UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

THE CHICKASAW NATION,

Plaintiff,

v.

1. CVS CAREMARK, LLC;
2. CAREMARK PHC, LLC;
3. CAREMARK PCS HEALTH, LLC;
4. CAREMARK, LLC;
5. CAREMARK RX, LLC;
6. AETNA, INC.;
7. AETNA HEALTH, INC.;
8. OPTUMRX, INC.;
9. OPTUM, INC.;
10. UNITED HEALTHCARE SERVICES, INC.; and
11. UNITEDHEALTH GROUP, INC.

Defendants.

Case No. 6:20-cv-00488-PRW

PLAINTIFF'S CONSOLIDATED RESPONSE TO
DEFENDANTS' NOTICES OF SUPPLEMENTAL AUTHORITY (ECF NOS. 105, 106)

Plaintiff, the Chickasaw Nation (the "Nation"), hereby submits the following Consolidated Response to Defendants' Notices of Supplemental Authority (ECF Nos. 105 and 106) (collectively, the "Notices").[1] For the reasons herein, as well as those set forth in the Nation's prior briefing (ECF Nos. 81, 82, 99, 100, and 104), the Nation respectfully requests this Court disregard the Notices, grant the Nation's Cross-Motion, and deny Defendants' Motions.

ARGUMENT

In reaching its decision—which the Nation intends to appeal—the Arizona Court ***wrongly assumed*** its own conclusion: that the parties entered into a clear and binding arbitration agreement (they did not). As the Arizona Court acknowledges, arbitration is a matter of contract and "depends upon whether the parties agreed to arbitrate that dispute." Order at 3 (citation omitted). In concluding the delegation clause vested arbitrators with the power to decide whether the parties agreed to arbitration, the Order simply assumes there was a valid arbitration agreement in the first place, and hence a valid delegation clause. But there was no such agreement and no valid delegation clause.

The Arizona Court ignored the fact that the Nation's pharmacies never signed *any* document with *any* Caremark entity that actually contained an arbitration provision (much less a delegation clause). Nor did the Arizona Court even cite, much less discuss, the only Supreme Court decision involving agreements to arbitrate by Native American tribes, *C & L Enterprises, Inc. v.*

[1] As used herein: **(i)** "Defendants" collectively refers to CVS Caremark, LLC; Caremark PHC, LLC; CaremarkPCS Health, LLC; Caremark RX, LLC; Aetna, Inc.; Aetna Health, Inc.; OptumRx, Inc.; Optum, Inc.; United Healthcare Services, Inc.; and UnitedHealth Group, Inc.; **(ii)** the "Motions" collectively refers to the Caremark/Aetna Defendants' Motion to Stay (ECF No. 61) and the Optum/United Health Defendants' Motion to Stay (ECF No. 59); **(iii)** the "Cross-Motion" refers to the Nation's Cross-Motion for an Order or Declaratory Relief that its Claims are not Subject to Arbitration (ECF No. 82); **(iv)** the "Arizona Court" refers to the District of Arizona referenced in Defendants' Notices; and **(v)** the "Order" refers to the Arizona Court's Order Compelling Arbitration (ECF No. 105-1).

Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001), which establishes a "clear" and "unequivocal" standard that cannot be met by Caremark's reliance on "Provider Agreements" and "Network Enrollment Forms" that do not even contain the word "arbitration."

Absent a clear and unequivocal assent by the Nation to arbitrate, there was no enforceable arbitration agreement, no valid delegation clause, and hence no basis for the Arizona Court to invoke that clause. The law is clear: **Before granting a stay (*see* 9 U.S.C. § 3) or compelling arbitration (*see* 9 U.S.C. § 4) under the Federal Arbitration Act ("FAA"), a Court—not an arbitrator—must first determine whether a valid arbitration agreement exists (none exists here)**.[2] *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1515-16 (10th Cir. 1995) ("***a valid arbitration agreement*** and a dispute within the scope of that agreement are condition precedents to arbitration") (emphasis added).[3] The presence of a delegation clause does not affect this analysis. "A delegation clause is merely a specialized type of arbitration agreement, and the Act 'operates on this additional arbitration agreement just as it does on any other.'" *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 538 (2019) (citation omitted). Where "a party specifically challenges the validity of the agreement to arbitrate" – and here the Nation never agreed to the arbitration

[2] *See* ECF No. 81 at 10-22. *See* 9 U.S.C. § 3 ("[T]he court in which such suit is pending, ***upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement***, shall grant an application for stay."); *id*. at § 4 ("The court shall hear the parties, and ***upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue***, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. … If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.") (emphases added).

[3] *See also Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1106-07 (10th Cir. 2020) ("By claiming that neither she nor the other class members read or accepted the 2016 arbitration agreement, Fedor raised an issue of formation which—according to the Supreme Court in both *Rent-A-Center* and *Granite Rock*—cannot be delegated to an arbitrator"); *Black v. Del Webb Communities, Inc.*, 2006 WL 8446305 *2 (D. Cal. 2006) ("under both sections three and four, the Court must be 'satisfied' that the arbitration agreement is binding before issuing the order.").

provision or the delegation clause – it is entitled to a judicial resolution of that issue. *Id.*; *see also Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 299 (2010) ("[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.").[4]

As the Nation previously briefed, a Court must also consider whether the Nation waived its sovereign immunity (it did not);[5] and whether the Recovery Act displaces any purported agreement to arbitrate (it does).[6] The Arizona Court erroneously failed to consider ***any*** of these issues. As the Arizona Court failed to determine whether a valid and enforceable agreement to arbitrate existed (and hence whether there was any valid and enforceable delegation clause), that decision now necessarily rests with this Court.

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[4] The cases cited by the Arizona Court are to the same effect. *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (where party resisting arbitration "did not clearly agree to submit the question of arbitrability to arbitration," the issue of arbitrability of the dispute "was subject to independent review by the courts"). The remaining cases cited by the Arizona Court are inapposite. In *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011), there was no dispute as to formation of an arbitration agreement. *Loc. Joint Exec. Bd. v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 598-99 (9th Cir. 2018), held it was for the court, not arbitrator, to decide in the first instance the substantive arbitrability of a union's grievance. In *PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1189 (9th Cir. 2004), the complaining party agreed to delegate arbitrability to the arbitrators and "itself argued that the arbitration panel should independently determine the arbitrability of all its claims."

[5] *See* ECF No. 81 at 10-16.

[6] *See* ECF No. 81 at 23-35.

CONCLUSION

For the foregoing reasons and the reasons stated in the Nation's prior briefing (ECF Nos. 81, 82, 99, 100, and 104), the Nation respectfully requests the Court disregard Defendants' Notices, deny Defendants' Motions to Stay, and grant the Nation's Cross-Motion.

Respectfully submitted on July 12, 2021:

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