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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 SUPPLEMENTAL RESPONSE TO YORK INSURANCE SERVICE'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 Supplement to her Response to Defendant York Insurance Service's Motion to Dismiss, filed October 1, 2013, because the contract for insurance at issue was finally produced with Defendant Allied World Assurance Company's Motion to Dismiss, long after Ms. McVay's timely Response to York's Motion to Dismiss was filed. This Supplemental 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.

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MEMORANDUM OF POINTS & AUTHORITIES

The insurance contract disclosed with Defendant Allied's Motion to Dismiss (and, actually filed later than the motion as an *Errata* on November 5, 2013) affirms everything Ms. McVay alleged in her Complaint.

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

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

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

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

Contract, Coverage Part 1, Secton 1(A); relevant portions attached and incorporated as Exhibit 1.

The contract also contains a "Sovereign Immunity Endorsement", which is at issue in this 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 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.

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

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

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

> (1) Beginning in 1990, the Secretary [of the Interior] shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant 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.
>
> . . .
>
> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a pro-vision 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

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

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

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

C. Mrs. McVay is a "Named Insured" Under the Contract's Own Definition.

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

> …any person, …to whom the Named Insured is obligated by virtue of

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> a written contract or oral agreement to provide insurance such as is afforded by this policy, but only in respect to liability for "personal injuries"… caused, in whole or in part, by the Named lnsured's acts or omissions or the acts or omissions of those acting on the Named lnsured's behalf, in the performance of the Named lnsured's ongoing operations or in connection with premises owned by or rented to the Named Insured.

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

Vignola provides an exception to the "privity of contract" limitation of actions for bad faith for non-contracting parties who are named insureds. Ms. McVay is a Named Insured under the contract, because she is the specific intended beneficiary of the coverage, under Federal law. *Vignola*, 804 F. Supp. 2d at 1076 n. 2. Mrs. McVay's circumstances neatly fit the exceptions allowing non-contracting parties to pursue claims against insurers for breach of contract and bad faith. Given the purpose behind the existence of the insurance coverage, it makes perfect sense that Mrs. McVay is allowed some avenue for recovery for her personal injuries, and that refusing to provide relief for injuries suffered is actionable by Mrs. McVay.

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

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

The defendants' argument that Mrs. McVay's claims here are premature because she is a pre-judgment claimant are akin to a defense used by the insurer in *Wohlers v. Bartgis*, 969 P.2d 949, 114 Nev. 1249 (1998). In *Wohlers*, the insurer argued that the jury's bad faith and fraud verdicts

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are "fatally inconsistent'' because if they had fraudulently misrepresented the amount of coverage under the policy by informing the insured that the policy afforded more coverage than in fact it did, then they could not be held liable for bad faith failure to pay a claim. Conversely, "if the policy did cover the full amount of plaintiff's claim, then nothing was concealed from the insured and there was no fraud or actionable nondisclosure." The Court dismissed this argument, finding that the insurer could not insulate itself from liability for bad faith through its own fraudulent acts. "[T]he jury could have found that [the insurer's] fraudulent actions constituted a breach of the duty of good faith and fair dealing, thereby exposing them to bad faith liability."

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

Contract, page 32 at Exhibit 1.

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

> 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?

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> 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 at Exhibit 2.

York's suggestion that the client tribal corporation's failure to provide written authorization at any time is meaningless or excusable ignores the strict time limit for making the written election. 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.

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

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

III. CONCLUSION

The policy at issue only exists because the law requires it for the benefit of Mrs. McVay, who was injured as a result of the insured's negligence. This underlying policy reason is reflected in the fact that Mrs. McVay is a named insured under the policy's own definition. As a specific intended beneficiary and named insured, Mrs. McVay has standing to sue Allied and its third party

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administrator, York, for breach of contract and bad faith. The insurance contract supports Mrs. McVay's Amended Complaint, which clearly states claims, under Nevada law, for which relief may be granted.

DATED this 13th day of November, 2013.

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