trust responsibilities

Defendants next argue that Plaintiffs fail to state a claim for violation of trust responsibilities for two reasons: (1) "this case does not involve federal fiduciary obligations in managing Indian property or trust assets," and (2) *Gila River Indian Cmty. v. Burwell*, Civ. A. No. 14-0943, 2015 U.S. Dist. LEXIS 27595 (D. Ariz. Mar. 6, 2015) bars Plaintiffs' claim because the current violation of trust claim is "another attempt by Plaintiffs to re-litigate matters already decided between the parties." Def. Br. at 20.

Plaintiffs' position, as spelled out in the Complaint and in more detail in Argument § I.b.iii, is that IHS's trust responsibility augments its duties under the Compact and informs the Court's interpretation of the Compact. *See* Compl. ¶ 41. Defendants' first point is therefore

irrelevant to the Plaintiffs' Complaint, because no trust corpus is necessary for IHS's trust responsibility to clarify its duties under the Compact. *See, e.g., Ramah*, 644 F.3d at 1062-63 (stating the canon of construction favoring Indian tribes, "grounded in the trust relationship between the federal government and Indian tribes, applies with equal force to interpretation of contracts.").

As for *Burwell*, that decision is not binding on this Court, and provides no guidance here. *Burwell* concerned a dispute over IHS's decision not to fund certain healthcare services under a Funding Agreement reached in 2014. *See Burwell*, 2015 U.S. Dist. LEXIS 27595 at *2-3. There is no material similarity between that claim and the present claims, which address IHS's failure to advocate for and consult with Plaintiffs prior to accepting a deal with VA to severely reduce Plaintiffs' reimbursement for veterans' care. These issues are not identical such that the *Burwell* decision bars Plaintiffs' present claims. *See Rogers*, 466 F. Supp. 2d at 169.

c. Consultation responsibility

Defendants next argue that IHS had no consultation responsibility because Executive Order 13175 disclaimed enforceability of its provisions. Defendants contend that "IHS did not create a judicially enforceable right or duty by incorporating a reference to the Executive Order in the Compact." Def. Br. 21. Defendants are incorrect. While the Executive Order standing alone may not create enforceable rights in any particular party, its incorporation into the Compact does create enforceable contractual rights to which the parties freely agreed. *See, e.g., United States ex rel. DOL,* 131 F.3d at 1042 ("When a contract incorporates a regulation by reference, that regulation becomes a part of the contract for the indicated purposes as if the words of that regulation were set out in full in the contract") (citing *Washington Metro.,* 626 F.2d at 962 n.3). Defendants do not cite any contrary authority, which is unsurprising because it is a

bedrock principle of contract law that contracts are construed "in a manner that gives effect to the words used by the parties, and assumes that the parties intend every part of a contract to mean something, so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory. *United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 56 (D.D.C. 2006) (internal quotations omitted). There would be no reason to incorporate the Executive Order—which already provided guiding language for the Government's relationship with tribes like the Community—into the Compact unless the purpose was to make the terms of the Executive Order enforceable. Defendants' argument essentially asks the Court to conclude that specific terms of the Compact Defendants agreed to are meaningless and unenforceable. This is contrary to law and fundamental fairness.

Moreover, by adopting a tribal consultation policy per Executive Order 13175, Defendants voluntarily constrained the discretion they may have otherwise had in construing Section 1645. In *Cheyenne River Sioux Tribe v. Jewell*, for example, the Court held that the Bureau of Indian Affairs limited its discretion by adopting internal policies for government-to-government consultation. 205 F. Supp. 3d 1052, 1057 (D. S.D. 2016). In denying the agency's motion to dismiss, the Court noted that:

> When analyzing the statutory consultation requirements, the Indian law canons of construction require the court to construe the statutes liberally in favor of the Tribe, and ambiguous provisions are to be interpreted to the Tribe's benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985). *The court must also consider the requirements created by defendants' own consultation policies in assessing the plausibility of the Tribe's complaint*.
>
> ...
>
> Thus, when construing the facts in a light most favorable to the Tribe, the court finds that the Tribe plausibly alleges that defendants failed to consult with the Tribe in an open, government-to-government discussion regarding the proper means of BIE reform.

Id. at 1059. (emphasis added).

In *Yankton Sioux Tribe v. Kempthorne*, the court similarly confirmed that "[a]n agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA." 442 F. Supp. 2d 774, 784 (D. S.D. 2006). The court noted that where an agency established a policy "requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given." *Id*. (citations omitted); *see also Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 713, 721 (8th Cir. 1979) (same). Thus, whether Defendants followed their own consultation policy and Executive Order 13175 is clearly relevant in determining whether they satisfied their Compact duties to the Community.

Defendants also assert that IHS "did hold extensive consultation on IHS-VA agreement," Def. Br. 21, but this contention is contradicted by multiple allegations in the Complaint that IHS failed to negotiate with the Community, raising a fact issue that cannot be resolved against Plaintiffs at this stage of the case. *See, e.g.*, (Compl. ¶¶ 19-24.)

VI. Alternatively, If the Court Disagrees with Plaintiffs' Position, Plaintiffs Request Leave to Amend the Complaint.

The Court should deny Defendants' motion in its entirety. However, in the event the Court were to conclude Plaintiffs' factual allegations are insufficient to establish standing or subject matter jurisdiction, or to state a plausible claim for relief, Plaintiffs respectfully seek leave to amend the Complaint to cure any deficiencies. The Court "should freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). Plaintiffs have not previously amended the Complaint, and if the Court were to conclude the factual allegations are insufficient to meet applicable legal standards, justice requires that Plaintiffs be given the opportunity to come forward with additional allegations.

REQUEST FOR ORAL HEARING

Pursuant to United States District Court for the District of Columbia Local Rule 7(f), Plaintiffs hereby respectfully request an oral hearing on this motion.

CONCLUSION

For all the foregoing reasons, the Court should deny Defendants' Motion to Dismiss in its entirety.

Date: December 1, 2021

Respectfully submitted,

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