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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 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN A NECESSARY AND INDISPENSABLE PARTY** **(Oral Argument Requested)**

Plaintiff's opposition to Ameriben's Motion to Dismiss for Failure to Join a Necessary and Indispensable Party is based on the incorrect premise that this Court must accept as true the allegations of Plaintiff's Complaint. Much to the contrary, this Court should, and AmeriBen argues must, consider the additional facts presented in AmeriBen's Motion, supporting Declaration, and authenticated exhibits to determine whether Tuba City Regional Healthcare Corporation ("TCRHCC") and/or the Plan must be joined in this action. This is the very nature of a Rule 19 dispute. Although Plaintiff attempts to manufacture a separate contract with AmeriBen, it is clear that Plaintiff wants to be paid for services rendered pursuant to the Plan. The only entity that should be liable

for payment is TCRHCC and/or the Plan. Thus, Plaintiff must join TCRHCC and/or the Plan, and if joinder is not possible, this action must be dismissed.[1]

I. The Allegations of Plaintiff's Complaint Do Not Control to the Exclusion of Other Evidence.

AmeriBen did not bring a Rule 12(b)(6) motion. Thus, this Court's inquiry is not confined to the allegations in Plaintiff's Complaint in ruling on AmeriBen's Rule 12(b)(7) Motion. And, this Court is not required to accept Plaintiff's allegations as true. The party moving to dismiss for failure to join an indispensable party bears the burden in **producing evidence** in support of the motion. *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994) ("The proponent's burden [on a Rule 12(b)(7) motion] can be satisfied by providing 'affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence.'") (citations omitted). The burden of production presupposes that the evidence produced will carry some weight. In fact, it is well-established that Rule 12(b)(7) is a practical and fact specific inquiry, dependent on the unique facts of a particular case. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19 (1968)).

Plaintiff cites two unpublished decisions in support of its claim that this court is required to accept as true all allegations of Plaintiff's Complaint. (See Doc. 12 at p. 3). As an initial matter, an unpublished order of another district court is not binding on this court. *See Starbuck v. City and County of San Francisco*, 556 F. 2d 450, 457 n. 13 (9th. Cir. 1977) (citing 1B Moore's Federal Practice ¶ 0.402[1], p. 61 (2d ed. 1947) ("Thus a

[1] Plaintiff notes in its Response that AmeriBen did not meet and confer with Plaintiff prior to filing its Motion. Plaintiff did not advise the Court that both counsel for Ameriben attempted to call Plaintiff's Arizona counsel, and were informed that Plaintiff's counsel was out of the country for an extended period of time. No one responded to the call, and AmeriBen filed its Motion to avoid the potential for default. Plaintiff does not state that a meet and confer would have obviated the need for this Motion. Based on Plaintiff's opposition to the Motion and given no indication that Plaintiff will voluntarily join TCRHCC and/or the Plan, these facts suggest that even if Plaintiff and AmeriBen had met and conferred, this Motion would still have been necessary.

decision of one district court is not binding upon a different district court.")). More importantly, the cases on which Plaintiff relies appear to have cited an incorrect standard of review. For example, the court in *Zazzali v. Goldsmith* (In re DBSI Inc.*),* 2013 Bankr. LEXIS 1524, *12 (Bankr. D. Id. Apr. 11, 2013) cited a Ninth Circuit decision for the proposition that a court must "accept as true all the allegations in the complaint" in deciding a Rule 12(b)(7) motion. *Id*. (citing *Transmission Agency of N. Cal. v. Sierra Pac. Power Co*., 295 F.3d 918, 923 (9th Cir. 2002)).[2] However, *Transmission Agency* was not a Rule 12(b)(7) or Rule 19 case and does not set forth the standard of review for Rule 12(b)(7) motions. The *Zazzali* court's—and by extension Plaintiff's—reliance on *Transmission Agency* is misguided.

Plaintiff cannot rely solely on the allegations in its unverified Complaint to establish that TCRHCC and/or the Plan are *not* indispensable parties. Yet Plaintiff introduced no competent evidence to refute the AmeriBen's factual support for its Motion. Absent other contrary evidence, AmeriBen has met its burden of production by showing through the sworn Declaration and other admissible documents that TCRHCC and/or the Plan are/is a necessary and indispensable parties/party to this action.

