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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Caremark LLC, et al.,

10 Plaintiffs,

11 v.

12 Cherokee Nation, et al.,

13 Defendants.

14 and

15 Caremark LLC, et al.,

16 Plaintiffs,

17 v.

18 Cherokee Nation, et al.,

19 Defendants.

20

No. CV-24-00082-PHX-ROS

No. CV-24-00092-PHX-ROS

ORDER

21

22 The Cherokee Nation and the Muscogee (Creek) Nation own and operate
23 pharmacies that provide medication and services to members of those nations. Caremark
24 and its affiliated companies entered into agreements with the pharmacies under which
25 Caremark agreed to provide pharmacy benefit management services. Those agreements
26 included language requiring the parties arbitrate any disputes. In 2023, the Nations filed
27 separate suits against Caremark in the Eastern District of Oklahoma, alleging Caremark
28 improperly denied and underpaid claims made by the pharmacies. In 2024, Caremark filed
the present suits, seeking orders compelling the parties to resolve their disputes via

1 arbitration. Other judges in the District of Arizona have compelled arbitration in almost
2 identical situations and the Ninth Circuit affirmed one of those orders. The Ninth Circuit’s
3 ruling establishes the petitions to compel arbitration in these cases must be granted.

4 **BACKGROUND¹**

5 The Cherokee Nation and the Muscogee (Creek) Nation operate pharmacies where
6 members of the nations can obtain prescriptions and other services. Each nation has a
7 contractual relationship with Caremark for Caremark to provide services to the pharmacies.
8 As relevant here, Caremark’s services relate to the pharmacies being paid for prescriptions
9 and services. The contract between each nation and Caremark is found in “two key
10 documents: the Provider Agreement and the Provider Manual.” *Caremark, LLC v.*
11 *Chickasaw Nation*, 43 F.4th 1021, 1025 (9th Cir. 2022). The Provider Agreement is a short
12 document that incorporates the Provider Manual. *Id.* The Provider Manual is a lengthy
13 document that “governs all aspects of a pharmacy’s relationship with Caremark, including
14 the process for submitting pharmacy claims.” (Doc. 12 at 10). The Provider Manual
15 contains the arbitration provision at issue in these cases.

16 Section 15.09 of the Provider Manual is titled “Arbitration.” That section provides,
17 in relevant part,

18 Any and all disputes between Provider and Caremark . . .
19 including, but not limited to, disputes in connection with,
20 arising out of, or relating in any way to, the Provider
21 Agreement or to Provider’s participation in one or more
22 Caremark networks or exclusion from any Caremark networks,
23 will be exclusively settled by arbitration. This arbitration
24 provision applies to any dispute arising from events that
25 occurred before, on, or after the effective date of this Provider
Manual. . . . Unless otherwise agreed to in writing by the
parties, the arbitration shall be administered by the American
Arbitration Association (“AAA”) pursuant to the then
applicable AAA Commercial Arbitration Rules and Mediation
Procedures including the rule governing Emergency Measures
of Protection (available from the AAA). . . .

26 (Doc. 8-18 at 100). All arbitrations under this provision must occur in Scottsdale, Arizona.

27 The same section of the Provider Manual requiring arbitration also contains what is

28 ¹ The citations to the record are from CV-24-82 but the record in CV-24-92 contains the same documents.

1 known as a “delegation clause.” A “delegation clause” is “a clause requiring the arbitrator,
2 rather than courts, to resolve threshold issues about the scope and enforceability of the
3 arbitration provision.” *Caremark*, 43 F.4th at 1026. The Provider Manual’s delegation
4 clause states,

5 The arbitrator(s) shall have exclusive authority to resolve any
6 dispute relating to the interpretation, applicability,
7 enforceability, or formation of the agreement to arbitrate
8 including, but not limited to, any claim that all or part of the
9 agreement to arbitrate is void or voidable for any reason.

10 (Doc. 8-18 at 100).

