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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BECKY McVAY,

Plaintiff,

Case No. 3:13-cv-00359

v.

ALLIED WORLD ASSURANCE COMPANY (U.S.), Inc., a Delaware company; YORK INSURANCE SERVICES GROUP, INC.; DOES I through X inclusive; DOE CORPORATION I through X, inclusive; DOE ORGANIZATION I through X, inclusive;

Defendants.
/

PLAINTIFF'S RESPONSE TO DEFENDANT YORK'S MOTION TO DISMISS

Plaintiff, BECKY McVAY ("Mrs. McVay") by and through her undersigned counsel, Nicole M. Harvey, Esq., and HARVEY LAW FIRM, PLLC, hereby provides this Response to Defendant York's Motion to Dismiss, filed October 1, 2013. This Response is supported by the attached Memorandum of Points & Authorities, the pleadings and papers on file herein, and any oral argument this Court requests.

DATED this 10th day of October, 2013.

/s/ Nicole M. Harvey, Esq.

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MEMORANDUM OF POINTS & AUTHORITIES

I. FACTS

Ms. McVay lives in Fallon, Nevada. Like many people in Fallon, she bought her cigarettes at the Fox Peak Station, which is a gas station, convenience store and tobacco store in Fallon. Unbeknownst to Ms. McVay, Fox Peak Station was (and still is) owned by the Fallon Paiute Shoshone Tribe's "Fallon Tribal Development Corporation" (the "FTDC"). The Fallon Paiute Shoshone Tribe (the "Tribe") has a reservation near the Fox Peak Station, but Fox Peak Station is not on the reservation; it is in Fallon.

On or about August 6, 2009, Ms. McVay went to Fox Peak Station to purchase her cigarettes. The store has a cement floor, which was wet that day. There was no "wet floor" sign near the area where Ms. McVay slipped and fell. Ms. McVay suffered extensive nerve damage in her back as a result of her fall. Ms. McVay has incurred substantial medical bills, and her income has decreased, as a result of her injury at Fox Peak Station.

Allied was put on notice of Ms. McVay's claim, and York was notified shortly thereafter. Defendants made no offer to settle Ms. McVay's claim, until Ms. McVay involved the Nevada Department of Insurance. Ms. McVay was then offered $5,000 to settle her claim.

Ms. McVay filed suit against the FTDC on January 27, 2011 in Churchill County Court. On March 10, 2011, the parties stipulated to dismiss the action in Churchill County and file the action in Fallon Tribal Court ("Tribal Court"). York's counsel indicated in correspondence to Ms. McVay's counsel that sovereign immunity would protect the insured from liability.

Ms. McVay filed an action in Tribal Court on August 5, 2011. The FTDC filed a Motion to Dismiss in Tribal Court, on the basis of sovereign immunity, which was granted on November 28, 2011. On February 7, 2012, Ms. McVay sought permission to amend her Complaint. At the July 9, 2012 Tribal Court hearing on Ms. McVay's Motion to Amend, counsel for FTDC stated:

> WILLIAMS: …In this case your Honor, this is going beyond what's in the pleas [sic] a little bit but there is an insurance policy that covers this case and there is a writer [sic] to that insurance policy that says that the insurance company is not invoke sovereign immunity in defense unless it's approved by the client, which is the Corporation. And in this case I went before the Corporations [sic] Board and they authorized me to invoke the sovereign immunity defense for the Corporation. So even if we ended up down the road here we are going to end up with the same issue where it is going to be dismissed because sovereign immunity is still going to apply.
>
> JUDGE: And that was done in writing?
>
> WILLIAMS: Of course not done in writing, the writer does say that it needs to be in writing but I was at the Board meeting
>
> JUDGE: The representation based upon?
>
> WILLIAMS: Yes, we didn't do a writing because I am the Corporations [sic] General Counsel and the Insurance Company hired me to represent them in this case so I would be writing myself a memo saying invoke the sovereign immunity defense. I can go out hand write one right now and it would have the effect.

Hearing Transcript, 13:6 – 14:14, relevant portions attached as Exhibit 1.

By York's counsel's own description, Defendant York, through its counsel and on behalf of Allied and the insured, thus denied Ms. McVay's claims on the basis of a sovereign immunity defense that Allied did not have authority to assert.