II. TCRHCC is a Necessary and Indispensable Party to this Dispute.

A. Plaintiff Cannot Obtain Complete Relief Against AmeriBen Alone.

When rights under a contract are litigated, all parties to the contract are necessary parties in order to afford complete relief. *See Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999)(citing *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir.1975)). In the Rule 19 context, complete relief means "meaningful relief"—i.e., relief that would achieve the objective of the litigation. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc*., 375 F.3d 861, 879 (9th Cir. 2004). "This factor is concerned with

[2] Plaintiff also cites *Incubadora Mexicana, SA de CV v. Zoetiz, Inc*., 310 F.R.D. 166 (E.D. Pa. 2015). There the district court stated: "In conducting a Rule 19 analysis the Court must accept as true the allegations in the Amended Complaint and draw all reasonable inferences in the non-moving party's favor." *Id.* at 170. The *Incubadora* court cited no case law in support of this statement, and the binding Ninth Circuit authority directly discussed herein contradicts it.

consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." *Northrop Corp. v. McDonnell Douglas Corp*., 705 F.2d 1030, 1043 (9th Cir.1983).

The Ninth Circuit has already held that the party who decides whether and to what extent medical benefits are paid is a necessary party to a breach of contract action involving those medical insurance benefits. *See Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F. 2d 815, 819-20 (9th Cir. 1985). In that case, the Ninth Circuit determined that Plaintiff could not obtain complete relief from the insurance company alone because "the ultimate responsibility for the medical plan and for decisions allowing or disallowing claims" rested with the employer/ERISA plan provider. *Id*. The Ninth Circuit also held that there was a possibility that collateral estoppel could operate against the absent employer and that this potential harm to the employer was an additional basis for finding that the employer was a necessary party to the medical benefits dispute. *Id*. at 821.

Even assuming, *arguendo*, AmeriBen was a party to the Discount Agreement (AmeriBen does not concede this), AmeriBen's authority to negotiate with providers and providers' right to demand payment stems from the TPA Agreement and ultimately, the Plan. In other words, the agreement that gave rise to Plaintiff's purported right to payment, and any other entity's alleged authority to negotiate that right to payment, was the Plan. Furthermore, there is a significant possibility that TCRHCC and/or the Plan could be collaterally estopped from relitigating issues decided in this proceeding. Thus, TCRHCC and/or the Plan is a necessary party to this dispute. Thus, TCRHCC, as Plan Administrator, and/or the Plan must be joined before any alleged right of Plaintiff to payment can be fully adjudicated, even assuming the Discount Agreement is considered.

Plaintiff cites several cases (none binding on this court) in support of its argument that "it is neither unusual nor misleading for a health care provider to assert a damages claim directly against a third-party claims administrator," including *Baylor Health Care Syst. v. Insurers Admin Corp.*, 2010 U.S. Dist. LEXIS 127897 (N.D. Tex. Dec. 3, 2010). In *Baylor*, a provider sued a third party administrator of a health care plan based on a

"tripartite agreement" between the plan, the third party administrator, and the provider. *Id*. at *9. Under that tripartite agreement, the third party administrator expressly agreed (under a "Payor Acknowledgement") to pay providers and such was the basis of the provider's breach of contract action. *Id*. at *4. However, no such agreement exists here. To the contrary, AmeriBen has produced evidence showing that AmeriBen was not liable for payments to Plaintiff under either the TPA Agreement or the Discount Agreement. (See Doc. 11 at pp. 3-4; Doc 11-1 at pp. 8, 11.)

Nevertheless, AmeriBen does not dispute that, *in theory*, a third party administrator may be authorized to enter contract directly with providers or other third parties. However, AmeriBen has produced evidence showing definitively that is not this case. AmeriBen has produced a verified copy of the alleged contract, a Discount Agreement between Plaintiff and CSG Consulting, Inc. that (1) does not bear AmeriBen's name or signature as a party or does not obligate AmeriBen to pay, and (2) specifically states that the agreement does not constitute a guarantee of benefits. (Doc. 11-1 at p. 11). It is not sufficient to survive a Rule 12(b)(7) motion that Plaintiff allege a cognizable cause of action—Plaintiff must produce competent evidence to refute AmeriBen's showing that there is no independent contractual relationship between AmeriBen and Plaintiff. *See Citizen Band Potawatomi Indian Tribe*, 17 F.3d at 1293.

