IN THE DISTRICT COURT OF OSAGE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* GENTNER DRUMMOND,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

vs.

ET GATHERING & PROCESSING LLC, *successor by merger to* ENABLE MIDSTREAM PARTNERS, LP, ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC, ENABLE GAS TRANSMISSION, LLC, and ENABLE ENERGY RESOURCES, LLC,

Defendants.

Case No. CJ-24-77
Honorable Stuart Tate

DEFENDANTS' MOTION TO DISMISS AND ALTERNATIVELY TO TRANSFER VENUE AND BRIEF IN SUPPORT

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Pursuant to Oklahoma Statute Title 12, § 2012(B)(6), Defendants ET Gathering and Processing LLC ("ETGP"), Enable Midstream Partners, LP ("EMP"), Enable Oklahoma Intrastate Transmission, LLC ("EOIT"), Enable Gas Transmission, LLC ("EGT"), and Enable Energy Resources, LLC ("EER") (collectively, "Enable" or "Defendants"), move the Court to dismiss the Petition filed by the State of Oklahoma (the "State") or transfer venue, for the following reasons.

INTRODUCTION

Winter Storm Uri was an unprecedented weather event that brought record-breaking cold temperatures to Oklahoma and surrounding states. The extreme freeze had a cascading effect on the supply and price of natural gas across the state. The cold weather "froze in" large numbers of gas-producing wells, causing immediate and significant shortages in the supply of available natural gas. At the same time, the demand for natural gas spiked. The result was a significant increase in natural gas prices. Numerous courts, the Oklahoma Corporation Commission ("Commission"), and other governmental and regulatory entities have investigated and analyzed the root cause of this February 2021 jump in natural gas prices. And all have reached the same conclusion: that severe cold weather was responsible. The Oklahoma Supreme Court may have summarized it best: Winter Storm Uri's "severe cold weather resulted in a shortage of the natural gas supply due to incredibly high demand and the cold weather preventing the gas's extraction and transportation, which, in turn, caused extraordinary natural gas costs for regulated utilities operating in Oklahoma." *In re Matter of Okla. Dev. Fin. Auth.*, 2022 OK 47, ¶ 2, 511 P.3d 1052, 1054.

This lawsuit tells a different story. Ignoring the conclusions of other state agencies, the Oklahoma Supreme Court, and—perhaps most conspicuously—its own support for these conclusions in these same judicial and regulatory proceedings, the Attorney General now places the blame for increased gas prices solely on Defendants. According to the Attorney General in this lawsuit, the spike in natural gas prices was not the result of frozen energy infrastructure and

increased demand for electricity to warm houses in the face of record low temperatures, but instead was caused by Defendants "manipulat[ing] the natural gas market in Oklahoma." That market manipulation, the Attorney General alleges, directly harmed Grand River Dam Authority ("GRDA")—on whose behalf the State purports to bring its claims. To recover for those alleged harms, the Attorney General asserts various contract, antitrust, and tort violations.

The flaws in the State's meritless Petition are not limited to its counter-factual allegations. The Petition suffers from a number of fatal defects that require dismissal at the pleading stage. ***First***, the State filed suit in the wrong forum, violating the terms of the very agreement it purports to enforce. That agreement establishes Oklahoma County as the exclusive forum for any dispute "associated directly or indirectly with" the agreement. For this reason alone, the Court should dismiss the State's claims or, alternatively, transfer the case to the parties' agreed-to venue.

Second, collateral estoppel bars the State from bringing allegations inconsistent with earlier agency and judicial findings that the extreme cold weather—not Defendants' conduct—caused the natural gas shortage and resulting high prices during Winter Storm Uri. The State, through the Attorney General, was a party to these earlier proceedings and did not challenge these findings. The State's claims based on allegations that Defendants' "market manipulation" is the cause of high natural gas prices during Winter Storm Uri should be dismissed.

Third, the State comes nowhere close to stating a claim on which relief can be granted. As a threshold matter, the State's own allegations confirm that many of its claims are barred by the statute of limitations. Separately, the State has failed to plead facts supporting critical—and required—elements of each of its claims. Lastly, independent from the other grounds for dismissal, many of the damages the State seeks are precluded as a matter of law by the agreement's limitation-of-liability clause. For these reasons, too, the State's Petition should be dismissed.

BACKGROUND[1]

Defendants are affiliated corporate entities that "gather, process, transport, market and trade large volumes of natural gas" within Oklahoma. Pet. ¶¶ 4–8, 20. EOIT owns the pipeline that delivers natural gas to GRDA. *Id.* ¶ 21. Importantly, EOIT is a pipeline company. It does not itself sell or supply natural to GRDA but rather transports and delivers it to GRDA on its pipeline under the terms of the bargained-for service agreement. *See id.* ¶¶ 4–8, 21, 22–23.

I. GRDA AND EOIT AGREE TO THE SERVICE AGREEMENT.

On April 1, 2014, GRDA and EOIT entered into an Intrastate Firm Transportation Service Agreement, as amended (the "Service Agreement"). *Id.* ¶ 22; *see* Ex. A-1. No other Defendant is party to the Service Agreement. *See* Ex. A-1 at 1, 16.

The Service Agreement requires EOIT to "transport and deliver" gas to GRDA on its intrastate pipeline. *See id.*; Pet. ¶ 22. It does not require EOIT to supply gas. *See* Ex. A-1; Pet. ¶ 22. Rather, EOIT is merely "obligated to transport and deliver natural gas" that GRDA has "purchased" elsewhere. *See* Ex. A-1 at § 4; Pet. ¶ 23. As the State acknowledges, the Service Agreement provides agreed-to rate structures and formulas for various rates related to EOIT's transportation and delivery of gas. Pet. ¶¶ 23–29. This includes some fees tied to "certain index prices[.]" Pet. ¶ 25. In addition to other types of fees, EOIT is further "allowed to charge imbalance fee[s]" dependent on the volume of gas taken by GRDA at its point of delivery. Pet. ¶ 28.

The Service Agreement also broadly limits both party's ability to recover various types of damages arising out of or relating to the Service Agreement:

> **11. Damages.** NEITHER PARTY SHALL BE LIABLE OR OTHERWISE RESPONSIBLE TO THE OTHER PARTY FOR PUNITIVE, SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES OR FOR LOST

[1] Defendants dispute the facts alleged in the Petition. Nonetheless, for purposes of the present motion alone (except for collateral estoppel), Defendants accept as true the facts in the Petition.

PROFITS WHICH ARISE OUT OF OR RELATE TO THIS AGREEMENT OR THE PERFORMANCE OR BREACH THEREOF.

The State's Petition ignores that the Service Agreement also expressly incorporates the Statement of Operating Conditions Applicable to Transportation Services (the "SOC") on file with the Federal Energy Regulatory Commission ("FERC"), and that it makes the SOC "a part [of the Service Agreement] for all purposes applicable to Intrastate Service." Ex. A-1, § 6.a. The SOC on file with FERC, dated February 28, 2023, contains additional guidelines on rates and charges and the application of force majeure to service agreements. *See* Ex. A-2, § 7 & General Terms and Conditions, § 5. The SOC further provides that EOIT "shall have the right to issue System Operations Orders", which "require actions or measures that [EOIT] determines will neutralize or reduce threats to, or otherwise preserve, the integrity of all or a portion of [EOIT]'s System." *Id.* at 18–19.

Section 9 of the SOC also contains a forum-selection clause that fixes venue in Oklahoma County for "any cause of action associated directly or indirectly with the terms and conditions of a Contract and the Statement of Operating Conditions."

After entering the Service Agreement, GRDA and EOIT negotiated several amendments, none of which materially changed the basic terms of the Service Agreement referenced above. Pet. ¶ 22; *see* Exs. A-3–A-6.

II. OKLAHOMA COURTS AND AGENCIES CONCLUDE THAT THE CAUSE OF HIGH NATURAL GAS PRICES WAS EXTREME COLD WEATHER, WHICH RESULTED IN INFRASTRUCTURE FAILURES AND INCREASED DEMAND.

"In February 2021, extreme cold winter weather hit Oklahoma"—and many other states—"in what became known as 'Winter Storm Uri.'" Pet. ¶ 32. Causing "record-breaking snow, ice, and freezing temperatures," Winter Storm Uri "battered the Southern United States, disrupting power, water, and . . . natural gas production across the region." *Clearwater Enterprises, L.L.C. v.*

Leggett & Platt, Inc., 2023 WL 3397420, at *1 (W.D. Okla. May 11, 2023); *Mieco LLC v. Pioneer Nat. Res. USA, Inc.*, 2023 WL 2064723, at *1 (N.D. Tex. Feb. 15, 2023). Oklahoma in particular "endured record cold temperatures." *In re Matter of Okla. Dev. Fin. Auth.*, 2022 OK 47, ¶ 2. In response to the "[e]xtreme freezing temperatures and severe winter weather including snow, freezing rain, and wind," Governor Stitt "declared a disaster emergency ***caused by severe winter weather*** in all 77 Oklahoma counties that threaten[ed] the public's peace, health, and safety." *See* Ex. A-7, at 1 (emphasis added).