These facts are set forth in the Amended Complaint. These facts give rise to cognizable claims under Nevada law; claims for bad faith, for which the insurer and its third party administrator are liable. These claims cannot be dismissed under FRCP 12 for the legal reasons set forth herein.

II. LEGAL ANALYSIS

A. Standard of Review

A Plaintiff need not plead a prima facie case in their complaint pursuant to Fed. R. Civ. Pro. 8(a)(2). *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). A prima facie case is a standard

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of proof, not a pleading standard. *Id*. at 510. The standard for pleading is Fed. R. Civ. Pro. 8.

This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court. Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Ms. McVay has pled facts sufficient to support her legal causes of action against York and Allied.

If a court dismisses a claim the court should grant leave to amend unless the court determines the allegation of other facts consistent with the operative pleading could not possibly cure the deficiency. *Schreiber Distrib. Co. v. Serv-Well Furn. Co.*, 806 F.2d 1393, 1401 (9th Cir.1986). See also, *Reddy v. Litton Industries*, 912 F.2d 291 (9th Cir. 1990), cert. denied, 502 U.S. 921 (1991). Ms. McVay respectfully requests that if Defendant's motion to dismiss is granted, she be provided leave to amend her complaint.

State substantive law determines whether Plaintiffs allege facts sufficient to support a claim of bad faith. *Conestoga Servs. Corp. v. Executive Risk Indem., Inc.,* 312 F.3d 976, 980–81 (9th Cir.2002). Nevada law is the appropriate jurisdiction to apply in this analysis.

B. In Nevada, "Third Party Administrators" are amenable to liability on claims of bad faith.

York and Allied are joint venturers under Nevada's analysis of third party administrator liability, and York is thus subject to liability to Ms. McVay for bad faith.

In *Wohlers v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (Nev.,1998), the Nevada Supreme Court considered whether a third party administrator could be liable for "bad faith", along with the insurer:

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> In general, no one "is liable upon a contract except those who are parties to it." *County of Clark v. Bonanza No. 1*, 96 Nev. 643, 648-49, 615 P.2d 939, 943 (1980). However, according to a well-established exception to this general rule, where a claims administrator is engaged in a joint venture with an insurer, the administrator "may be held liable for its bad faith in handling the insured's claim, even though the organization is not technically a party to the insurance policy." William M. Shernoff *et al.*, Insurance Bad Faith Litigation § 2.03[1], at 2-10 (1998).
>
> Pursuant to this generally recognized exception, in *Farr v. Transamerica Occidental Life Insurance Co.*, 145 Ariz. 1, 699 P.2d 376, 386 (Ariz.Ct.App.1984), the Arizona Court of Appeals concluded that an insurance administrator was sufficiently involved in a joint venture with the insurer to expose it to bad faith liability based on evidence that the administrator collected premiums, handled claims, and received a commission on collected premiums and a percentage of renewal commissions.
>
> In the instant case, and in similar fashion, we conclude that the evidence sufficiently established that Wohlers and Allianz were involved in a joint venture to an extent sufficient to expose Wohlers to all policy based contractual claims and bad faith liability. Here, the evidence proffered at trial indicated that Wohlers developed promotional material, issued policies, billed and collected premiums, paid and adjudicated claims, and assisted Allianz in the development of the ancillary charges limitation provision. Further, because Wohlers shared in Allianz's profits, it had a direct pecuniary interest in optimizing Allianz's financial condition by keeping claims costs down.
>
> . . .
>
> Due to the extent of Wohlers' administrative responsibilities, policy management duties, and special relationship with Allianz, we conclude that Wohlers and Allianz were involved in a joint venture to an extent sufficient to expose Wohlers to liability on all contract-based and bad faith claims.

Wohlers, at 959.

In this case, much like Wohlers and Allianz, Allied has delegated administrative responsibilities and policy management duties to York. In fact, it was York's attorney who was actively handling the case, and who advanced the sovereign immunity defense on behalf of the insured. York and Allied have the same or similar special relationship with each other as the insurer and third party administrator did in *Wohlers*. Regardless of whether the parties' findings in

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discovery bear out this relationship, it is a properly stated claim for which relief may be granted.

