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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEDICATO TREATMENT CENTER, INC, a California corporation,

Plaintiff,

vs.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, a Federally recognized Indian Tribe,

Defendant.

CASE NO.: 2:22-cv-04045-CAS-Ex

The Hon. Christina A. Snyder

DEDICATO TREATMENT CENTER, INC.'S MEMORANDUM IN OPPOSITION TO SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT [FRCP 12(b)(1), (2), and (6)]

Date: September 25, 2023
Time: 10:00 a.m.
Room: 8D

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PRELIMINARY STATEMENT

The Salt River Pima-Maricopa Indian Community (the "Community") provides a federally-regulated healthcare plan to its members. It promises they will receive federally-regulated and state-licensed healthcare treatment anywhere they like, subject to screening and authorization of its third party administrator (TPA). It authorizes the TPA to enter into binding contracts with healthcare providers for the provision of treatment on its behalf. The TPA agrees to defend and indemnify the Community for any of its errors or omissions in the performance of its duties; the Community has a reciprocal agreement with the TPA.

The TPA entered into a series of contracts with Dedicato Treatment Center, Inc. ("Dedicato") for the provision of healthcare services to one of the Community's enrolled members. The fact that the TPA was entering into those contracts on behalf of an Indian Tribe that would claim sovereign immunity from civil suit was not disclosed to Dedicato. Had that fact been disclosed, Dedicato would not have entered into those contracts for treatment. With that material fact undisclosed, the TPA authorized 18 courses of treatment, and made partial payments on that treatment. Dedicato relied on the TPA's actions (and nondisclosure) in continuing to provide treatment to the Community's enrolled member over a 15-month period.

Dedicato initially filed suit against AmeriBen on grounds that AmeriBen misrepresented whether the Community had sovereign immunity from civil suit. ECF #1. AmeriBen moved to dismiss under Rule 12(b)(7) on grounds that the Community was a "necessary party" to this proceeding. ECF #17. While Dedicato alleged that the Community had sovereign immunity, AmeriBen denied it: "[I]t bears noting that Ninth Circuit authority holds that Indian tribes waive their sovereign immunity when they operate health plans governed by [ERISA], as appears to be the case here." ECF#19, at 4:20-28. Based, in part, on AmeriBen's

denial of the Community's sovereign immunity, the Court granted AmeriBen's motion and gave Dedicato leave to sue the Community (ECF#22). Dedicato then sued and served the Community, which led us here.

Now, having extricated its agent, AmeriBen, from this matter based on an affirmative representation that the Community did not have sovereign immunity, the Community moves to dismiss based on an expansive view of its sovereign immunity. More specifically, the Community asserts that this Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and claims that "[a]s an arm of the Community, the Plan also enjoys sovereign immunity." Opp. Memo, at 2:11-12. The Community's about-face position is an attempt by the Community to use sovereign immunity as both a sword and a shield and cannot stand. AmeriBen was the Community's agent in fact and in law when it made the admission of an absence of sovereign immunity – it is a near certainty that AmeriBen and the Community discussed the position in advance – and the Community should be bound by it. To find otherwise would offend the principles of judicial estoppel[1] and ignore the Community's waiver of sovereign immunity through AmeriBen.

The Community's shifted focus to its Plan being an arm of the Community is an attempt to sidestep or confuse its admitted lack of sovereign immunity by, once again, latching onto the position of a non-party. Specifically, the Community now focuses on the alleged sovereign immunity *of the Plan*. The Plan, however, is not a party to this suit, because Dedicato's claims are against the Community. If the Court determines that the Plan should be a party to this suit so that a determination may be made of whether the Plan is a tribally affiliated entity of the

[1] Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The doctrine exists to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id*. at 743. See *Hamilton v. State Farm Fire & Cas. Co*., 270 F.3d 778, 782-83 (9th Cir. 2001).

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Community that would be cloaked with some intact portion of the Community's sovereign immunity, Dedicato asks for leave of the Court to add the Plan as a party. But even if the Plan were added as a party, the Community would have the burden to prove its Plan is an "arm of the Tribe," a burden it cannot meet.

Irrespective of whether the Plan is an "arm of the Tribe," the Community's motion fails for two other reasons. First, Congress expressly authorized ERISA-related actions against Indian Tribes that establish ERISA Plans. Dedicato's claims arise necessarily and exclusively in relation to the Community's ERISA Plan and the Community cannot evade civil suits that arise in relation to it.