In the aftermath of Winter Storm Uri, various Oklahoma governmental entities assessed and analyzed its devastating impact on energy infrastructure in Oklahoma and the surrounding states. Among other things, these assessments focused on determining the root cause of the increase in natural gas prices. For example, the Commission oversaw multiple securitization proceedings—***to which the Attorney General was a party***—brought by various regulated utilities, including Public Service Company of Oklahoma, Oklahoma Gas and Electric Company, CenterPoint Energy Oklahoma Gas, and Oklahoma Natural Gas Company, under the Regulated Utility Consumer Protection Act. Okla. Stat. tit. 74, § 9070–81; *In re Matter of Okla. Dev. Fin. Auth.*, 2022 OK 47, ¶ 12. In these proceedings, the Commission was specifically charged with determining whether each utility's "extreme purchase costs" or "extraordinary costs" (including natural gas purchases) due to Winter Storm Uri "would otherwise be recoverable from customers as fair, just and reasonable expenses and prudently incurred." Okla. Stat. tit. 74, §§ 9073(A), (E); *In re Application of Okla. Dev. Fin. Auth. for Approval of Not to Exceed $800,000,000 Ratepayer-Backed Bonds*, 2022 OK 41, ¶¶ 3,4, 510 P.3d 165, 167.

In approving each securitization application, the Commission specifically examined—and issued Findings of Fact concerning—Winter Storm Uri's causal effect on the natural gas shortage, natural gas supply constraints, enhanced demand for natural gas, and increased natural gas prices:

- "In February 2021, Oklahoma experienced an ***extreme weather event that brought*** nearly two weeks of ***record cold temperatures*** to the state."[2]
- "The ***extreme cold weather resulted*** in a shortage of natural gas supply, the failure of certain infrastructure, and increased demand for natural gas and electric power."[3]
- "The ***extreme weather conditions resulted*** in extraordinary costs for regulated utilities operating in the state."[4]
- "The ***February 2021 Winter Weather Event swept in fast, causing*** unprecedented low temperatures and extensive ice storms ***that brought about very rapid well and pipeline freeze-offs to an extent not seen before***. This shortage of gas supply deprived the entire natural gas market of large quantities of Southwest production, leading to widespread power curtailments and blackouts in Texas as well as market prices never before experienced in the Southwest region. Supply restrictions ***caused*** by wellhead and pipeline freeze-offs during ***the 2021 Winter Weather Event caused*** prices of all relevant supplies to skyrocket for a few days."[5]
- "The very large run-up in prices this February was the ***result of an anomalous event***..."[6]
- The "winter storm" was "***unforeseen***, ***unprecedented***, and [of] ***extreme nature***[.]"[7]
- "[N]atural gas production in Oklahoma fell significantly below demand for nine days of the storm between February 11, 2021, and February 19, 2021, and many of ONG's suppliers declared force majeure under their contracts due to upstream supply constraints ***caused by the extreme weather***. At the same time, demand on ONG's distribution system surged to record highs ***due to the extremely cold weather***."[8]

The Commission's Final Financing Orders containing these detailed Findings of Fact followed a "thorough review of the entire record" developed in each proceeding, including

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2 Ex. A-8 at 18; Ex. A-9 at 17; Ex. A-10 at 17; Ex. A-11 at 17.
3 Ex. A-8 at 18; Ex. A-9 at 17; Ex. A-10 at 17; Ex. A-11 at 17.
4 Ex. A-8 at 4; Ex. A-9 at 4; Ex. A-10 at 4; Ex. A-11 at 4.
5 Ex. A-10 at 20; *see also* Ex. A-9 at 2.
6 Ex. A-10 at 22.
7 Ex. A-8 at 23; Ex. A-11 at 24.
8 Ex. A-8 at 24.

documentary evidence and oral and written testimony, with the opportunity to conduct cross-examination, including by the Attorney General. The Attorney General "consistently supported" the proceedings' outcomes, and never appealed or challenged the Commission's Orders. *In re Matter of Okla. Dev. Fin. Auth.*, 2022 OK 47, n.3. The Commission's orders are "final." *Id.*

Oklahoma's highest court affirmed the Commission's assessment. In upholding ratepayer-backed bonds, the Oklahoma Supreme Court explained that "[t]he severe cold weather ***resulted*** in a shortage of the natural gas supply due to incredibly high demand and the cold weather preventing the gas's extraction and transportation[.]" *In re Matter of Okla. Dev. Fin. Auth.*, 2022 OK 47, ¶ 2 (emphasis added). That, "in turn, ***caused*** extraordinary natural gas costs for regulated utilities operating in Oklahoma." *Id.* (emphasis added). Importantly, ***nowhere*** in ***any*** of the comprehensive findings of facts affirmed by the Oklahoma Supreme Court is "market manipulation" by Defendants identified as a cause of the increase in natural gas prices.

III. THE STATE ASSERTS UNFOUNDED ALLEGATIONS PUTATIVELY ON BEHALF OF GRDA.

In bringing this case, the State ignores the findings of the Oklahoma Supreme Court (and numerous other courts) and the Commission, and the Attorney General's own decision to not challenge or appeal key factual findings it now attempts to avoid here.

The State instead spins a counterfactual narrative in which Defendants' purported wrongful conduct—not Winter Storm Uri—was the cause of the increase in nature gas prices. To that end, the State broadly alleges that Defendants "manipulat[ed] the natural gas market in Oklahoma" during the February 2021 Winter Storm Uri. Pet. ¶ 37. It says that Defendants did so by issuing *force majeure* and System Operations Orders ("SOO") declarations to encourage customers to "refrain from taking more gas from its system than they were providing to the system." *Id.* ¶¶ 39–44. The State alleges that these declarations—in response to what the State admits was an historic

weather event—were really a "pretext" that allowed Defendants to store gas and then later "releas[e] into the open market [the gas] volumes that were previously committed to fixed price contracts" at higher prices. *Id.* ¶ 46. Finally, the State alleges that Defendants reported these trades in order to artificially manipulate the market index and increase the prices that GRDA was required to pay under the Service Agreement. *Id.*[9]

Absent from the Petition, however, is any allegation that EOIT failed to comply with its contractual duty to transport and deliver gas to GRDA during Winter Storm Uri. In fact, the Petition presumes that GRDA received the gas it required in accordance with the Service Agreement. *See id.* The State does not allege that EOIT violated any express terms of the Service Agreement. Nor does it allege that EOIT was a supplier of gas or had any contractual duty to supply gas to GRDA. To the contrary, the Petition concedes that EOIT was obligated only "to transport and deliver natural gas" that GRDA "purchased" from other suppliers. *Id.* ¶ 23. And, according to the Petition, EOIT fulfilled this obligation. The Petition similarly fails to identify any alleged misrepresentations made by Defendants or to whom they were allegedly made. In short, the Petition alleges no misconduct by Defendants that caused the purported damages alleged.

LEGAL STANDARD

In cases concerning "the judicial enforcement of a contract-based obligation specifying venue selection," a defendant may seek dismissal through "an appropriate § 2012(B)(6) motion challenging the sufficiency of the face of the petition." *Tucker v. Cochran Firm-Crim. Def.*

[9] The State claims that the natural gas market in Oklahoma "is especially vulnerable to manipulation" because it is not governed by FERC. Pet. ¶¶ 16–19. But the parties have always understood that the Service Agreement would fall outside of FERC's regulatory authority—indeed, the parties purposely designed it that way. The Service Agreement itself provides that "all acts, obligations, and intrastate services performed" by EOIT, "and the charges therefor, are exempt from the regulation of FERC." Ex. A-1, § 9. In sum, GRDA voluntarily agreed to the terms that the State now alleges made it so "especially vulnerable."

Birmingham L.L.C., 2014 OK 112, ¶¶ 20–21, 341 P.3d 673, 681–82 (internal citations and emphasis omitted). A defendant may also move to dismiss a petition for failure to state a claim pursuant to Oklahoma Statute Title 12, § 2012(B)(6). When reviewing a motion to dismiss, the Court must accept as true the plaintiff's well-pleaded factual allegations, but it may not accept as true legal conclusions or conclusory statements unsupported by factual allegations. *See Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1162. Dismissal is appropriate "when there is no cognizable legal theory to support the claim or insufficient facts under a cognizable legal theory." *Nicholson v. Stitt*, 2022 OK 35, ¶ 5, 508 P.3d 442, 445; *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1209.