York relies on the older case of *Knittle v. Progressive Cas. Ins. Co.*, 908 P.2d 724, 726, 112 Nev. 8, 11 (1996), but this case is nothing like *Knittle*. In *Knittle*, the plaintiffs sought a declaratory judgment against an insurer for an amount in excess of the policy limits, at the same time the plaintiffs were pursuing the insured for negligence. In that case, the Plaintiff was trying to secure a deep pocket in the *hopes* of collecting *if* the plaintiff prevailed. This case is very different. Ms. McVay currently has no active complaint in any litigation against the insured in her case, and there is no forum available to her to pursue such a complaint. In this case, the insured completely escaped liability when its insurer's third party administrator's attorney advanced a sovereign immunity defense, when he did not have the requisite written authority required to do so.

Ms. McVay has clearly stated a claim against both York and Allied, which exists under Nevada law, and for Nevada law provides relief. These claims against York cannot be dismissed.

C. Ms. McVay has standing to sue for bad faith.

Defendant's Motion to Dismiss attacks Ms. McVay's standing, without addressing the 2011 Nevada case that recognizes bad faith claims by third parties.

The Nevada Supreme Court has suggested that in the absence of a contractual relationship, a third party may have standing to bring a claim of bad faith if it is a specific intended beneficiary under the policy or has relied to its detriment on actions or representations made by the insurer. *Vignola v. Gilman*, 804 F.Supp.2d 1072 at FN2 (Nev. 2011), citing *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 830 P.2d 1335, 1336 (1992). Therefore, a contractual relationship is required to assert a claim of bad faith unless a third party is a specific intended beneficiary to the insurance contract or alleges it relied to its detriment on representations made by the insurer. *Vignola* citing *Gunny*, 830 P.2d at 1335–36. Additionally, this Court recognized that Nevada may extend the implied covenant of good faith and fair dealing to noncontracting parties who are defined as "insureds" under the applicable policy language. Thus, a non-contracting party who is defined as an insured under the

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relevant policy could state a claim against the insurer for bad faith refusal to settle. *Vignola v. Gilman*, at 1076, FN2 (Nev. 2011), citations omitted.

It remains to be seen, when the underlying contract is produced in the discovery process, whether Ms. McVay is defined as an "insured" under the contract. Regardless, Ms. McVay was a patron at Fox Peak Station, who had a reasonable expectation that if she encountered harm on the premises, there was surely an insurance policy in place to rectify the damages she might incur. Albeit not consciously, as a customer, Ms. McVay was relied on her belief that Fox Peak Station had premises liability insurance to cover the costs associated with injuries incurred on the property. The underlying contract likely insures against claims by patrons who are injured on the premises; patrons like Ms. McVay. Ms. McVay is thus the specific intended beneficiary of the policy at issue.

York and Allied have completely prevented any potential recovery by Ms. McVay for her injuries, because her forum is limited to Tribal Court where York asserted a sovereign immunity defense. The Defendants told Ms. McVay the FTDC was protected by its insured's sovereign immunity, but as it turns out, sovereign immunity was not an available defense, by the terms of the policy.

Ms. McVay has standing to bring her complaint against York and Allied. Under an FRCP 12 analysis, Ms. McVay has stated a claim for bad faith against Allied and York, which claims survive York's motion to dismiss.

III. CONCLUSION

Ms. McVay was seriously injured at Fox Peak Station, and has incurred substantial medical bills as a result. The only offer of settlement she ever received was in the amount of $5,000, and only after she complained to the Nevada Insurance Commissioner. York's attorney cannot escape the written requirements of the contract to Ms. McVay's disadvantage, and for its own convenience. Ms. McVay has no other available avenue of recovery, because York's and Allied's bad faith

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actions have effectively prevented her from pursuing its insured in any forum for civil justice.

DATED this 10th day of October, 2013.

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 515 Court Street, Reno, Nevada 89501. On the 10th day of October, 2013, I served the within document(s):

Response to Defendant York's Motion to Dismiss

BY CM/ECF: the Court's Electronic Filing System, which serves an electronic copy of the document(s) list above to the person(s) as set forth below.

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I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

Executed on this 10th day of October, 2013.

/s/ Nicole M. Harvey, Esq.
An employee of Harvey Law Firm

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