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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

LDFS LLC, a Delaware limited liability
company, d/b/a U.S. Renal Care Flagstaff
Dialysis,

Plaintiff,

v.

IEC Group, Inc., an Idaho corporation d/b/a
AmeriBen,

Defendant.

Case No. 3:17-cv-08046-JJT

**PLAINTIFF'S MEMORANDUM
OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION
TO DISMISS**

Plaintiff LDFS LLC, d/b/a U.S. Renal Care Flagstaff Dialysis ("Flagstaff Dialysis") respectfully submits this memorandum of law in opposition to the motion to dismiss filed by defendant IEC Group, Inc., d/b/a AmeriBen ("AmeriBen") pursuant to Rules 12(b)(7) and 19.

I.

INTRODUCTION

AmeriBen insists that Flagstaff Dialysis's breach of contract claims should be recharacterized as a claim for benefits under the Tuba City health plan, but Flagstaff Dialysis is *not* seeking health benefits under that plan, nor is it seeking payment on behalf of a plan participant or beneficiary.

Rather, Flagstaff Dialysis is asserting *direct*, non-derivative claims that arise from AmeriBen's failure to honor the terms of a pricing agreement with Flagstaff Dialysis under which dialysis services were provided to a specified patient. Thus, while AmeriBen describes Flagstaff Dialysis's allegations as "misleading," it is neither unusual nor improper for a health care provider to assert claims for relief against a third-party administrator, particularly where the health care provider and the administrator are parties to the same written pricing contract.

AmeriBen's motion should be denied, because the Tuba City health plan's presence as a party is not needed for a complete resolution of the claims between Flagstaff Dialysis and AmeriBen, and proceeding without the health plan as a party will not impair in any way the health plan's ability to protect its own interests against a potential subsequent claim for indemnity by AmeriBen.¹

In essence, AmeriBen is arguing that Flagstaff Dialysis should be required to join an entity against which *Flagstaff* is not asserting a claim, because at some point *AmeriBen* may assert a claim for indemnity against that same absent entity. Neither Rule 12(b)(7) nor Rule 19 compels this result.

¹ Flagstaff Dialysis notes that AmeriBen did not meet and confer with Flagstaff Dialysis prior to filing its motion to dismiss, as required by the Court's Order dated March 8, 2017. (Doc. 9)

1 **II.**

2 **FACTUAL BACKGROUND**

3 On May 12, 2015, following negotiations with a medical fee negotiator known as
 4 CSG Consulting, Inc. (“CSG”), U.S. Renal Care entered into a written agreement with
 5 AmeriBen on behalf of its affiliate Flagstaff Dialysis that specified the payment level for
 6 dialysis services provided by Flagstaff Dialysis to the patient named in that agreement.
 7 (Doc. 1, ¶ 13) Flagstaff Dialysis has alleged that CSG was AmeriBen’s agent and that
 8 CSG was acting on AmeriBen’s behalf and within the scope of its authority in arranging
 9 and negotiating that pricing agreement. (Doc. 1, ¶¶ 10 & 11)

10 Pursuant to the terms of the agreement, Flagstaff Dialysis was to be paid at the
 11 rate of 60 percent of its billed charges for the dates of service from February 9, 2015
 12 through April 29, 2015. The agreement also specifically provided that the same
 13 discounted rate would apply to “ongoing” dialysis services from Flagstaff Dialysis to the
 14 patient, and that “as treatment is continuing[,] future charges will be reduced as above.”
 15 (Doc. 1, ¶ 14) The Tuba City health plan is not a party to this pricing agreement. (Doc.
 16 11-1, p. 11)

17 **III.**

18 **MEMORANDUM OF LAW**

19 In conducting a Rule 19 analysis, a court must accept as true the allegations in the
 20 Complaint and draw all reasonable inferences in the non-moving party’s favor. *Zazzali*
 21 *v. Goldsmith (In re DBSI Inc.)*, 2013 Bankr. LEXIS 1524, *12 (Bankr.D.Id. Apr. 11,
 22 2013); *Incubadora Mexicana, SA de CV v. Zoetis, Inc.*, 310 F.R.D. 166, 170 (E.D.Pa.
 23 2015). The party moving for dismissal under Rules 12(b)(7) and 19 bears the burden of
 24 showing why an absent party should be joined. *Shermoen v. United States*, 982 F.2d
 25 1312, 1317 (9th Cir. 1992); *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 635 F.3d
 26 87, 97 (3rd Cir. 2011).