In deciding a motion to dismiss, a court may consider any document that is "an integral part of the pleading[]" and "incorporated in it by reference." *Springs v. Braum's Inc.*, 2022 OK CIV APP 11, ¶ 12, 510 P.3d 864, 869; *see Tucker*, 2014 OK 112, ¶ 30. A court may also consider facts of which it may take judicial notice, including "public records and government documents available from reliable sources on the internet," including "public agency actions, factfinding, and decisions." *Farley v. City of Claremore*, 2020 OK 30, ¶¶ 13–17, 465 P.3d 1213, 1222–24; *Merswin v. Williams Companies, Inc.*, 364 F. App'x 438, 440 (10th Cir. 2010) (holding that district court did not err in considering court records from a prior lawsuit without converting a motion to dismiss to one for summary judgment).

ARGUMENT AND AUTHORITIES

I. THE COURT SHOULD DISMISS THE PETITION, OR ALTERNATIVELY TRANSFER VENUE, BECAUSE IT IS FILED IN THE WRONG COUNTY UNDER THE SERVICE AGREEMENT'S MANDATORY FORUM-SELECTION CLAUSE.

The Court should dismiss the Petition, or alternatively exercise its discretionary authority to transfer venue, because the Service Agreement's forum-selection clause mandates venue exclusively in Oklahoma County. "[F]orum selection clauses in contracts are prima facie valid and

should be enforced unless clearly unreasonable; a court may properly refuse to exercise its jurisdiction out of respect for the intent of the parties concerning the venue of any litigation concerning the contract." *Barker Leasing, Inc. v. State Ins. Fund*, 1995 OK CIV APP 158, ¶ 2, 910 P.2d 1102, 1103. Where a mandatory forum-selection clause dictates venue, the "plaintiff's choice of forum merits no weight," and "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *See Tucker*, 2014 OK 112, ¶ 32 (quoting *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 63 (2013)). If the plaintiff fails to meet this burden, the case should be dismissed. *See id.*; *Barker Leasing, Inc.*, 1995 OK CIV APP 158, ¶ 2.

A. The SOC's forum-selection clause applies because the Petition concerns the Service Agreement and SOC.

The State's claims fall within the scope of the SOC's forum selection clause. That clause applies "to any cause of action associated directly or indirectly with the terms and conditions of a Contract and the Statement of Operating Conditions[.]" Ex. A-2 at 16. "Contract" is defined as "a service agreement for the transportation of Natural Gas between Transporter and Shipper." *Id.* at 2. The Service Agreement between GRDA and EOIT thus constitutes a "Contract" under the SOC. And the Petition expressly references, relies on, and challenges specific terms of the Service Agreement and SOC, including provisions surrounding fees and rates, transportation obligations, force majeure notices, and SOOs. *See* Pet. ¶¶ 22–31, 37, 41–42, 45–46. Thus, because the action here directly concerns the Service Agreement and SOC, the SOC's forum selection clause applies, and "proper venue" is exclusively in Oklahoma County.

B. Venue is mandatory in Oklahoma County under the forum-selection clause.

"In Oklahoma, the cardinal rule in contract interpretation is to determine and give effect to the intent of the parties." *Porter v. Okla. Farm Bureau Mut. Ins. Co.*, 2014 OK 50, ¶ 12, 330 P.3d

511, 515 (quoting *In re Kaufman*, 2001 OK 88, ¶ 13, 37 P.3d 845, 853). Courts "look to the plain and ordinary meaning of the [contract] language to determine and give effect to the parties' intent." *Id.* Here, the SOC's forum-selection clause reads:

> With respect to any cause of action associated directly or indirectly with the terms and conditions of a Contract and the Statement of Operating Conditions, the parties agree and consent to the exclusive jurisdiction of the federal or state courts sitting in the State of Oklahoma, and acknowledge proper venue to be in either state or federal court located in Oklahoma County, Oklahoma, and hereby waive any defenses or objections thereto; provided, however, that Transporter may agree to permit a court with jurisdiction to decide venue as to a specific matter or matters.

Ex. A-2, § 9. The parties' intent is clear based on this clause: proper venue lies exclusively in Oklahoma County.

First, the SOC's use of the term "proper" leaves no ambiguity as to where venue must lie under the Service Agreement and SOC. "Proper" is defined as "[s]trictly pertinent or applicable; exact; correct." Black's Law Dictionary (11th ed. 2019). Venue in Oklahoma County is thus not merely possible or permissible under the parties' agreement; to the contrary, venue is "strictly applicable," "exact," and "correct" in Oklahoma County.

Second, the forum-selection clause's waiver of "any defenses or objections" to venue in Oklahoma County further supports that venue is mandatory there. *See* Ex. A-2 at 16. Courts have routinely held that a forum-selection clause is mandatory where, as here, it waives objection to the designated venue. *See Aguas Lenders Recovery Grp. v. Suez*, S.A., 585 F.3d 696, 700 (2d Cir. 2009); *AAR Int'l, Inc. v. Nimelias Enterprises S.A.*, 250 F.3d 510, 525–26 (7th Cir. 2001). Courts have relied on this rationale in rejecting a plaintiff's choice of a non-designated venue. *See S & L Birchwood, LLC v. LFC Cap., Inc.*, 752 F. Supp. 2d 280, 284–86 (E.D.N.Y. 2010) (granting defendant's motion to transfer where forum-selection clause's waiver of objection "indicate[d] the parties' intent to have their disputes determined" in the designated venue); *Or-Cal, Inc. v. Tessenderlo Kerley, Inc.*, No. 6:14-CV-01074-AA, 2014 WL 12646028, at *2 (D. Or. 2014)

(granting defendant's motion to transfer venue where it "irrevocably waive[d] any objection" to the designated venue). The same is true here. The parties waived objection to venue in Oklahoma County, and any objection by the State now would be a clear violation of the parties' agreement.

Third, to interpret the forum-selection clause as anything but mandatory would render the second part of the clause superfluous. That part provides that EOIT "may agree to permit a court with jurisdiction to decide venue as to a specific matter or matters." Ex. A-2 at 16. But as a general matter, courts do not require permission from litigants to decide venue. *See* Okla. Stat. tit. 12, § 140.3; *Safeway Stores, Inc. v. Martin*, 1974 OK 149, ¶ 4, 530 P.2d 131, 133. The only interpretation that gives meaning to this clause is that venue is mandatory in Oklahoma County; indeed, where no venue is contractually mandated, it would be redundant and superfluous to restate a court's authority to decide venue. Interpreting it otherwise would render EOIT's ability to agree to permit a court to decide venue meaningless, contravening well-settled contract interpretation principles. *See Patel v. Tulsa Pain Consultants, Inc., P.C.*, 2022 OK 56, ¶ 9, 511 P.3d 1059, 1062 ("[A] contract is to be construed as a whole, giving effect to each of its parts, and not construed so as to make a provision meaningless, superfluous or of no effect.") (quoting *McGinnity v. Kirk*, 2015 OK 73, ¶ 37, 362 P.3d 186, 199). Therefore, giving independent purpose and effect to each part of the forum-selection clause, it is clear the clause is mandatory.

C. The State cannot meet its burden of showing that the forum-selection clause is invalid or otherwise unenforceable.

The State has not alleged that the SOC's forum-selection clause is invalid or unenforceable. Indeed, it has utterly ignored it. Where the parties have contracted for venue, the party challenging venue in the designated forum bears the burden of showing that "the forum for which the parties bargained is unwarranted." *Tucker*, 2014 OK 112, ¶ 26. Nothing from the face of the Petition, the Service Agreement, or the SOC suggests that the forum-selection clause is "unreasonably

favorable" to EOIT, the result of a lack of "meaningful choice" or "overreaching or [] the unfair use of unequal bargaining power," or a violation of contract law or public policy. *See Eads v. Woodmen of the World Life Ins. Soc.*, 1989 OK CIV APP 19, ¶¶ 13–14, 785 P.2d 328, 331; *Tucker*, 2014 OK 112, ¶ 33. Indeed, public policy favors enforcement of the bargained-for forum-selection clause here. The forum-selection clause alone thus provides grounds for dismissal.

II. THE STATE'S PETITION FAILS BECAUSE IT IS BASED ON FACTS THAT THE STATE IS COLLATERALLY ESTOPPED FROM ALLEGING.

The Commission and the Oklahoma Supreme Court have already determined—in proceedings to which the Attorney General and the State was a party—that Winter Storm Uri's cold temperatures—not defendants' actions—caused the shortage of natural gas supply, the failure of certain infrastructure, the enhanced demand for natural gas, and the corresponding spike in the price of natural gas. *See supra* Background II. Because the State, through the Attorney General, was party to these proceedings and this issue was actually adjudicated and necessary to those adjudications, collateral estoppel bars it from asserting inconsistent facts regarding the cause of the shortage of natural gas supply, the failure of certain infrastructure, the enhanced demand for natural gas, and the increased costs of natural gas during the storm. And because those facts are necessary to support all of the State's claims, the Petition must be dismissed.

