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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 ALLIED'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 Allied's Motion to Dismiss, filed October 24, 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 13th day of November, 2013.

/s/ Nicole M. Harvey, Esq.

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MEMORANDUM OF POINTS & AUTHORITIES

The insurance contract at issue in this litigation (“Insurance Contract” or “Contract”) is not a simple premises liability contract for the Fox Peak Station convenience store. It is the policy of insurance issued to the Fallon Paiute Shoshone Tribe, and mandated by Federal law. Those unique circumstances alone set this case apart from every case cited by York and Allied in support of their Motions to Dismiss this case.

In this case, the purpose of the contract of insurance is to provide compensation to persons that may suffer personal injury for which the tribal government may ultimately be liable. The tribal government already has the ultimate risk management tool; the power to declare sovereign immunity from suit. Because the tribal government has no civil liabilities against which to insure; the immune sovereign has very little regard for liability insurance or those persons injured on property owned by the sovereign nation. But it only stands to reason that tribal governments must provide some protection to those injured on their property if they want to operate businesses open to the public. Yet York and Allied argue just the opposite, in contravention of public policy and simple common sense.

The insurer, insured tribal governmental entity, and the claimant in this case present unique circumstances, and under these circumstances, Ms. McVay has clearly stated claims for breach of contract and breach of the covenant of good faith and fair dealing against both Allied and York.

I. FACTS

a. History of the Underlying Personal Injury Claim

Ms. McVay lives in Fallon, Nevada. Like many people in Fallon, on or about August 6, 2009 Ms. McVay went to purchase cigarettes at the Fox Peak Station—a gas station, convenience store and tobacco store located 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”).

1 Unfortunately for Ms. McVay, the stores cement floor was wet that day and there was no
2 “wet floor” sign near the area where Ms. McVay slipped and fell. Sadly, Ms. McVay suffered
3 extensive nerve damage in her back as a result of her fall. In addition, Ms. McVay has incurred
4 substantial medical bills, and her income has decreased, as a result of her injury at Fox Peak Station.

5 Allied was put on notice of Ms. McVay’s claim, and York was notified shortly thereafter.
6 Defendants made no offer to settle Ms. McVay’s claim, until Ms. McVay involved the Nevada
7 Department of Insurance. Ms. McVay was then offered \$5,000 to settle her claim—a sum so
8 insufficient to remedy her harm that it would not even cover Ms. McVay’s medical bills.

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

13 Ms. McVay filed an action in Tribal Court on August 5, 2011. The FTDC filed a Motion to
14 Dismiss in Tribal Court, on the basis of sovereign immunity, which was granted on November 28,
15 2011. On February 7, 2012, Ms. McVay sought permission to amend her Complaint. At the July
16 9, 2012 Tribal Court hearing on Ms. McVay’s Motion to Amend, counsel for FTDC stated:

17 WILLIAMS: ...In this case your Honor, this is going beyond
18 what’s in the pleas [sic] a little bit but there is an insurance policy that
19 covers this case and there is a writer [sic] to that insurance policy that
20 says that the insurance company is not invoke sovereign immunity in
21 defense unless it’s approved by the client, which is the Corporation.
22 And in this case I went before the Corporations [sic] Board and they
23 authorized me to invoke the sovereign immunity defense for the
24 Corporation. So even if we ended up down the road here we are
25 going to end up with the same issue where it is going to be dismissed
26 because sovereign immunity is still going to apply.

27 JUDGE: And that was done in writing?

28 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?

1
2 WILLIAMS: Yes, we didn't do a writing because I am the
3 Corporations [sic] General Counsel and the Insurance Company hired
4 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.

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

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

9
10 **b. The Contract for Insurance.**

11 Allied attempts to reframe Ms. McVay as an eager "prejudgment" plaintiff; however, that
12 myopic characterization fails to encompass the unique circumstances and serious public policy
13 issues before the Court in this case.