11 The Nations and Caremark operated under versions of the Provider Agreement and
12 Provider Manual for years and the contractual relationships appear to be ongoing. On
13 August 3, 2023, the Nations filed separate suits against Caremark in the District Court for
14 the Eastern District of Oklahoma. The complaints in those suits explain each nation
15 operates numerous pharmacies dispensing prescriptions and providing other services to
16 members of the Nations. Pursuant to federal law, the members “receive health care
17 (including pharmacy services) at [Nations’] facilities at no charge.” (Doc. 1-1 at 5). To
18 “recoup the costs of covered services,” federal law grants the Nations the right to recover
19 some of the costs “from any applicable insurance coverage the [Nation member] may
20 have.” (Doc. 1-1 at 5). In other words, if a member of the Nations has private health
21 insurance, and that member receives a prescription at a facility operated by a Nation, the
22 member will not pay the Nation for that prescription, but the Nation has a statutory right to
23 seek payment from the member’s health insurer. (Doc. 1-3 at 30). The statute granting
24 Nations this entitlement is referred to as the “Recovery Act.” 25 U.S.C. § 1621e.

25 The Recovery Act provides a Nation “may enforce the right of recovery” provided
26 by the statute by “instituting a separate civil action.” 25 U.S.C. § 1621e(e)(1). The
27 Recovery Act also provides “no provision of any contract . . . shall prevent or hinder the
28 right of recovery.” 25 U.S.C. § 1621e(c). According to the Nations, the language of the
 Recovery Act grants them an entitlement to file lawsuits and no contractual provision, such
 as an arbitration provision, can remove that entitlement.

1 the Ninth Circuit in *Caremark v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022). The
2 facts and governing documents in that case were effectively the same as the facts and
3 documents in the current cases. In seeking reversal of the order compelling arbitration, the
4 Chickasaw Nation offered the Ninth Circuit “two reasons why its Recovery Act claims
5 [were] not arbitrable.” *Id.* at 1028. First, the Chickasaw Nation claimed there was no
6 indication it had “clearly and unequivocally waived its tribal sovereign immunity.” *Id.*
7 Second, the nation argued “the Recovery Act itself precludes the enforcement of any
8 agreement to arbitrate.” *Id.* The Ninth Circuit rejected both reasons but, before doing so,
9 the Ninth Circuit provided the framework courts must apply when resolving contested
10 petitions to compel arbitration.

11 The first step when ruling on a petition to compel arbitration is to “resolve any
12 challenge that an agreement to arbitrate was never formed, even in the presence of a
13 delegation clause.” *Id.* at 1030. If an agreement was formed, “a court must . . . resolve
14 any challenge directed specifically to the enforceability of the delegation clause before
15 compelling arbitration of any remaining gateway issues of arbitrability.” *Id.* If an
16 arbitration agreement was formed, and there is no valid challenge specifically to the
17 delegation clause, “all arguments going to the scope or enforceability of the arbitration
18 provision are for the arbitrator to decide in the first instance.” *Id.*

19 The Ninth Circuit concluded the Chickasaw Nation and Caremark had an
20 agreement. Based on “the hundreds of thousands of claims the [Chickasaw] Nation has
21 submitted to Caremark over the last several years . . . the Nation [could not] plausibly deny
22 that it formed contracts with Caremark.” *Id.* at 1031. It was undisputed those contracts
23 contained “arbitration provisions with delegation clauses.” *Id.*

24 Given the indisputable formation of agreements containing arbitration provisions
25 with delegation clauses, the Ninth Circuit turned to whether the Chickasaw Nation was
26 making any challenge “directed specifically to the enforceability of the delegation clause.”
27 *Id.* at 1030. The Ninth Circuit recognized the Chickasaw Nation was arguing the language
28 of the Recovery Act meant compelling arbitration would be improper. But the Ninth

1 Circuit concluded “[t]he Nation’s theory that the Recovery Act displaces the arbitration
2 provisions . . . does not impugn the validity of the delegation clauses specifically.” *Id.* at
3 1033. Instead, the argument that the language of the Recovery Act prohibits arbitration
4 was “a challenge to the enforceability of the arbitration provisions as a whole.” *Id.*
5 Because the Chickasaw Nation’s argument based on the Recovery Act was not a “challenge
6 directed specifically to the enforceability of the delegation clause,” the parties had to
7 proceed to arbitration where the arbitrator would resolve “any challenge to the validity of
8 the [arbitration agreement] as a whole.” *Id.* at 1033.