Collateral estoppel "applie[s] defensively when the party against whom it [is] being asserted was a party or in privity with a party to the prior proceedings." *Hesser v. Central Nat. Bank & Trust Co. of Enid*, 1998 OK 15, ¶ 18, 956 P.2d 864, 868. A defendant may "defensively assert estoppel" against a party "attempting to assert inconsistent facts." *Carris v. John R. Thomas and Assoc.*, 1995 OK 33, ¶ 11, 896 P.2d 522, 528. "The test is whether the question of fact in issue in the second action is a question which was actually determined in the first adjudication." *Id.*

The Commission's causal determinations were essential to its approval of securitization applications in the wake of Winter Storm Uri. Because extreme weather caused the "extraordinary costs" shouldered by regulated utilities, the Commission concluded that those costs were "prudently incurred." Okla. Stat. tit. 74, § 9073(A), (E). The Commission repeatedly determined, upon thorough review of developed and contested factual records, that the "extreme cold weather" led to supply shortages and increased demand during the storm, causing prices to surge throughout Oklahoma. *Supra* Background II. Likewise, the Oklahoma Supreme Court recognized that "severe cold weather resulted in a shortage of the natural gas supply due to incredibly high demand and the cold weather preventing the gas's extraction and transportation, which, in turn, caused extraordinary natural gas costs[.]" *In re Matter of Okla. Dev. Fin. Auth.*, 2022 OK 47, ¶ 2.

The State was a party to each such adjudication, "consistently supported" their outcomes, and never appealed or challenged their findings of fact or conclusions of law. *See id.* n.3. As the Oklahoma Supreme Court held, the Commission's orders are "final," *id.* ¶ 13, and the State is collaterally estopped from alleging "inconsistent facts" here. *Carris*, 1995 OK 33, ¶ 11. The State's assertions that increased natural gas prices resulted from defendants' conspiracy to exploit their alleged monopoly power, or from defendants' alleged negligence in preparing for the storm, should be dismissed as inconsistent with binding prior determinations by the Commission and the Oklahoma Supreme Court that the extreme cold weather during Winter Storm Uri caused statewide supply issues and surging demand for natural gas, which were responsible for the increased prices. Since these estopped allegations form the basis of all of the State's claims, the Petition must be dismissed.

III. THE STATE'S PETITION FAILS TO STATE A CLAIM.

A. The State's claims for fraud, constructive fraud, negligence, negligence per se, unjust enrichment, and bad faith breach of contract are barred by the statute of limitations.

The State's claims for fraud, constructive fraud, negligence, unjust enrichment, and bad faith breach of contract are barred by the two-year statute of limitations applicable to those claims. *See Burkes v. The Estate of Burkes*, 1997 OK 76, ¶ 12, 945 P.2d 481, 484 (fraud); *Last Chance Minerals v. BP Am. Prod. Co.*, 2023 OK CIV APP 44, ¶ 39, 539 P.3d 712, 720 (constructive fraud); *Samuel Roberts Noble Found., Inc. v. Vick*, 1992 OK 140, ¶ 18, 840 P.2d 619, 624 (negligence); *City of Tulsa v. Bank of Okla., N.A.*, 2011 OK 83 ¶ 20, 280 P.3d 314, 320 (unjust enrichment); *Morgan v. State Farm Mut. Auto. Ins. Co.*, 2021 OK 27 ¶ 13, 488 P.3d 743, 746 (bad faith tort).

A cause of action must be commenced within the relevant period "after the cause of action shall have accrued" or it is barred. *Stephens v. General Motors Corp.*, 1995 OK 114 ¶ 8, 905 P.2d 797, 799. "The statute of limitations begins to run when the cause of action accrues. A cause of action accrues when a litigant could first maintain an action to a successful conclusion." *Id.* For negligence, a claim accrues when "any injury to the plaintiff, for which an action could proceed is certain and not merely speculative." *Id.* "Under Oklahoma law, a plaintiff who seeks to avoid a limitations defense on the ground that the statute was tolled must allege and prove the facts pertinent to such tolling." *Royal Crown Bottling Co. of Oklahoma City, Inc. v. Aetna Cas. & Sur. Co.*, 438 F. Supp. 39, 45 (W.D. Okla. 1977).

Each of the State's claims center on alleged conduct and injuries during Winter Storm Uri—in February 2021. The State complains about the alleged "exorbitant fees" it paid during the Storm due to the constrained "available supply of natural gas" and Defendants' alleged failure to winterize and supply consistent natural gas to GRDA. Pet. ¶¶ 35-36, 46-47, 53, 61, 84. GRDA's alleged injuries would have thus become actionable at the time of the storm. And the State cannot

show any tolling doctrine applies—nor does it allege that one does. *Royal Crown Bottling Co.*, 438 F. Supp. at 45. Because the State did not file suit until April 9, 2024—more than a year ***after*** the applicable two-year statute of limitations period expired—its claims for fraud, constructive fraud, negligence, unjust enrichment, and bad faith breach of contract are time-barred.

B. The State fails to state a claim for breach of contract or bad faith breach of contract.

The State does not contend that any express provision of the Service Agreement was breached—nor could it—but rather hangs its hat on a purported breach of the implied covenant of good faith and fair dealing for both its breach of contract and bad faith breach of contract claims. It fails to state either claim many times over.

1. The State's contract claims against non-parties to the Service Agreement are not viable.

The State asserts contract claims against all Defendants, but it concedes that only one Defendant—"*EOIT*"—had a contractual relationship with GRDA. Pet. ¶¶ 60-62 (asserting breach of contract claim "against Defendants"), 73-76 (asserting bad faith breach of contract claim "against Defendants"). The State's claims against ETGP, EGT, and EER—none of whom is a party to the Service Agreement—fail as a matter of law.

It is axiomatic that "[a] person or entity not party to a contract cannot be sued for breach." *Sandhar v. CSAA Gen. Ins. Co.*, 2020 WL 4334797, at *4 (N.D. Okla. July 28, 2020) (citing *Miller v. BCG Healthcare Investments LLC*, 2012 WL 12863169, at *1 (W.D. Okla. Sept. 11, 2012)); *see Commonwealth Cotton Oil Co. v. Lester*, 1932 OK 2, ¶ 35, 9 P.2d 738, 744 ("[T]he obligation and duty arising out of a contract are due only to those with whom it is made."). The State alleges that GRDA was in a contractual relationship with EOIT"—not any other defendant—"for the supply of natural gas." Pet. ¶¶ 22, 73; *see also* Ex. A-1 at 1 (Introduction) and 16 (signature page)

(showing EOIT and GRDA only parties to agreement). Its claims against Defendants not party to the Service Agreement—ETGP, EGT, and EER—should therefore be dismissed.

2. The State alleges no facts showing that EOIT failed or refused to discharge its contractual responsibilities or frustrated the purpose of the Agreement.

The State's attempt to twist EOIT's undisputed compliance with the Service Agreement into a breach of an unstated implied duty fails, as the State identifies no failure or refusal to discharge contractual obligations, concedes the purpose of the Service Agreement was carried out, and admits facts showing GRDA's reasonable expectations were met. A breach of the implied covenant of good faith and fair dealing requires "a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party." *Orthman v. Premiere Pediatrics, PLLC*, 2024 OK CIV APP 7, 545 P.3d 124, 138 (Okla. Civ. App. 2024) (citing *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 607 F.3d 742 (11th Cir. 2010)). In *Orthman*, for example, the court dismissed such a claim because plaintiffs failed to "identif[y] any conscious or deliberate act carried out by [defendant] which frustrate[d] the purpose of the . . . contract." *Id.* ¶ 36.

The purpose of the Service Agreement was for EOIT to transport GRDA's gas pursuant to the express provisions in the Service Agreement, which the State does not dispute. *See* Pet. ¶¶ 28. Nor does the State dispute that gas was in fact transported to GRDA pursuant to the Service Agreement during Winter Storm Uri. *See generally* Pet. (lacking allegations that Defendants did not transport gas as agreed or that Defendants breached any express provision of the Service Agreement). Rather, the crux of GRDA's complaint is that Defendants allegedly engaged in conduct that caused "the price for natural gas available on EOIT's intrastate pipeline system [to] balloon[] exponentially" and GRDA to pay more for natural gas as a result. Pet. ¶¶ 36, 37, 41, 46.