Although Plaintiff has ***alleged*** a direct contractual relationship with AmeriBen, AmeriBen does not concede that any contract enforceable against AmeriBen by Plaintiff exists. Likewise, Plaintiff's allegation of agency between AmeriBen and CSG Consulting is not sufficient to prove that CSG Consulting was acting on behalf of AmeriBen in light of evidence in the Declaration that CSG was acting on behalf of TCRHCC's third-party stop-loss carrier. (Doc. 11-1 at p. 3 ¶ 7) Without showing some written agreement that AmeriBen signed in its individual capacity or any other competent evidence to establish a contractual relationship between AmeriBen and Plaintiff, this meritless basis for a direct action against AmeriBen must be rejected.

TCRHCC is a necessary party because complete relief cannot be afforded to the existing parties without it and because TCRHCC subjects AmeriBen to duplicative obligations. Under Rule 19(a), Fed R. Civ. P., complete relief cannot be obtained between the existing parties because Plaintiff has failed to join TCRHCC, the only entity with any liability for the alleged unpaid and underpaid benefits payments that Plaintiff seeks. That Plaintiff has already submitted requests for these alleged unpaid and underpaid benefits **directly to TCRHCC** (Doc 11-1 at p. 13) undermines Plaintiff's claim that this action arises out of AmeriBen's alleged failure to honor the terms of a pricing agreement with Plaintiff. AmeriBen is more than just entitled to indemnity from TCRHCC. The TPA Agreement expressly states that AmeriBen "has no responsibility for any funding of Plan benefits." (Doc. 11 at p. 3; Doc. 11-1 at p. 7.) Plaintiff's attempt to characterize the payments as due from AmeriBen should be unavailing as unsupported allegations that disappear in the light of the evidence presented by AmeriBen.

B. TCRHCC Has A Legally Protected Interest In this Action.

Plaintiff erroneously claims that TCRHCC has not claimed an interest in the subject of the litigation. TCRHCC has a legally protected interest in its account and its funds.

The "bounced check" claim relates directly to the checking account owned and maintained by TCRHCC. The checks that underlie Plaintiff's "bounced check" claim are drawn on TCRHCC's account. (See Doc. 11-1 at pp. 18-24) Thus, Plaintiff's allegations that AmeriBen "issued two checks" to Plaintiff and the checks were "from AmeriBen" are demonstrably false. (Doc. 1, ¶ 22.) AmeriBen is not the account owner, maker, issuer, nor drawer of the alleged bounced checks, and therefore Plaintiff has no basis for asserting that AmeriBen is independently obligated to reissue TCRHCC's checks to Plaintiff. *See* A.R.S. § 12-671(A). Plaintiff's unfounded belief that it can bring a bounced check claim without naming the stated payor defies logic. Likewise, as the ultimate payor, TCRHCC has an obvious interest in whether Plaintiff is entitled to any payment either under the Discount Agreement or otherwise.

Plaintiff also claims that TCRHCC has no legally protected interest in the funds that will pay any judgment. Such an assertion is without merit. Assuming, *arguendo*, that a judgment is obtained by Plaintiff, the funds to be used to pay any judgment will come from TCRHCC because AmeriBen is not responsible for funding any payment. Plaintiff purports to quote from *Cachil Dehe Band of Wintun Indians v. California*, 547 F. 3d 962, 971 (9th Cir. 2008) for the proposition that "some financial consequence" in the subject matter is not sufficient to provide a protected interest in the subject matter. *(*Doc. 12, p. 8.) The quote by Plaintiff is incorrect and the actual quote is:

> The mere fact that the outcome of Colusa's litigation may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties, however. *See, e.g., Makah*, 910 F.2d at 558 ("[The] interest must be more than a financial stake."). The absent tribes must have a legally protected interest and, on this record, the only potential protection lies in the 1999 Compacts themselves. The interest could be protected if it actually "arises from terms in bargained contracts." *Am. Greyhound Racing*, 305 F.3d at 1023. We conclude that it does not.