A. Flagstaff's Claim is Against AmeriBen, Not the Tuba City Health Plan

As a preliminary matter, AmeriBen has raised numerous factual disputes that are not appropriate for resolution through this motion, because the allegations in Flagstaff Dialysis's complaint must be accepted as true. Most notably, AmeriBen asserts in passing that it is not even a party to the pricing agreement, because, according to AmeriBen, the fee negotiator was acting on behalf of an unrelated stop loss carrier in negotiating that agreement. (Doc. 11, p. 4, lines 9-11) Significantly, however, AmeriBen does not identify this carrier, nor does AmeriBen contend that this carrier is an indispensable party, even though AmeriBen asserts that this carrier is the *real* counterparty.²

Moreover, while AmeriBen insists it "bears no responsibility" for the amounts sought in this action, Flagstaff Dialysis has appropriately alleged a direct contractual relationship with AmeriBen that obligated AmeriBen to pay for Flagstaff Dialysis's services at the rate set forth in that agreement. For purposes of this motion, those allegations control.

Thus, there is no basis for recharacterizing Flagstaff Dialysis's claims as arising from or as being dependent on the Tuba City health plan. Indeed, it is neither unusual nor misleading for a health care provider to assert a damages claim directly against a third-party claims administrator, rather than against a health benefits plan, particularly

² AmeriBen devotes a significant amount of its motion to a discussion of the financial arrangements between AmeriBen and the Tuba City health plan, but it remains disputed, among other issues, whether the fee negotiator disclosed these financial arrangements to Flagstaff Dialysis and whether Flagstaff Dialysis agreed to any restrictions on its ability to get paid based on those financial arrangements; whether the fee negotiator acted on behalf of AmeriBen or an unidentified stop loss carrier in negotiating the pricing agreement; the date on which AmeriBen communicated to Flagstaff Dialysis any purported changes in reimbursement rates; and whether Flagstaff Dialysis was bound by any purported changes in reimbursement rates. None of these disputed issues are appropriately resolved through this motion.

1 where the damages claim is based on a direct contract between the health care provider
 2 and the administrator or is based on some other legal obligation that is independent of
 3 the health plan.³ See, e.g., *Thrift Drug, Inc. v. Universal Prescription Admin.*, 131 F.3d
 4 95 (2nd Cir. 1997)(contract claims against third-party administrator relating to
 5 prescriptions dispensed to plan beneficiaries); *Baylor Health Care Syst. v. Insurers*
 6 *Admin. Corp.*, 2010 U.S. Dist. LEXIS 127897 (N.D.Tex. Dec. 3, 2010)(health care
 7 provider asserted contract claim against third-party administrator); *Knickerbocker*
 8 *Dialysis, Inc. v. TrueBlue, Inc.*, 582 F.Supp.2d 364 (E.D.N.Y. 2008)(health care
 9 provider's claims included breach of contract claim against third-party administrator for
 10 failure to pay certain health care claims); *GPA Holding, Inc. v. Baylor Health Care Syst.*,
 11 344 S.W.3d 467 (Tex.App. 2011)(health care provider asserted contract claim based on
 12 third-party administrator's breach of obligation to pay certain health care claims).