14 The insurance policy at issue is a "Program for Sovereign Indian Nations General Liability
15 Policy"; it provides general liability coverage for Mrs. McVay's injuries, as well as other lines of
16 coverage, such as cemetery malpractice, errors and omissions, and vehicle liability insurance. This
17 is the liability policy mandated by Federal law, as more fully set forth herein. The contract defines
18 the "insured" as not only the Fallon Paiute Shoshone Tribe, but also:
19

20 ...any person, ...to whom the Named Insured is obligated by virtue of
21 a written contract or oral agreement to provide insurance such as is
22 afforded by this policy, but only in respect to liability for "personal
23 injuries"... caused, in whole or in part, by the Named Insured's acts
24 or omissions or the acts or omissions of those acting on the Named
Insured's behalf, in the performance of the Named Insured's ongoing
operations or in connection with premises owned by or rented to the
Named Insured.

25 Contract, Coverage Part 1, Section 1(A); relevant portions attached and incorporated
26 as Exhibit 2.

27 The contract also contains a "Sovereign Immunity Endorsement", which is at issue in this
28 case. That endorsement provides:

In the event of a claim or suit, the “Carrier” agrees not to use the Sovereign Immunity of the “Insured” as a defense, unless the “Insured” authorizes the company to raise such a defense by written notice to the “Carrier”. Any such notice will be sent not less than 10 days prior to the time required to answer any suit.

Id.

Here, that did not occur. Thus, Ms. McVay is not an over-eager prejudgment plaintiff; she has standing to sue for breach of contract and bad faith on the subject agreement. Nor is York off the metaphorical hook by virtue of the fact that it is not a party to the contract; York’s involvement in handling and litigating the claim at issue brings York to the level of a “joint venturer” with Allied.

Ms. McVay did not have a copy of the underlying insurance agreement when she drafted and filed her Amended Complaint, and as a result the Complaint does not contain as much detail as the argument presented here. However, the facts alleged in the Amended Complaint are sufficient to give rise to cognizable claims under Nevada law; claims for bad faith, for which Allied as insurer and York as third party administrator are both 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 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

1 the court. Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited
 2 exceptions. Ms. McVay has pled facts sufficient to support her legal causes of action against York
 3 and Allied.

4 If a court dismisses a claim the court should grant leave to amend unless the court
 5 determines the allegation of other facts consistent with the operative pleading could not possibly
 6 cure the deficiency. *Schreiber Distrib. Co. v. Serv-Well Furn. Co.*, 806 F.2d 1393, 1401 (9th
 7 Cir.1986). See also, *Reddy v. Litton Industries*, 912 F.2d 291 (9th Cir. 1990), cert. denied, 502 U.S.
 8 921 (1991). Ms. McVay respectfully requests that if Defendant's motion to dismiss is granted, she
 9 be provided leave to amend her complaint.

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

15 **B. Mrs. McVay has standing to sue as a specific intended beneficiary.**

16 Under Nevada law, a contractual relationship with an insurer is required to assert a claim of
 17 bad faith refusal to settle a claim, unless a third party is a specific intended beneficiary to the
 18 insurance contract. *Vignola v. Gilman*, 804 F.Supp.2d 1072 (Nev. 2011).

19 Unlike the insurance policies discussed by York and Allied, the insurance policy in this case
 20 is mandated by the Indian Self Determination Act. 25 USCA § 405f(c) provides:

22 (1) Beginning in 1990, the Secretary [of the Interior] shall be
 23 responsible for obtaining or providing liability insurance or equivalent
 24 coverage, on the most cost-effective basis, for Indian tribes, tribal
 25 organizations, and tribal contractors carrying out contracts, grant
 26 agreements and cooperative agreements pursuant to this subchapter.
 In obtaining or providing such coverage, the Secretary shall take into
 consideration the extent to which liability under such contracts or
 agreements are covered by the Federal Tort Claims Act.

27 . . .

28 (3)(A) Any policy of insurance obtained or provided by the
 Secretary pursuant to this subsection shall contain a provision that

the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

Id. The legislative history explains the purpose of these rules. Pub.L. 105-277, Div. A, § 101(e) [Title VII, §§ 701 to 705], Oct. 21, 1998, 112 Stat. 2681-335 to 2681-337, provided that:

Sec. 701. Short Title. This title [enacting this note] may be cited as the 'Indian Tribal Tort Claims and Risk Management Act of 1998'.

Sec. 702. Findings and Purpose. (a) Findings.--Congress finds that--
(1) Indian tribes have made significant achievements toward developing a foundation for economic self-sufficiency and self-determination, and that economic self-sufficiency and self-determination have increased opportunities for the Indian tribes and other entities and persons to interact more frequently in commerce and intergovernmental relationships;

...
(4) there is an emergent need for comprehensive and cost-efficient insurance that allows the economy of Indian tribes to continue to grow and provides compensation to persons that may suffer personal injury or loss of property.