But this complaint, even if true (it is not), neither "frustrate[d] the agreed common purpose" of the Service Agreement nor "disappoint[ed] the reasonable expectations of" GRDA under the Service Agreement—and conspicuously absent from the Petition are any allegations that it did.

The Service Agreement's terms demonstrate that GRDA's "reasonable expectations" were met. Fundamentally, the Service Agreement does not guarantee fixed rates for every fee charged under it; to the contrary, certain of the agreement's rate formulas are explicitly based (in part) on market indices, meaning, by the parties' design, the imbalance prices that EOIT charges GRDA under the Service Agreement fluctuate based on market conditions—facts the State readily admits. *E.g.*, Pet. ¶¶ 23-25, 27. Those terms show that the prices GRDA may need to pay under the Service Agreement could increase (or decrease) based on market prices, that EOIT could charge GRDA imbalance charges for fluctuation in gas burns, and the possibility of gas shortages and force majeure events.[10] EOIT's compliance with these provisions could not have contravened GRDA's reasonable expectations—which is no doubt why the State does not claim that EOIT (or any other defendant) breached any express obligation under the Service Agreement—and forecloses the State's claim here. *See Hensley v. State Farm Fire & Cas. Co.*, 2017 OK 57, ¶ 19, 398 P.3d 11, 18 (explaining how in *May v. Mid–Century Ins. Co.*, 2006 OK 100, 151 P.3d 132, no breach of implied duty existed because express terms permitted conduct in question); *Orthman*, 545 P.3d at138 (Okla. Ct. Civ. App. 2024) (stating claim requires "a failure or refusal to discharge contractual responsibilities").[11]

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[10] This is further demonstrated by Plaintiff's admission that GRDA "often enter[s] long-term contracts for the transportation, purchase and supply of their required volumes of residue gas" and that those contracts "commonly contain 'force majeure' clauses." Pet. ¶ 14.

[11] *See also McAuliffe v. The Vail Corp.*, 69 F.4th 1130, 1152 (10th Cir. 2023) ("Further, the duty of good faith cannot be used to contradict terms or conditions for which a party has bargained.") (internal quotations omitted); *McGuire v. American Family Life Ins. Co.*, 448 F. App'x 801, 28 (10th Cir. 2011) ("[W]here one of the contracting parties complains of acts

3. The bad faith breach of contract claim fails for the additional reason that the State fails to allege facts showing the requisite "special relationship" exists.

The State's bad faith breach claim also fails because no special relationship exists between EOIT and GRDA, and the State fails to allege facts to support such a relationship. "In ordinary commercial contracts, a breach of [the duty of good faith and fair dealing implied in every contract] merely results in damages for breach of contract, not independent tort liability." *Tyree v. Cornman*, 2019 OK CIV APP 66, ¶ 11, 453 P.3d 497; *see also Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 999 (10th Cir. 2008) (internal quotations omitted). Only in "rare" circumstances where a "special relationship" exists between the parties does a breach of the duty of good faith and fair dealing lead to a tort claim. *Combs*, 551 F.3d at 999; *Tyree*, 2019 OK CIV APP at ¶ 11. A special relationship exists only if (1) there is a disparity in bargaining power and the "weaker party has no choice of terms" (adhesion contract), and (2) there is an elimination of risk of loss. *Embry*, 2010 OK 82 ¶ 7, 247 P.3d at 1160. "Oklahoma courts have found such a 'special relationship' in only very limited circumstances, most notably between an insurer and insured." *Combs*, 551 F.3d at 999; *see also Orthman*, 2024 OK CIV APP at ¶ 37 (affirming trial court's dismissal of bad faith breach claim because no "equivalent 'special relationship' [of insurer and insured] between patients and medical professionals"); *Robinson v. Southerland*, 2005 OK CIV APP 80, ¶ 38, 123 P.3d 35, 44 (stating Oklahoma courts "have generally refused to recognize a cause of action for breach of the contractual implied duty of good faith outside of the insured/insurer and employer/employee relationships"); *Bankers Tr. Co. v. Brown*, 2005 OK CIV APP 1, ¶ 17, 107 P.3d 609, 614 (affirming trial court's dismissal of bad faith breach claim because no special

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specifically authorized in the agreement, there is no breach of good faith and fair dealing as a matter of law."); *Pepsi-Cola Bottling Co. v. Pepsico*, 431 F.3d 1241, 1261 (10th Cir. 2005) (similar).

relationship between debtor and creditor). Accordingly, courts have refused to permit bad faith breach claims concerning a wide-range of commercial contracts where no equivalent special relationship exists. *Warrenfeltz v. Hogan Assessment Sys., Inc.*, 2018 WL 1546559, at *3 (N.D. Okla. Mar. 29, 2018) (collecting cases). Likewise, no special relationship exists here.

First, the State pleads no facts showing the Service Agreement is an adhesion contract offered on a take it or leave it basis—nor could it. The State concedes that providers like GRDA "often enter long-term contract for the transportation, purchase and supply of their required volumes of residue gas," Pet. ¶ 14, demonstrating that, far from being forced to contract with EOIT, GRDA likely "shopped around and came to" EOIT because it offered favorable rates. *See Rodgers*, 1988 OK 36, ¶ 15, 756 P.2d 1223, 1226; *see also* Ex. A-1, Recitals (GRDA "desires to have" EOIT "receive and transport . . . natural gas" and "the Parties desire to enter" the Service Agreement), § 7 ("[GRDA] . . . represents and warrants that it has the requisite authority to enter into this Agreement and incur the obligations herein.").

The State also has not pled facts that GRDA was a "weaker party." While the State nakedly asserts that there was a "disparity of bargaining power during the relevant time period," that conclusory statement is entitled to no weight, *see Tuffy's, Inc.*, 2009 OK 4, ¶ 6—particularly here, in the face of the State's more specific allegations contradicting it. For example, the State highlights that GRDA is "a state agency" and is "Oklahoma's largest public power utility." Pet. ¶ 2–3. The notion that GRDA, a "state agency" and "Oklahoma's largest public power utility" was a "weaker party" unable to negotiate the Service Agreement strains credulity beyond belief.[12] In

[12] *See Am. Bank & Tr. Co. v. Bond Int'l Ltd.*, 2006 WL 2947088, at *2 (N.D. Okla. Oct. 16, 2006) (holding there was no adhesion contract in part "because both parties to the contract were sophisticated and represented by legal counsel."); *Panhandle E. Pipeline Co. v. Corp. Comm'n of State of Okla.*, 715 F. Supp. 1055, 1059 (W.D. Okla. 1989) (noting the parties sophistication

any event, a mere "disparity of bargaining power" still falls short of alleging that GRDA had "no choice in the terms" of the Service Agreement. *Embry*, 2010 OK 82 ¶ 7, 247 P.3d at 1160; *Rodgers*, 1988 OK 36 ¶ 16.

Second, and independently fatal to the State's claim, the Service Agreement does not eliminate risk of accidental loss, and the State alleges no facts to support such a contention. Elimination of risk of loss is often found in insurance agreements where the purpose of such agreements is to "protect against the risk of accidental losses." *Rodgers*, 1988 OK 36, 756 P.2d at 1223. If the purpose of an agreement is for something other than elimination of risk—for example, commercial advantage—there is no special relationship. *See Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 999 (10th Cir. 2008) (holding no special relationship when agreement was "based upon each party's attempt to obtain a commercial advantage").

The Service Agreement is based on each party's attempt to obtain a commercial advantage, and therefore no special relationship exists. For GRDA specifically, the Service Agreement represented an alternative to the "secondary 'spot' market where prices change daily." Pet. ¶ 15. To avoid spot market purchases, GRDA sought an advantageous alternative: a "long-term contract" for its demand for gas. Pet. ¶ 14; *cf. Cimarex Energy Co. v. Calhoon*, 2012 WL 1371386, at *4-5 (W.D. Okla. Apr. 19, 2012) (dismissing claim with prejudice because "[t]he purpose of an oil and gas lease is to seek commercial advantage and take associated commercial risks; the purpose is not the elimination of risk as is the purpose of an insurance contract."); *see also Rodgers*, 1988 OK 36, ¶ 15, 756 P.2d 1223, 1226 ("The borrowers shopped around and came to the bank because it offered the most favorable interest rates."). To obtain that commercial

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and "presum[ing] that the express contractual provisions were voluntarily, intelligently, and knowingly entered into").

advantage, GRDA accepted the associated commercial risk of the fees and market fluctuations inherent in the Service Agreement, as well as the possibility of force majeure events. Pet. ¶ 14 (conceding "[t]hese contracts commonly contain 'force majeure' clauses . . . ."). Because the State's allegations make clear the Service Agreement was entered for commercial advantage, not to eliminate risk of accidental loss, its claim fails and should be dismissed.