9 Despite the reasoning in *Chickasaw Nation* that the Recovery Act did not preclude
10 sending that case to arbitration, the Nations in the current cases make an almost identical
11 argument.² The Nations’ current argument, however, appears to recognize the need to
12 focus on the delegation clause. Accordingly, the Nations argue “the existence of a
13 delegation clause cannot override the express will of Congress in precluding any
14 contractual provision that ‘prevents or hinders’ the Nation[s]’ rights under the Recovery
15 Act, including the right to maintain a civil action.” (Doc. 18 at 8-9). This argument relies
16 on giving the terms in the Recovery Act very specific meanings. Again, that statute grants
17 the Nations a statutory right to “enforce the right of recovery . . . by . . . instituting a separate
18 civil action.” 25 U.S.C. § 1621e(e)(1). The Recovery Act further provides “no provision
19 of any contract . . . shall prevent or hinder the right of recovery of . . . an Indian tribe.” 25
20 U.S.C. § 1621e(d). The Nations interpret this language to mean the Recovery Act
21 guarantees them the right to file “civil actions” in district court and any contractual
22 provision preventing or hindering that right, such as the delegation clause, is not

23 ² The Nations make a preliminary argument that Caremark should have filed motions to
24 compel arbitration in the pending Eastern District of Oklahoma cases. (Doc. 18 at 8). The
25 Nations go so far as to argue Caremark has “no legitimate reason for filing [its] Petition[s]
26 in this Court.” (Doc. 18 at 8). The Nations already know the precise reason Caremark
27 filed the petitions to compel in the District of Arizona. As mentioned in *Chickasaw Nation*,
28 the Tenth Circuit law binding on the Eastern District of Oklahoma prohibits district courts
from compelling arbitration outside of their districts. 43 F.4th at 1028 n.5. That is, “where
the parties agreed to arbitrate in a particular forum only a district court in that forum has
authority to compel arbitration.” *Ansari v. Qwest Commc’ns Corp.*, 414 F.3d 1214, 1219–
20 (10th Cir. 2005). Based on that rule, Caremark could not file motions to compel
arbitration in the pending Eastern District of Oklahoma cases because that court cannot
compel arbitration in Arizona.

1 enforceable.

2 Because the Nations’ argument under the Recovery Act is specifically aimed at the
3 enforceability of the delegation clause, the Court must resolve the issue. *Chickasaw*
4 *Nation*, 43 F.4th at 1029. Fortunately, the result is straightforward. Courts must “enforce
5 agreements to arbitrate according to their terms” unless the Federal Arbitration Act
6 (“FAA”) “has been “overridden by a contrary congressional command.” *CompuCredit*
7 *Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). A party arguing Congress intended to
8 override the FAA “faces a stout uphill climb.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510
9 (2018). The intention to do so must be “must be clear and manifest.” *Id.* The language of
10 the Recovery Act is not sufficiently clear to override application FAA.

11 Congress “knows how to override the [FAA] when it wishes—by explaining, for
12 example, that, ‘[n]otwithstanding any other provision of law, . . . arbitration may be used .
13 . . . only if’ certain conditions are met; or that ‘[n]o predispute arbitration agreement shall
14 be valid or enforceable’ in other circumstances; or that requiring a party to arbitrate is
15 ‘unlawful’ in other circumstances yet.” *Epic Sys.*, 584 U.S. at 514 (statutory citations
16 omitted). The language of the Recovery Act, however, does not explicitly reference
17 arbitration or the FAA. Instead, the language of the Recovery Act is like other vague
18 statutory language that has been found insufficiently clear.

19 In 1991 the Supreme Court addressed whether the Age Discrimination in
20 Employment Act of 1967 (“ADEA”) contained sufficiently clear language to override the
21 FAA such that agreements requiring arbitration of claims brought under the ADEA could
22 not be enforced. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991). The
23 ADEA “read, in part: “Any person aggrieved may bring a civil action in any court of
24 competent jurisdiction for such legal or equitable relief as will effectuate the purposes of
25 this chapter.” *CompuCredit*, 565 U.S. at 101 (quoting 29 U.S.C. § 626(c)). The Supreme
26 Court concluded this language allowing an individual to bring a “civil action” in a “court
27 of competent jurisdiction” was not a sufficiently clear indication that Congress wished to
28 override the FAA. *Gilmer*, 500 U.S. at 29.