Id. The same document contemplates a regular report from the Secretary of the Interior regarding tribes and their insurance coverage, which would, "make recommendations that the Secretary determines to... otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government." *Id.* at Sec. 704(b). **No one wants to do business with someone who cannot be held to account for bad acts; the mandated insurance coverage is designed to promote economic growth by providing an avenue of civil relief to injured claimants.**

Obviously, a sovereign nation has no need of liability insurance. The purpose of the federally mandated insurance coverage is not to protect against the tribe's potential liabilities, unlike the insureds involved in the cases cited by the defendants. In cases like the one at bar, the tribe does not lose sleep about being sued for a civil judgment as it has sovereign immunity.

1 Therefore, the only purpose of the insurance is to provide some modicum of relief to innocent third
 2 parties who suffer personal injuries on tribal property, or as a result of tribal actions. That is the
 3 clear purpose expressed in the legislative histories, and it is the only purpose that makes any logical
 4 sense, since the tribe is virtually immune from civil suit for liabilities arising in tort.

5 Mrs. McVay suffered a personal injury at Fox Peak Station, which is a property owned and
 6 operated by the Insured Tribe. These facts make Mrs. McVay the specific intended beneficiary of
 7 the insurance contract at issue.

8 Under Nevada law, Ms. McVay has stated a claim against both Allied and York for breach
 9 of contract, and bad faith.

10 **C. Mrs. McVay is a “Named Insured” Under the Contract’s Own Definition.**

11 The contract defines the “insured” as not only the Fallon Paiute Shoshone Tribe, but also:

12 ...any person, ...to whom the Named Insured is obligated by virtue of
 13 a written contract or oral agreement to provide insurance such as is
 14 afforded by this policy, but only in respect to liability for “personal
 15 injuries”... caused, in whole or in part, by the Named Insured’s acts
 16 or omissions or the acts or omissions of those acting on the Named
 17 Insured’s behalf, in the performance of the Named Insured’s ongoing
 18 operations or in connection with premises owned by or rented to the
 Named Insured.

19 Contract, Coverage Part 1, Section 1(A). Mrs. McVay is a person to whom the tribe owes the
 20 obligation of providing insurance pursuant to the written Indian Self Determination Contract, and
 21 under 25 USC § 450f. The limitation that it only applies to “personal injuries” still does not exclude
 22 Mrs. McVay’s claims. Mrs. McVay alleges her injuries were caused by the acts and omissions of
 23 those acting on the Insured Tribe’s behalf, in the performance of the Insured Tribe’s ongoing
 24 operation of Fox Peak or in connection with premises owned by or rented to the Insured Tribe.
 25 Mrs. McVay is a Named Insured under the terms of the contract itself.

26 Vignola provides an exception to the “privity of contract” limitation of actions for bad faith
 27 for non-contracting parties who are named insureds. Ms. McVay is a Named Insured under the
 28

1 contract, because she is the specific intended beneficiary of the coverage, under Federal law.
 2 Vignola, 804 F. Supp. 2d at 1076 n. 2. Mrs. McVay's circumstances neatly fit the exceptions
 3 allowing non-contracting parties to pursue claims against insurers for breach of contract and bad
 4 faith. Given the purpose behind the existence of the insurance coverage, it makes perfect sense that
 5 Mrs. McVay is allowed some avenue for recovery for her personal injuries, and that refusing to
 6 provide relief for injuries suffered is actionable by Mrs. McVay.
 7

8 Mrs. McVay, as a named insured, has standing to, and has stated claims for breach of
 9 contract and bad faith against Allied and York.