C. The State fails to state a claim under the Oklahoma Antitrust Reform Act because it has failed to allege facts supporting the elements of an antitrust claim.

The State's antitrust claim fails because (1) Defendants as a matter of law do not possess market power, and (2) the State fails to allege facts supporting critical elements of each antitrust theory of relief. The State alleges that Defendants have "monopoly power over the market for transmission and supply of natural gas" to GRDA and engaged in acts that "unreasonably restrained trade" and "used their market power to engage in anti-competitive price discrimination." Pet. ¶¶ 21, 51, 54. But under any theory of relief—monopolization, restraint of trade, or price discrimination—the State's claim fails.[13]

1. The State alleges no facts showing market power.

The State's antitrust claim fails first because the State does not allege—nor could it—that Defendants have market power. "Market power is the preliminary threshold inquiry and is often dispositive of antitrust cases." *Beville v. Curry*, 2001 OK 1, ¶ 13, 39 P.3d 754, 760. A plaintiff must allege facts showing market power to state a claim under any antitrust theory of relief. *See Cohlmia v. St. John Med. Ctr.*, 693 F.3d 1269, 1282 (10th Cir. 2012) ("Another element of an

[13] The OARA provides that its provisions "shall be interpreted in a manner consistent with Federal Antitrust Law . . . and the case law applicable thereto." Okla. Stat. tit. 79, § 212; *see Beville,* 2001 OK 1, ¶ 11, *as corrected* (Jan. 22, 2001) ("The provisions of this state's antitrust statutes are similar to federal legislation, and interpretation of federal antitrust legislation provides assistance in interpreting the provisions of the Oklahoma statutes."). Therefore, Defendants look to both the state and federal application of related antitrust laws in responding to the State's allegations.

antitrust claim requires the plaintiff to show the defendant can wield 'market power.'"). To show market power, the plaintiff must "define the relevant market." *Id.* "The relevant market inquiry has two components: geographic market and product market." *Green Country Food Mkt., Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1281–82 (10th Cir. 2004). "[T]he geographic market is the narrowest market which is wide enough so that products from adjacent areas cannot compete on substantial parity with those included in the market." *Helmerich & Payne Int'l Drilling Co. v. Schlumberger Tech. Corp.*, 2017 WL 6597512, at *5 (N.D. Okla. Dec. 26, 2017) (internal quotations omitted). "[T]he relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced." *Id.* (internal quotations omitted). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient[.]" *Id.* (quoting *Campfield*, 532 F.3d at 1118). "Failure to allege a legally sufficient market is cause for dismissal of the claim." *Id.*

The Petition nakedly alleges that Defendants "have monopoly power over the market for transmission and supply of natural gas to the GRDA plant in Mayes County, Oklahoma." Pet. ¶ 21. But this conclusory allegation falls woefully short of meeting OARA's market definition requirements. ***First***, although the Petition references the location of GRDA's plant, it is "silent" regarding the scope of the alleged "geographic market, and includes no facts upon which an inference of the relevant geographic market may be based." *See Helmerich*, 2017 WL 6597512, at *5. ***Second***, and independently fatal, the Petition fails to allege any relevant product market, including the "reasonable interchangeability" of use or the "cross-elasticity of demand" between a product and its substitutes. *See id.* Absent such allegations, "even when all factual inferences are

granted in [the State's] favor, the relevant market is legally insufficient," and dismissal is thus appropriate. *See Campfield*, 532 F.3d at 1118 (internal citation omitted); *Helmerich,* 2017 WL 6597512, at *5 (dismissing OARA claim for failure to "identify the relevant market with sufficient specificity"). Because the state alleged a legally insufficient relevant market, its antitrust claims fail.

Even if the State alleged facts sufficient to define the relevant market (it has not), its claim that Defendants have market power is defective as a matter of law. That is because one's "own product[] do[es] not [it]sel[f] comprise a relevant product market"; therefore, it is impossible to have market power over that product. *Green Country Food Mkt., Inc.*, 371 F.3d at 1282. For example, in *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, the Tenth Circuit affirmed a district court's dismissal of an antitrust claim based on a television network's refusal to license its programming to the plaintiff. 964 F.2d 1022, 1026 (10th Cir. 1992). The court reasoned that the television network could not violate antitrust law "by attempting to monopolize a market which it is incapable of monopolizing"—its own programming—and that the plaintiff's allegations of the relevant market were "insufficient as a matter of law." *Id.*

So too here. The State suggests that because Defendants "own[] and control[] the single pipeline that delivers natural gas to the GRDA power plant" and "control the available supply of gas" on that pipeline, Defendants necessarily have market power. *See* Pet. ¶ 21. But as illustrated in *Green Country Food* and *Turner Network*, it is legally impossible for Defendants to have market power over their own product—the pipeline that delivers natural gas to GRDA. Moreover, the State does not allege that GRDA lacked choice regarding whom to use for this service. In fact, the Petition states that GRDA contracted with EOIT for the transportation of natural gas, presumably choosing to work with EOIT over other providers. *See id.* at ¶ 22. Nor does the Petition allege that

Defendants have prevented other providers from entering the market or offering similar services, whether now or in the future. *See Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008) (finding that a complaint failed to allege the "counterintuitive claim" that a defendant had market power over its own product where it lacked facts "plausibly supporting that" the defendant's product "suffers *no* actual or potential competitors"). As a matter of law, then, the State fails to allege the market power required to state an antitrust claim.

2. The State alleges no facts supporting an intent to monopolize.

Independently fatal to the State's monopolization claim is its failure to allege that Defendants had the requisite intent to monopolize. To state a monopolization claim under the OARA, the State must allege that Defendants "willful[ly]" acquired or maintained market power "through exclusionary conduct as distinguished from growth or development as a consequence of . . . historic accident." Okla. Stat. tit. 79, § 203(d)(1). The Petition alleges that Defendants took "deliberate steps" and acted "with the objective" of controlling the natural gas market. Pet. ¶ 35. But these "conclusory allegations of motive are not facts entitled to the assumption of truth." *See TKO Energy Servs., LLC v. M-I L.L.C.*, No. 12-CV-108-GKF-PJC, 2013 WL 789458, at *7 (N.D. Okla. Mar. 4, 2013) (dismissing monopolization claim "peppered with legal conclusions" regarding intent to monopolize but "lack[ed] factual allegations to support them"). Therefore, the State's claim fails because it lacks facts showing an intent to monopolize.

3. The State alleges no facts showing an adverse effect on competition.

The State's restraint-of-trade claim also fails because it does not allege an adverse effect on competition. To state a restraint-of-trade claim, the State must allege facts showing a "detrimental effect[] on competition." *Beville*, 2001 OK 1, ¶ 13; *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1310 (10th Cir. 2017). The State alleges that Defendants artificially "drove up . . . the price GRDA was forced to pay for gas" and "the fees charged to

GRDA" under the Service Agreement. Pet at ¶ 46. But these allegations "show only that plaintiffs have [allegedly] been harmed as a result of the practices at issue, not that those practices are anticompetitive" or that Defendants caused any "injury to competition beyond the [alleged] impact on" GRDA. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198–1204 (9th Cir. 2012) (affirming dismissal of antitrust claim where plaintiffs failed to allege "how competition (rather than consumers) [wa]s injured"); *see also Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 334–35 (7th Cir. 2012) (stating that because antitrust laws "protect consumers from injury that results from diminished competition," a plaintiff "must allege, not only an injury to himself, but an injury to the market as well"). Therefore, because the State's claim "relate[s] only to injury to [GRDA], not injury to competition," it should be dismissed. *See Beville*, 2001 OK 1, ¶ 32.

4. The State alleges no facts showing price discrimination between competitors that has adversely affected competition.

The State's pricing discrimination claim likewise fails because it has not alleged price discrimination between competitors that has adversely affected competition. Because the OARA "proscribes price discrimination only to the extent that it threatens to injure competition," a plaintiff must allege an injury or threatened injury to competition to state a claim. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006) (internal quotation marks and citation omitted); *Beville*, 2001 OK 1, ¶ 21. As explained above, the State has alleged no such injury to competition. *See supra* Section III.C.3. Moreover, to state a price-discrimination claim, the plaintiff must allege not just that the defendant sold the same product at different prices, but that the defendant sold that product "at different prices to *competitors*." *Dart Indus., Inc. v. Plunkett Co. of Okla.*, 704 F.2d 496, 499 (10th Cir. 1983) (emphasis added). The State alleges that Defendants executed "intra-company trades" at lower rates than "external customers." Pet. ¶ 48.

But the State does not allege that these two groups are competitors. Without these critical allegations, the State fails to state a claim. *See Dart Indus., Inc.*, 704 F.2d at 499.