13 **B. The Tuba City Health Plan is Not a Necessary Party**

14 Rule 19 requires that a court conduct a three-step analysis to determine whether
 15 joinder of an absent person is required. *Salt River Project Agric. Imp. & Power Dist. v.*
 16 *Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012); *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774,
 17 779 (9th Cir. 2005); *Anchorage v. Integrated Concepts & Research Corp.*, 1 F.Supp.3d
 18 1001, 1012 (D.Ak. 2014).

19 First, a court evaluates whether the absent person is necessary to the action. An
 20 absent person may be necessary in three different ways: (1) under Rule 19(a)(1)(A), if
 21 “in that person’s absence, the court cannot accord complete relief among [the] existing
 22

23 ³ AmeriBen also asserts that the Tuba City health plan is governed by ERISA. (Doc.
 24 11, p. 2, lines 8-10 & 18-19) Based on AmeriBen’s limited description of the plan,
 25 however, it appears the Tuba City plan is a “governmental plan” within the meaning
 26 of 29 U.S.C. §1002(32) and is therefore not within the reach of ERISA. See *Dobbs v.*
Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1278-1279 (10th Cir. 2010). In any
 event, it is unnecessary to resolve this issue through this motion, because Flagstaff
 Dialysis is not making a claim for benefits under the Tuba City health plan.

parties”; or (2) under Rule 19(a)(1)(B)(i), if the absent person claims an interest in the action and a decision issued in its absence may “impair or impede [its] ability to protect the interest”; or (3) under Rule 19(a)(1)(B)(ii), if the absent person claims an interest in the action and a decision issued in its absence may “leave an existing party subject to a substantial risk if incurring double, multiple, or otherwise inconsistent obligations.” *Anchorage*, 1 F.Supp.2d at 1012-1013.

If the absentee is not “necessary,” the analysis ends and the Rule 19 motion must be denied.

1. Complete Relief Can Be Accorded to the Existing Parties

The Rule 19(a)(1)(A) inquiry is limited to whether the Court can grant complete relief to the persons *already* parties to the action, regardless of whether the plaintiff may have a better or separate claim against an absent party. *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1068 (N.D.Cal. 2005); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 405-406 (3rd Cir. 1993). Whether a court’s decision may affect an absent person is not material for this analysis. *Id.* at 405.

Accordingly, a party is necessary *only* when its absence precludes the court from effecting relief not in some overall sense, but between the current parties only. *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3rd Cir. 1996).

Here, it is apparent that complete relief can be accorded between the existing parties.

Flagstaff Dialysis and AmeriBen will effectively resolve *their* entire controversy, despite the Tuba City health plan’s absence. Specifically, this action will determine *in its entirety* whether AmeriBen is liable to Flagstaff Dialysis on Flagstaff’s breach of contract and bounced check claims. If AmeriBen is found liable, Flagstaff Dialysis will be made whole. If AmeriBen is not found liable, Flagstaff Dialysis will have *fully* resolved its controversy with AmeriBen.

Whether AmeriBen is entitled to indemnity from the Tuba City health plan under a *separate* contract between AmeriBen and the health plan is an intramural dispute between those parties that may be resolved wholly separate from this case. *Anchorage*, 1 F.Supp.3d at 1013-1014 (existing party's potential claim for litigation costs from absent party insufficient to make absentee a necessary or required party).

In short, AmeriBen has not established that the health plan is a necessary party under Rule 19(a)(1)(A).

2. The Tuba City Health Plan Has Not Claimed Any Interest

The next step under Rule 19(a)(1) requires the Court to consider whether the Tuba City health plan "claims an interest relating to the subject of the action" and is "so situated that disposing of the action without [it] may" either: (i) impair or impede the health plan's ability to protect its interests; or (ii) subject AmeriBen "to a substantial risk of incurring double, multiple or otherwise inconsistent obligations" because of the health plan's interest.

For joinder under Rule 19(a)(1)(B)(i), the Court's inquiry is limited to determining whether the Tuba City health plan would be prejudiced if the litigation proceeds in its absence. Such prejudice arises only when the absentee has claimed a "legally protected interest relating to the subject matter of the action" that would be directly and immediately impacted that action. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983). The effect that would "impair or impede" the rights of the absent party must be "direct and immediate." *Janney*, 11 F.3d at 407.