Cachil, 547 F. 3d at 971. Plaintiff then extends that misstated quote to the incorrect conclusion that TCRHCC only has some financial interest that is not protected. The cases relied on by *Cachil* do not support Plaintiff's argument or conclusion.

Cachil cites *Makah Indian Tribe v. Verity* 910 F.2d 555 (9th Cir. 1990), a case involving quotas for a salmon catch. *Makah*, in turn, cites *Northern Alaska Environmental Center v. Hodel*, a case involving agency procedure for mining in national parks. 803 F. 2d 466 (9th Cir. 1986). In *Northern Alaska*, defendant sought to join all miners in national parks where the Plaintiffs sought to enjoin the agency until environmental impact statements were completed. *Id*. at 467. The court determined that the miners had a financial stake in mining, but not in the procedures at issue. *Id*. at 468. In the present case, TCRHCC has a protected right in its account and its funds and in the subject of this case. Payment will come from the Plan. This is a protected right that arises from the agreement with AmeriBen and the Plan.

C. Joinder of TCRHCC is not Feasible.

TCRHCC, an arm of the sovereign Navajo Nation, cannot feasibly be joined to this "breach of contract" action.[3] Because joinder is not feasible, this action must be dismissed because it cannot "in equity and good conscience" proceed without TCRHCC/the Plan. *See* Fed. R. Civ. P. Rule 19(b). As discussed at length in AmeriBen's Motion (Doc. 11 pp. 8-9), all four Rule 19(b) factors weigh in favor of dismissal. Most importantly, although AmeriBen denies all liability to Plaintiff in this action, should AmeriBen be found liable, AmeriBen bears the risk of being held fully responsible for a liability that should be with TCRHCC's/the Plan's liability. This is the classic case of prejudice to an existing party. *Paiute-Shosone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 1001 (9th Cir. 2011) (A defendant may properly wish to avoid "sole responsibility for a liability he shares with another) (citations omitted). For this, and the reasons stated in AmeriBen's Motion, this action should be dismissed for failure to join TCRHCC/the Plan.

III. The Existence of Factual Disputes Arising out of the TPA Agreement Further Demonstrate that TCRHCC is a Necessary Party.

Plaintiff lists a number of other disputed issues implicated in AmeriBen's Motion, including: (1) whether the fee negotiator disclosed the financial arrangement between AmeriBen and the Plan to Plaintiff; (2) whether Plaintiff agreed to any restrictions on its ability to get paid based on those financial arrangement; (3) whether the fee negotiator acted on behalf of AmeriBen or an unidentified stop loss carrier in negotiating the "pricing agreement"; (4) the date on which AmeriBen communicated to Plaintiff any purported changes in reimbursement rates; and (5) whether Plaintiff was bound by any purported changes in reimbursements rates. (See Doc. 12, p. 4 n.2)

AmeriBen agrees that the *merits* of these disputed issues are not properly resolved through this Motion, but the existence of the disputed issues which implicate the

[3] Plaintiff also states, with admitted incomplete information, that the Plan appears to be a "governmental plan" and not an ERISA plan. AmeriBen agrees that the legal status of the Plan is immaterial to the question of whether the Plan must be joined to effect complete and adequate relief for the parties. In all circumstances, TCRHCC is a necessary party to this action.

relationship and obligations between Ameriben and TCRHCC under the TPA Agreement, and the relationship among the fee negotiator, the stop loss insurer and TCRHCC underscore the necessity and indispensability of TCRHCC and/or the Plan to this action. Furthermore, that there may be additional necessary and/or indispensable parties to this action does not diminish the fact that TCRHCC and/or the Plan are/is necessary and indispensable. Such is the basis for AmeriBen's Motion.

IV. Conclusion

For the foregoing reasons, AmeriBen respectfully requests that the Court grant AmeriBen's Motion and enter its order dismissing this action in its entirety. AmeriBen requests its costs and attorneys' fees as discussed above. In the alternative, AmeriBen requests that the Court order Plaintiff to join TCRHCC and/or the Plan immediately, and stay this action until Plaintiff accomplishes the same.

RESPECTFULLY SUBMITTED this 2nd day of June 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 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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