No. 22-15543

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAREMARK LLC, ET AL.,

Petitioners-Appellees,

v.

CHOCTAW NATION, ET AL.,

Respondents-Appellants.

On Appeal from the United States District Court
for the District of Arizona
No. CV-21-01554-SMB
Hon. Susan M. Brnovich

APPELLANTS' REPLY BRIEF

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Appellants the Choctaw Nation, *et al.* (collectively, "Appellants" or the "Nation") hereby submit this Reply Brief in further support of their Opening Brief. For the reasons herein and those discussed in the Nation's Opening Brief, the Nation respectfully requests that the Court reverse.

ARGUMENT

Caremark theorizes the Nation waived sovereign immunity to subject it to Caremark's Arizona lawsuit because (1) the Nation filed suit against Caremark in Oklahoma; and (2) the Nation's representatives signed Caremark's Provider Agreements that incorporated Caremark's arbitration provisions by reference. *See, e.g.*, Appellees' Br. 14-19, 28-30. Caremark's "filing" and "signing" waiver theories fail for two reasons. First, Caremark's "filing" waiver theory is not legally supported, as waiver in one forum does not constitute waiver in another forum. Second, Caremark's "signing" waiver theory fails because, although Caremark conflates authority to *contract* with authority to waive *sovereign immunity*, none of the Nation's representatives had authority to waive the Nation's *sovereign immunity* to subject the Nation to Caremark's Arizona lawsuit.

I. CAREMARK'S VIEW OF SOVEREIGN IMMUNITY IS LEGALLY UNSUPPORTED.

Caremark baselessly suggests that "[b]y invoking federal jurisdiction in the federal district court in Oklahoma, appellants necessarily waived immunity in other federal courts." *See* Appellees' Br. 15. Caremark is wrong for several reasons.

First, it is well-settled law that "a waiver of sovereign immunity in one forum does not effect a waiver in other forums" *West v. Gibson*, 527 U.S. 212, 226 (1999) (Kennedy, J., dissenting). Caremark even concedes as much. Appellees' Br. 15 (conceding that waivers in one forum "***do not carry over to another***.") (emphasis added); *see also id.* (Caremark acknowledging that "a tribe that files suit and thereby opens itself to judgment on some claims does not automatically waive immunity as to counterclaims."); *McKenzie v. Dep't of Corr.*, 981 N.W.2d 353, 362 n. 13 (Mich. 2022) (noting that the Ninth Circuit was not convinced with the proposition that "the waiver of sovereign immunity in one federal court with jurisdiction operated to waive immunity in another federal court that could exercise jurisdiction") (citing *McGuire v. United States*, 550 F.3d 903 (9th Cir. 2008)). Here, the federal district courts of Arizona and Oklahoma are indisputably separate fora. *See* Black's Law Dictionary (11th ed. 2019) (defining "forum" as "[a] court or other judicial body; a place of jurisdiction.").

Second, the Nation did not voluntarily appear in the District of Arizona as it did in the District of Oklahoma. *See generally Beckham v. Nat'l R.R. Passenger Corp.*, 569 F. Supp. 2d 542 (D. Md. 2008) (Motion to transfer venue to another federal district court did not constitute a voluntary appearance for purposes of waiving Eleventh Amendment immunity, and thus did not preclude state transit

agency from filing subsequent motion to dismiss based on Eleventh Amendment immunity in transferee court).

Third, the Nation only waived its immunity with respect to the issues addressed within its Oklahoma lawsuit. Contrary to Caremark's argument (Appellees' Br. 16), the Nation's Oklahoma lawsuit and Caremark's Arizona lawsuit involve entirely distinct issues. On the one hand, the Nation's Oklahoma lawsuit involves a federal statutory cause of action (not based on any contract) relating to Caremark's wrongful denial of the Nation's pharmacy claims against Caremark. 2-ER-48-91. On the other hand, Caremark's Arizona lawsuit is about attempting to compel the Nation to arbitration based on contractual provisions contained within Caremark's Provider Manuals. 2-ER-30-47. Thus, the Nation's Oklahoma lawsuit did not waive the Nation's sovereign immunity with respect to Caremark's Arizona lawsuit. *See Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1018 (9th Cir. 2016) (recognizing that "filing a complaint" "invites the court to resolve a specific issue but ***does not waive immunity as to other issues***") (emphasis added).

Because the Nation's filing of its Oklahoma lawsuit did not waive the Nation's sovereign immunity to subject it to Caremark's Arizona lawsuit, the District of Arizona never had jurisdiction to compel the Nation to arbitration. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) ("[i]f they [tribal defendants] were entitled to

tribal immunity from suit, the district court would lack jurisdiction over the claims against them and would be required to dismiss them from the litigation").

Further, as discussed below, the Nation's "signing" theory of waiver also fails because no one at the Nation was authorized to waive the Nation's sovereign immunity with respect to Caremark's lawsuit against the Nation in Arizona.

II. Caremark Does Not Dispute that No One At the Nation Was Authorized to Waive the Nation's Sovereign Immunity to Subject the Nation to Caremark's Arizona Lawsuit.

Caremark's brief notably does not dispute that no one at the Nation was authorized to waive the Nation's sovereign immunity to subject the Nation to suit in Arizona. Instead, Caremark points to the *Chickasaw* decision to argue that the Nation's representatives had the authority to enter into binding contracts with Caremark. Appellees' Br. 29. In so arguing, Caremark improperly conflates authority to *contract* with authority to *waive sovereign immunity*. Even if the Nation's representatives had authority to contract with Caremark, they did *not* have authority to waive the Nation's sovereign immunity to subject the Nation to suit in Arizona. *See, e.g.*, *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) ("giving authority to operate the Casino is not equivalent to authorizing the Management Company to waive the Tribe's sovereign immunity"); *Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 858 (Tex. 2002) ("even though the TNRCC's executive director had the authority to

enter into the contract with IT–Davy on the TNRCC's behalf, he did not have authority to, and thus did not, waive the TNRCC's immunity from suit"). The Nation's uncontested declaration establishes as much. 2-ER-23-26.

Caremark also insists a tribe may assert a lack-of-authority defense only if it has enacted tribal laws in advance expressly so providing. Appellees' Br. 29-30. Caremark's argument has no legal basis. A tribe (just like any State or the United States) can proceed by common law and constitutional principles, as well as by statute. The Supreme Court has opined (without citing to a tribal statute) that "immunity cannot be waived by [tribal] officials." *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940). No court has imposed the precondition sought by Caremark.

The Nation never waived sovereign immunity to subject it to suit in Arizona.

CONCLUSION

For the foregoing reasons and those discussed in the Nation's Opening Brief, this Court should reverse the district court's judgment.

March 31, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,524 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using MS Word Times New Roman 14-point font.

Dated: March 31, 2023

/s/ Michael Burrage
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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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