AmeriBen has not demonstrated that the Tuba City health plan has claimed *any* interest in the subject matter of this case. This is not surprising, because the health plan has *no* legally protected interest in the determination of the validity and enforceability of the pricing agreement pursuant to which Flagstaff Dialysis has asserted claims for relief in the present case.

1 To the extent AmeriBen contends the Tuba City health plan has an interest in the
2 subject matter of this case because of its potential responsibility to pay for any amounts
3 found to be due, the Ninth Circuit has rejected that exact argument:

4 The mere fact that the outcome of this litigation may have
5 some financial consequences for the non-party trib[e] is not
6 sufficient to make [that tribe] a required party. [T]he interest
must be more than a financial stake.

7 *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 971 (9th Cir. 2008).

8 Unlike the situation in *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th
9 Cir. 2002), where the district court's injunction modified the compacts of absent tribes
10 and stripped those tribes of the benefit of their bargains, Flagstaff Dialysis seeks to
11 enforce the payment terms of its *own* direct agreement with AmeriBen. This litigation is
12 not "aimed" at the Tuba City health plan or any other absentee. *Am. Greyhound Racing,*
13 *Inc. v. Hull*, 305 F.3d at 1026.

14 Consequently, resolution of Flagstaff Dialysis's contract claim against AmeriBen
15 will not "impair or impede" the health plan's separate agreement with AmeriBen or
16 affect in any way the health plan's ability to protect its own interests. The health plan
17 remains free to assert whatever defenses it chooses to AmeriBen's potential claims for
18 indemnity.

19 Moreover, proceeding without the absentee health plan as a party will not expose
20 AmeriBen to *any* risk of "inconsistent obligations" within the meaning of Rule 19.

21 Rule 19(a) "is intended to protect the defendant against inconsistent obligations,
22 not inconsistent adjudications." *Janney*, 11 F.3d at 411.

23 If Flagstaff Dialysis prevails on its claim that its agreement with AmeriBen is
24 valid and enforceable, and was breached by AmeriBen, then AmeriBen will have ample
25 opportunity to pursue its separate contractual claim for indemnity against the health plan
26 at whatever time and in whatever forum it believes is appropriate.

AmeriBen does not face “multiple liability” within the meaning of Rule 19 if it loses in this action and then loses in a subsequent action for indemnity, because “[t]his is not ... the double liability that Rule 19(a)(2)(ii) refers to.” *Id.* Even “the possibility of a subsequent adjudication that may result in a judgment that is inconsistent as a matter of logic [does not] trigger the application of Rule 19.” *Id.* at 411-412. As the Third Circuit explained in *Janney*: “The possibility that [the defendant] may bear the whole loss if it is found liable is not the equivalent of double liability. *Id.* at 412.

Pasco International (London), Ltd. v. Stenograph Corp., 637 F.2d 496 (7th Cir. 1980) is to the same effect. Defendant Stenograph argued it would be prejudiced by the possibility of inconsistent results in any later litigation between itself and the absentee. The Seventh Circuit rejected this argument, noting that if Stenograph were found liable, it could assert a claim for contribution or indemnity against the absentee. The Seventh Circuit held that “potential indemnitors have never been considered indispensable parties, or even parties whose joinder is required if feasible.” *Id.* at 503, citing 3A *Moore’s Federal Practice*, para 19.07-1(2.-2), at n. 32 (2d ed. 1979).

As the Seventh Circuit noted, “if persons subject to rights of indemnity or contribution were always indispensable parties, there would not be a need for the impleader provisions of Rule 14.” *Pasco*, 637 F.2d at 503.

In short, AmeriBen has not established that the health plan is a necessary party under any prong of Rule 19(a). Accordingly, the inquiry should end and AmeriBen’s motion should be denied.⁴ *Id.* at 970.