1 Similarly, in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), the statutory
2 provision at issue included “repeated use of the terms ‘action,’ ‘class action,’ and ‘court.’”
3 *Id.* at 100. The party resisting arbitration in that case argued those terms “call to mind a
4 judicial proceeding” such that any agreement to arbitrate was not enforceable. *Id.* The
5 Supreme Court disagreed, reasoning “[i]t is utterly commonplace for statutes that create
6 civil causes of action to describe the details of those causes of action, including the relief
7 available, in the context of a court suit.” *Id.* Merely using terms often associated with
8 proceedings in court is not “sufficient to establish the contrary congressional command
9 overriding the FAA.” *Id.*

10 Here, the Recovery Act prohibits any contract from hindering a Nation from
11 “instituting a separate civil action.” 25 U.S.C. § 1621e(e)(1). That language falls well
12 short of the demanding standard to override the FAA. In fact, the language of the Recovery
13 Act is less indicative of such an intent than the language of the ADEA entitling a plaintiff
14 to file “a civil action in any court.” *CompuCredit*, 565 U.S. at 101 (quoting 29 U.S.C. §
15 626(c)). The Recovery Act does not preclude enforcement of the delegation clause.

16 The Nations make two additional arguments against compelling arbitration. The
17 first argument was rejected in *Chickasaw Nation* and the second argument was rejected in
18 cases prior to *Chickasaw Nation*. First, the Nations argue they cannot be forced to arbitrate
19 their disputes because they did not waive their sovereign immunity. (Doc. 18 at 12). The
20 Ninth Circuit rejected this argument. *Chickasaw*, 43 F.4th at 1032-33. According to the
21 Ninth Circuit, “a tribal organization might agree to arbitrate any disputes for which it has
22 waived sovereign immunity but still reserve its ability to choose whether to waive
23 immunity in any given case.” *Id.* at 1032. It would be inappropriate for a court “to resolve
24 whether there has been a waiver of tribal immunity for particular claims for which
25 arbitration is sought before determining whether an arbitration agreement exists at all.” *Id.*
26 at 1033. This language appears to mean that “[w]hen an arbitration agreement contains a
27 delegation clause . . . a court need not resolve any sovereign-immunity implications but,
28 instead, must only decide whether an arbitral agreement exists and, if so, then delegate to

1 the arbiter gateway questions of arbitrability (including whether an Indian tribe waived
2 sovereign immunity).” *Sovereign immunity—Effect of arbitration on sovereign immunity*,
3 2 Commercial Arbitration § 40:81. The Nations are free to make their sovereign immunity
4 argument in the arbitrations.

5 The Nations’ final argument is arbitration cannot be required because the parties’
6 agreement is “unconscionable.” This argument is not aimed specifically at the delegation
7 clause. The Ninth Circuit has long held that when there is a delegation clause, a general
8 argument that the entire contract is unconscionable is for an arbitrator to resolve. *See*
9 *Brennan v. Opus Bank*, 796 F.3d 1125, 1133 (9th Cir. 2015) (noting a party seeking to
10 avoid arbitration must argue the unconscionability of the delegation clause itself and not
11 the unconscionability of the arbitration agreement as a whole). Therefore, the Nations’
12 unconscionability argument must be presented to the arbitrator.

13 Consistent with *Chickasaw Nation*, the Court must compel arbitration. Current
14 Ninth Circuit law would allow the Court to compel arbitration and dismiss these suits but
15 the Supreme Court is considering whether the language of the FAA allows for dismissal in
16 these circumstances. *Forrest v. Spizzirri*, 62 F.4th 1201, 1204 (9th Cir. 2023), *cert. granted*
17 *sub nom. Smith v. Spizzirri*, 144 S. Ct. 680 (2024). The parties will be required to file a
18 joint statement indicating if the Court should stay or dismiss these cases.

19 Accordingly,

20 **IT IS ORDERED** the Petition to Compel (Doc. 12) in CV-24-82 and the Petition
21 to Compel (Doc. 12) in CV-24-92 are **GRANTED**.

22 **IT IS FURTHER ORDERED** the Clerk of Court shall docket this Order in CV-
23 24-82 and CV-24-92.

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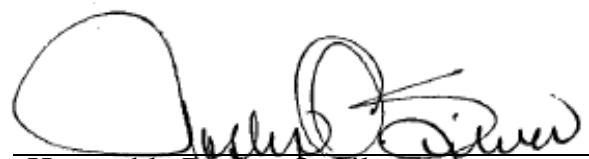
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IT IS FURTHER ORDERED no later than **May 15, 2024**, the parties shall file a joint statement in CV-24-82 stating whether the Court should stay or dismiss these actions.

Dated this 8th day of May, 2024.



Honorable Roslyn O. Silver
Senior United States District Judge