D. The State fails to state a claim for unjust enrichment because a contract regulates the parties' relationship.

The contract precludes the State's unjust enrichment claim. "[A] party is not entitled to pursue a claim for unjust enrichment when it has an adequate remedy at law for breach of contract." *Am. Biomedical Grp., Inc. v. Techtrol, Inc.*, 2016 OK 55, ¶ 27, 374 P.3d 820, 828. Under this "hornbook rule[,]" "quasi-contractual remedies . . . are not to be created when an enforceable express contract regulates the relations of the parties with respect to the disputed issue." *Parrish v. Arvest Bank*, 717 Fed. App'x. 756, 765 (10th Cir. 2017) (affirming dismissal of unjust enrichment claim for failing to state claim); *see also Summer Oaks Realty SPE LLC v. Minera, LLC*, No. CIV-20-1223-R, 2021 WL 6101882, at *3 (W.D. Okla. June 10, 2021) ("[A]n adequate remedy at law exists when an enforceable express contract regulates the relations of the parties with respect to the disputed issue."). That is precisely the case here. The Service Agreement governs the parties' relationship concerning the transportation and delivery of gas and the corresponding fees—the central issues in the State's unjust enrichment claim. *See* Pet. ¶¶ 23-29 (describing rate terms), ¶ 63 (allegations concerning "price of natural gas paid for by GRDA, as well as fees and penalties paid by GRDA"). The State alleges "no separate obligation or duty aside from the obligations and benefits outlined in the [Service Agreement]." *Summer Oaks Realty SPE LLC*, 2021 WL 6101882, at *3. Because the Service Agreement governs the disputed issues, the State's unjust enrichment claim fails.

E. The State's conclusory allegations fail to state a fraud claim.

The State's rote recitation of fraud elements lack any supporting factual allegations necessary to adequately state a fraud claim. "[A]llegations of fraud must be stated with sufficient

particularity to enable the opposing party to prepare his or her responsive pleadings and defenses." *Dani v. Miller*, 2016 OK 35, ¶ 25, 374 P.3d 779, 791; *see also* Okla. Stat. tit. 12, § 2009(B) (requiring allegations of fraud to be "stated with particularity."). Thus, the "circumstances constituting fraud or mistake shall be stated with particularity." *Dani,* 2016 OK 35, ¶ 25. "This standard requires specification of the time, place, and content of an alleged false representation." *Id.* (citing *Gianfillippo v. Northland Cas. Co.,* 1993 OK 125, ¶ 11, 861 P.2d 308).

The Petition does not allege any misrepresentations, much less any of the circumstances constituting Defendants' alleged fraud, and therefore it fails to state a claim. The State baldly asserts that Defendants "made representations to GRDA concerning the reduction in available supply of natural gas, the cause of such reduction and the cause of skyrocketing prices." Pet. ¶ 67. But it does not identify with particularity the content of any supposed "misrepresentations," when or where they were made, who allegedly made them, or to whom they were alleged made. The State's conclusory allegations fall well-short of stating a viable claim. *See Dani*, 2016 OK 35, ¶ 25 (affirming trial court's order granting of motion to dismiss for failure to state fraud claim, among others); *Porter v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2014 OK 50, 330 P.3d 511, 518 n. 2 ("[T]he district court correctly dismissed the fraud claim" because "Plaintiffs failed to state with particularity the circumstances constituting fraud[.]"). The claim should be dismissed.

F. The State fails to state a claim for negligence because Defendants owed GRDA no cognizable duty and the State alleges no breach of any such duty.

Despite dedicating nearly all of its Petition to alleging that Defendants engaged in rampant market manipulation, the State then contradicts itself, alleging that GRDA's alleged damages were, instead, caused by Defendants' purported negligence in failing to winterize equipment and continuously supply gas. The State's negligence claims fare no better than the others.

"Any claim of negligence depends on the existence of a duty and the breach of that duty." *Tyree,* 2019 OK CIV APP 66, ¶ 8. "The cornerstone of a negligence action is the existence of a duty, and the issue of whether a duty exists is a question of law." *Miller v. David Grace, Inc.*, 2009 OK 49, ¶ 11, 212 P.3d 1223, 1227. "[I]f the defendant did not owe a duty of care to the plaintiff, there can be no liability for negligence as a matter of law." *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶ 12, 160 P.3d 959, 964. Defendants owe no duty to GRDA, and even if they did, the State fails to allege that they actually breached any such duty.

1. Defendants had no duty to winterize equipment or ensure an adequate and consistent supply of gas to GRDA.

The State's negligence claims fail at the outset because Defendants do not owe either duty on which the State predicates its claims—a purported "duty [by Defendants] [ ] to adequately winterize their equipment, facilities, and pipelines" to ensure that natural gas supply to GRDA would not be interrupted and a further purported "duty [by EOIT] to ensure a consistent and adequate supply of natural gas to GRDA." Pet. ¶¶ 80, 83. "A defendant does not owe a duty of care to the world; any duty is defined by the interest of a particular plaintiff which the law finds is entitled to protection from the conduct of the defendant." *Tyree,* 2019 OK CIV APP 66, ¶ 16. "Whether a defendant stands in such relationship to a plaintiff that the law will impose upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff is a question for the court." *Id.*

To begin, the State's claims sound exclusively in contract. Any duty GRDA is owed regarding the transportation and delivery of natural gas is set forth in the Service Agreement, so any breach of that purported duty is a breach of contract, not a tort. *See, e.g.*, Pet. ¶ 23 ("Under the terms of the Contract, EOIT is obligated to transport and deliver natural gas purchased by GRDA, and to maintain sufficient capacity on its pipeline to handle such volumes."); *see also Embry v.*

Innovative Aftermarket Sys. L.P., 2010 OK 82, ¶ 14, 247 P.3d 1158, 1161 (affirming dismissal of negligence claim, observing "[a]ny neglect and lack of diligence on the part of the defendants is simply proof of their breach [claim], and not an independent theory of recovery"). Further, ETGP, EGT, and EER are not party to the Service Agreement, so owe GRDA no duties under it. Because the State's attempt to transform contractual duties owed by EOIT into common law duties owed by non-contracting parties fails, its negligence claims should be dismissed. *See Tyree,* 2019 OK CIV APP 66, ¶ 16 (affirming district court's dismissal of negligence claim, rejecting plaintiff's effort "to revive the now discredited practice of 'tortifying' contract law").

Moreover, the State's claims do not arise out of any common-law tort duty recognized in Oklahoma, and no basis exists for this Court to create either alleged duty here. To impose such common-law duties on Defendants simply because they participate in Oklahoma's natural gas market would radically alter the industry, effectively transforming any pipeline owner or participant into an insurer of consistent, adequate, uninterruptable gas to every gas consumer, and have no limiting principle cabining that duty. It finds no legal support in Oklahoma or elsewhere.[14]

2. The State fails to allege that Defendants breached any purported duty.

The Petition also fails to allege that Defendants breach their supposed duties to winterize or ensure a consistent and adequate supply of gas. "[T]o successfully state a cause of action for

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[14] Courts across the country have considered—and declined to create—similar "continuous supply" duties, most notably in the generation context, dismissing negligence claims based on purported common law duties of power generators to continuously supply electricity. *See In re Luminant Generation Co. LLC*, No. 01-23-00097-CV, 2023 WL 8630982, at *10 (Tex. App.—Houston [1st Dist.] Dec. 14, 2023, no pet.) (declining "to create a new negligence-based duty on the wholesale power generators to continuously generate electricity for the retail customers in these proceedings"); *see also Rehab. Ctr. at Hollywood Hills, LLC v. Fla. Power & Light Co.*, 299 So. 3d 16, 20 (Fla. Dist. Ct. App. 2020) ("We have found no case holding that a utility owes a general duty to the public or noncustomer for a continuous supply of power. Indeed, the few cases which have touched on the issue have all determined that no such duty exists.") (collecting cases).

negligence, in addition to a duty of care, there must be failure to perform that duty." *Murrow v. Penney*, 2023 OK 91, ¶ 20, 535 P.3d 1275, 1280.

No alleged breach of purported duty to winterize. The Petition alleges no facts supporting the conclusory assertion that Defendants failed to winterize their equipment. While the State contends that Defendants claimed "damage to wells and equipment, freezing of lines of pipes, and power outages," Pet. ¶ 43, the State does not assert that Defendants did *not* winterize. Indeed, as far as the Petition is concerned, Defendants winterized and still experienced such equipment complications to the admitted "extreme cold winter weather[.]" Pet. ¶ 32. No other mention of winterization is made in the Petition until the State alleges a breach of a duty. Pet. ¶ 82. This conclusory allegation is not entitled to an inference of truth. *See Tuffy's, Inc.*, 2009 OK 4, ¶ 6.