C. It is Unknown if Joinder of the Tuba City Health Plan is Feasible

While Flagstaff Dialysis respectfully submits that it is unnecessary for the Court to proceed to the other aspects of the Rule 19 analysis, it notes that AmeriBen has

⁴ As this motion should be denied, AmeriBen is not entitled to its attorney’s fees pursuant to A.R.S. § 12-341.01.

submitted only excerpts of its separate agreement with the Tuba City health plan. Consequently, it is unknown whether AmeriBen negotiated a contractual waiver of tribal sovereign immunity for enforcement of AmeriBen's indemnity rights or any other potential claims against the health plan.

D. The Tuba City Health Plan is Not an Indispensable Party

Flagstaff Dialysis again respectfully submits that it is unnecessary for the Court to proceed to the Rule 19(b) analysis, under which the Court must determine whether "equity and good conscience" require that the litigation proceed among the existing parties or that it should be dismissed.

The first and second factors under Rule 19(b) are "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties" and to what extent such prejudice "can be lessened or avoided."

"Joinder is contingent ... upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action." *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999).

As previously explained, AmeriBen has failed to present any evidence that the Tuba City Health Plan "claims an interest" in the subject of this litigation in any manner such that its interests need protecting. Indeed, the health plan has *no* legally protected interest in the determination of the validity and enforceability of the pricing agreement pursuant to which Flagstaff Dialysis has asserted claims for relief in the present case.

The third factor under Rule 19(b) is "whether a judgment rendered in the person's absence will be adequate. Specifically, this factor allows the court to consider whether the relief it grants will provide an adequate remedy for *the plaintiff*." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 112 (1968).

Again, this action will determine *in its entirety* whether AmeriBen is liable to Flagstaff Dialysis on Flagstaff's breach of contract claims. If AmeriBen is found liable,

1 Flagstaff Dialysis will be made whole. If AmeriBen is not found liable, Flagstaff
2 Dialysis will have *fully* resolved its controversy with AmeriBen.

3 The fourth factor under Rule 19(b) is whether the plaintiff has a remedy if the
4 action is dismissed. Even though Flagstaff Dialysis's claim is against AmeriBen and not
5 the Tuba City health plan, AmeriBen suggests that Flagstaff should proceed against the
6 health plan in tribal court, where it is unknown whether the sort of claim proposed by
7 AmeriBen is even cognizable.

8 In any event, the possibility of an alternative forum does not transform the Tuba
9 City health plan into an indispensable party. 3A J. Moore, *Moore's Federal Practice*,
10 para. 19.07-2[4], at 19-161 (2d ed. 1979)("surely the availability of an alternative forum
11 cannot be the sole basis for dismissing a suit commenced in the federal courts").

12 In short, AmeriBen's insistence that Flagstaff Dialysis's claim is really against
13 the Tuba City health plan does not make it so. Flagstaff has properly alleged a direct
14 contractual relationship with AmeriBen, and it is hardly unusual for a party to assert
15 claims for relief against a counterparty to a contract.

16 Moreover, the fact that AmeriBen may seek indemnity from the Tuba City health
17 plan for any amounts for which AmeriBen is found liable in this case does not transform
18 the health plan into a necessary or indispensable party. Indeed, that exact argument has
19 been repeatedly rejected and should be rejected in connection with this motion as well.

20 IV.

21 ORAL ARGUMENT

22 If the Court grants AmeriBen's request for oral argument, Flagstaff Dialysis
23 respectfully requests pursuant to LRCiv 7.2(h) that the Court allow argument by speaker
24 telephone conference call.

V.

CONCLUSION

For the foregoing reasons, Flagstaff Dialysis respectfully requests that the Court deny AmeriBen's motion to dismiss.

RESPECTFULLY SUBMITTED this 23rd day of May, 2017.

By: /s/ Casey S. Blais

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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