10 **D. Mrs. McVay is not a Pre-Judgment Claimant.**

11 The defendants' argument that Mrs. McVay's claims here are premature because she is a
 12 pre-judgment claimant are akin to a defense used by the insurer in Wohlers v. Bartgis, 969 P.2d 949,
 13 114 Nev. 1249 (1998). In Wohlers, the insurer argued that the jury's bad faith and fraud verdicts
 14 are "fatally inconsistent" because if they had fraudulently misrepresented the amount of coverage
 15 under the policy by informing the insured that the policy afforded more coverage than in fact it did,
 16 then they could not be held liable for bad faith failure to pay a claim. Conversely, "if the policy did
 17 cover the full amount of plaintiff's claim, then nothing was concealed from the insured and there
 18 was no fraud or actionable nondisclosure." The Court dismissed this argument, finding that the
 19 insurer could not insulate itself from liability for bad faith through its own fraudulent acts. "[T]he
 20 jury could have found that [the insurer's] fraudulent actions constituted a breach of the duty of good
 21 faith and fair dealing, thereby exposing them to bad faith liability."
 22

23
 24 In this case, the insurer cannot completely bar Mrs. McVay's only avenue for the relief she
 25 seeks by breaching the contract, and be insulated from suit on the basis that Mrs. McVay has not
 26 obtained a civil judgment. The breach of contract in this case is that of the terms in the Sovereign
 27 Immunity Endorsement. That Endorsement – a part of the Insurance Contract – provides:
 28

In the event of a claim or suit, the "Carrier" agrees not to use the

1 Sovereign Immunity of the “Insured” as a defense, unless the
2 “Insured” authorizes the company to raise such a defense by written
3 notice to the “Carrier”. Any such notice will be sent not less than 10
4 days prior to the time required to answer any suit.

Contract, page 32 at Exhibit 1.

5 In the Tribal Court hearing on Mrs. McVay’s Motion to Amend her Complaint, held July 9,
6 2012, counsel for York admitted:

7 WILLIAMS: ...In this case your Honor, this is going beyond
8 what’s in the pleas [sic] a little bit but there is an insurance policy that
9 covers this case and there is a writer [sic] to that insurance policy that
10 says that the insurance company is not invoke sovereign immunity in
11 defense unless it’s approved by the client, which is the Corporation.
12 And in this case I went before the Corporations [sic] Board and they
13 authorized me to invoke the sovereign immunity defense for the
14 Corporation. So even if we ended up down the road here we are
15 going to end up with the same issue where it is going to be dismissed
16 because sovereign immunity is still going to apply.

17 JUDGE: And that was done in writing?

18 WILLIAMS: Of course not done in writing, the writer does
19 say that it needs to be in writing but I was at the Board meeting

20 JUDGE: The representation based upon?

21 WILLIAMS: Yes, we didn’t do a writing because I am the
22 Corporations [sic] General Counsel and the Insurance Company hired
23 me to represent them in this case so I would be writing myself a
24 memo saying invoke the sovereign immunity defense. I can go out
25 hand write one right now and it would have the effect.

Hearing Transcript, 13:6 – 14:14, at Exhibit 2.

26 York’s suggestion that the client tribal corporation’s failure to provide written authorization
27 at any time is meaningless or excusable ignores the strict time limit for making the written election.
28 To the contrary, such written notice was due on March 20, 2011, which was ten days prior to the
time required to answer. That notwithstanding, York was relying on sovereign immunity as a
complete defense long before that date, and to provide written notice in writing now would not cure
the defect.

1 The breach in this case benefits both the insured and the insurer; even York's Reply takes
2 time to explain that the insured is "satisfied" with the invocation of sovereign immunity. The
3 problem with this breach is that it injured the specific intended beneficiary, and the other "Named
4 Insured" – Mrs. McVay.

5 Defendants cannot use their breach of the contract to protect themselves from liability for
6 bad faith, any more than the insurer could escape liability for bad faith by committing fraud in
7 Wohlers.

8 **III. CONCLUSION**

9 The policy at issue only exists because the law requires it for the benefit of Mrs. McVay,
10 who was injured as a result of the insured's negligence. This underlying policy reason is reflected
11 in the fact that Mrs. McVay is a named insured under the policy's own definition. As a specific
12 intended beneficiary and named insured, Mrs. McVay has standing to sue Allied and its third party
13 administrator, York, for breach of contract and bad faith. The insurance contract supports Mrs.
14 McVay's Amended Complaint, which clearly states claims, under Nevada law, for which relief may
15 be granted.

16 DATED this 13th day of November, 2013.

17
18
19
20 /s/ Nicole M. Harvey, Esq.

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26 *Attorney for Plaintiff*
27
28

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 13th day of November, 2013, I served the within document(s):

Response to Defendant Allied'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 13th day of November, 2013.

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