No alleged breach of purported duty to continuously supply gas. The Petition also fails to allege that Defendants somehow breached their purported duty to ensure a consistent and adequate supply of gas. Indeed, the State does not contend that GRDA could not procure gas from EOIT's pipeline because of the weather or otherwise seek damages related to an inadequate supply of gas. Tellingly, the Petition never alleges that GRDA did not receive adequate transportation of gas from Defendants. The State's complaint is that GRDA paid too much for gas it received, not that it did not receive gas from EOIT's pipeline in the first place. *E.g.*, Pet. ¶¶ 31, 35–37.

No alleged breach of duty to exercise ordinary care. Lastly, the State's negligence per se claim fails because the State does not allege Defendants breached any duty to exercise ordinary care. Under the statute the State contends applies, a common carrier "owes at least ordinary care and diligence in the performance of all his duties." Okla. Stat. tit. 13, § 62. But the State asserts no factual allegations related to this claim, instead simply stating in conclusory fashion that "Defendants' conduct during Winter Storm Uri was a violation" and "[t]he negligent conduct of

Defendants during the Winter Storm Uri caused injury to GRDA." Pet. ¶¶ 89–90. These naked assertions fail to state a claim. *See MeGee v. El Patio, LLC*, 2023 OK 14, ¶ 9, 524 P.3d 1283, 1286 (stating elements of negligence per se).

3. The State alleges intentional wrongs that cannot form the basis of a negligence claim.

The State's negligence claim also fails because it is predicated on alleged intentional wrongs that cannot form the basis of a negligence claim. "[N]egligence, in its generally accepted meaning, has in it no element of willfulness; but involves a state of mind which is negative; a state of mind in which the person fails to give attention to the character of his acts or omissions or to weigh their probable or possible consequences." *Broom v. Wilson Paving & Excavating, Inc.*, 2015 OK 19, ¶ 32, 356 P.3d 617, 629 (quoting *Kile v. Kile,* 1936 OK 748, ¶ 7, 3 P.2d 753, 755) (internal quotations omitted). "Negligence excludes the idea of intentional wrong and when a person wills to do an injury, he ceases to be negligent." *Id.* (internal quotations omitted). In other words, "[a]n "intentional wrong is not negligent." *McBride v. Shipley*, 2018 WL 4101524, at *3 (W.D. Okla. Aug. 28, 2018) (internal quotations omitted).

Here, the State grounds its failure-to-provide-consistent-gas negligence claim on the same alleged market manipulation conduct that forms the basis of its intentional tort claims. Pet. ¶¶ 82–84 (alleging breach of duty of care by "taking steps to artificially reduce the available supply" and "engaging in conduct creating circumstances leaving GRDA with no alternative but to purchase gas at unconscionable prices and pay exorbitant fees"). "Even viewing these allegations in [the State's] favor, this sort of intentional conduct—deliberate 'activity that would produce an 'expected or intended' injury,' *Broom*, 356 P.3d at 629—cannot subject Defendants to a claim for negligence." *McBride*, 2018 WL 4101524, at *3 (dismissing negligence claim).

G. The State fails to state a claim for constructive fraud because Defendants owed GRDA no duty to disclose.

The State fails to plead any legal or equitable duties owed to GRDA to support a constructive fraud claim. Constructive fraud is defined as "a breach of a duty which allows one to gain advantage by misleading another." Okla. Stat. tit. 15, § 59. To state a claim, there must either be a breach of a legal or equitable duty to disclose. *Cosper v. Farmers Ins. Co.*, 2013 OK CIV APP 78, ¶ 11, 309 P.3d 147, 149; *see Howell v. Texaco Inc.*, 2004 OK 92, ¶ 29 P.3d 1154, 1161. No such duty exists here, given the State's claims for breach of contract, bad faith breach of contract, and negligence fail, and the State alleges no facts to support such a duty. *See Cosper v. Farmers Ins. Co.*, 2013 OK CIV APP 78, ¶ 11, 309 P.3d 147, 150 ("Since Defendants did not owe Plaintiff[] a duty in negligence or for misrepresentation, [its] claim for constructive fraud also fails.").

H. The State's fails to state a claim for civil conspiracy because the predicate claims on which it is based also fail.

Because the State's underlying claims fail, so too does its civil conspiracy claim. "Civil conspiracy itself does not create liability." *Roberson v. Painewebber, Inc.*, 998 P.2d 193, 201 (Okla. Civ. App. 1999). "To be liable the conspirators must pursue an independently unlawful purpose or use an independently unlawful means." *Id.* "A conspiracy between two or more persons to injure another is not enough; an underlying unlawful act is necessary to prevail on a civil conspiracy claim. *Id.* For the reasons set forth above, each of the State's intentional tort claims should be dismissed, leaving no "viable tort claim" as the underlying unlawful act. Accordingly, the State's conspiracy claim fails. *See FIMCO, Inc. v. Wootton New Holland, LLC*, 2017 WL 1067798 at *5 (W.D. Okla. Mar. 21, 2017).

I. The Service Agreement expressly precludes the damages the State seeks.

The State (on behalf of GRDA) cannot have its contract and defeat it too. *Willoughby v. Fid. & Deposit Co.*, 16 Okla. 546, 556 (Okla. 1906) ("It is the well settled law that a party seeking

to recover upon a contract cannot claim the benefits arising therefrom, and at the same time repudiate its burdens."). By purporting to enforce the Service Agreement, it must take its burdens along with the benefits. Those burdens—namely, the Service Agreement's express limitation-of-liability clause—bar recovery of the damages the State expressly seeks in its antitrust, breach of contract, fraud, constructive fraud, bad faith breach, civil conspiracy, negligence, and negligence per se claims.

Oklahoma "[c]ourts enforce contractual provisions limiting liability unless the provision is unconscionable or in violation of public policy." *WMS Springs, Inc. v. Huitt-Zollars, Inc.*, 2020 WL 7033969, at *4 (W.D. Okla. Nov. 30, 2020); *Elsken v. Network Multi-Fam. Sec. Corp.*, 1992 OK 136, ¶ 8, 838 P.2d 1007, 1009 (reciting rule that limitation-of-liability clauses "should not be declared void on the ground of public policy except in those cases that are free from doubt. Prejudice to the public interest must hence be clearly apparent before a court is justified in pronouncing a solemn agreement to be of no effect[.]").

Here, the State's request for "specific, consequential, incidental, and indirect damages" for Defendants' alleged breach of contract are expressly barred by the Service Agreement's limitation-of-liability clause barring recovery of consequential, incidental, special, and lost-profit damages. Pet. ¶ 62. The clause likewise bars the State's request for damages, and specifically punitive damages, in its antitrust, fraud, constructive fraud, bad faith breach, civil conspiracy, negligence, negligence per se claims, antitrust, tort, conspiracy, and bad-faith breach-of-contract claims. *See* Pet. ¶¶ 59, 69, 72, 76, 79, 85, 90.[15] *See, e.g., J.D. & Billy Hines Trucking, Inc. v. Hale Land &*

[15] By barring "punitive" damages, the parties made clear that the Service Agreement's limitation-of-liability clause applies not just to contract claims but also tort claims, such as the State's here. *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 139, P.3d 897, 905-06; *see also Abercrombie & Fitch Stores, Inc. v. Penn Square Mall Ltd. P'ship*, 2018 OK CIV APP 56, ¶ 14, 425 P.3d 757, 764 (holding clause precluding recovery of "consequential damages," on its

Cattle Co., 2016 WL 7444960, at *3 (W.D. Ark. Dec. 27, 2016) (enforcing clause barring recovery of "incidental, special, consequential, punitive or lost profits damages"); *New Berry, Inc. v. Manitoba Corp.*, 2019 WL 452493, at *4 (W.D. Pa. Feb. 5, 2019) (enforcing contractual limitation of incidental, consequential, and punitive damages at pleadings stage for breach-of-contract and tort claims). Moreover, nothing from the face of the Petition or the Service Agreement suggests that the limitation-of-liability clause violates public policy or that Defendants did not contract with GRDA at arm's length. *See Elsken*, 1992 OK 136, ¶ 8. Therefore, the Court should dismiss the State's claims for damages in Counts 1–2 and 4–9—whether specific, consequential, incidental, indirect, or punitive—as barred by the Service Agreement.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request the Court dismiss the Petition because the State's claims are collaterally estopped, barred by the statute of limitations, deficiently pleaded, and precluded by the Service Agreement's limitation-of-liability clause. Alternatively, Defendants respectfully request the Court dismiss the Petition or transfer for lack of venue.

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own, did not provide clear intent because consequential damages refers to contract rather than tort damages).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of June, 2024, a true and correct copy of the above and foregoing instrument was emailed and mailed, with postage fully prepaid thereon, to:

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