Second, even if Congress did *not* expressly authorize ERISA-related civil suits against the Community, the Community nevertheless waived its right to sovereign immunity, because it agreed to be "bound" by AmeriBen's contracts with healthcare providers (and therefore to the judicial enforcement of those contracts), and it also agreed to defend and indemnify AmeriBen in relation to its claims administration activity in state and federal courts. The Court has subject matter jurisdiction and the Community's Rule 12(b)(1) motion must be denied.

The Community's motion to dismiss under Fed. R. Civ. P. 12(b)(2) must be denied as well. Personal jurisdiction is not lacking. Under the applicable three-prong test, the Community "purposefully directed" its activities toward a California healthcare provider, Dedicato's claims arise out of the Community's forum-related activities in California, and exercise of jurisdiction would be fair.

Finally, the Community motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a complete misfire. The Community argues that Dedicato is without statutory grounds to bring a direct action against the Community under ERISA. But this is not a direct action under ERISA; it is an action alleging common law claims apart from ERISA. These claims are well-recognized.

In sum, the Community's motion is without merit and must be dismissed.

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STATEMENT OF FACTS

A. The Patient's Admission to Treatment.

At all relevant times herein, an individual (who, for confidentiality purposes is identified as "D.N.") was an employee of the Community and a participant in the Plan. D.N. paid premiums to the Plan, which the Plan accepted so that D.N., and D.N.'s dependents, would receive healthcare benefits, subject to certain terms and conditions of the Plan, none of which are relevant here. FAC ¶25.

On September 25, 2019, one of D.N.'s dependents, A.N. (the "Patient"), sought treatment from Dedicato for substance abuse. FAC ¶26. Dedicato is a fully-licensed, fully-operating drug and alcohol treatment center offering services for patients suffering from substance abuse. FAC ¶2. Dedicato asked whether the Patient was covered under any health insurance policy that would provide treatment for substance abuse and the Patient presented Dedicato with a medical ID card showing the Patient was enrolled in the Plan. FAC ¶27. Dedicato reviewed the ID card and provided a copy to its billing agent, Vertex Healthcare Services, Inc. ("Vertex"), to confirm whether the Patient was eligible for substance abuse treatment benefits and to obtain authorization for treatment. FAC ¶28.

On or about September 25, 2019, a Vertex representative spoke with an AmeriBen representative and confirmed that: (a) The Patient was covered under the Plan; (b) Dedicato was eligible to provide treatment to the Patient; (c) Dedicato had diagnosed the Patient in need of certain treatment; (d) Dedicato was authorized to provide its recommended course of treatment to the Patient. FAC ¶29.

According to the custom and practice in the healthcare industry, after a TPA confirms that an insured is eligible for treatment benefits, and after a TPA authorizes a specific course of medical treatment, the TPA is deemed to have agreed to pay the healthcare provider for the treatment provided. That payment

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will either be the healthcare provider's routine, normal rates or the healthcare provider's reasonable rates, which in Dedicato's case are the same. FAC ¶30.

While AmeriBen had advised Dedicato that no additional pre-certification was necessary to proceed with treatment, in an abundance of caution, Dedicato sought, and obtained, AmeriBen's advance authorization each time. Dedicato wanted to ensure that AmeriBen agreed with the treatment recommended and that it would agree to pay for that treatment after Dedicato provided it. FAC ¶31.

B. <u>AmeriBen's Treatment Authorizations</u>.

On six times between 9/25/19 and 11/12/19, Vertex requested and AmeriBen approved six courses of treatment for the Patient. Dedicato sent AmeriBen invoices for $26,000 and for $83,200; AmeriBen paid $3,810 and $12,192 on each invoice. FAC ¶¶32-40. Ten months later, the Patient was re-admitted. On ten times between 9/19/20 and 12/10/20, Vertex requested and AmeriBen approved ten courses of treatment. Dedicato sent AmeriBen seven additional invoices, totaling $235,400; AmeriBen paid $34,518 in response. FAC ¶¶41-46.

Three weeks later, the Patient was re-admitted. On two occasions between 2/12/18 to 2/18/21, Vertex requested, and AmeriBen approved, two courses of treatment. Dedicato sent six additional invoices totaling $163,400. FAC ¶47-50. Throughout this time AmeriBen advised Vertex that more payments were forthcoming. AmeriBen sent more payments, but for a fraction of the amounts billed. On invoices totaling $163,400, AmeriBen paid $21,745.63. FAC ¶52.

Further appeals by Vertex went unheeded; AmeriBen refused to respond to Vertex inquiries and it has made no further payment since February, 2022. AmeriBen had strung Dedicato along, offering the expectation of payment, while effectively refusing to pay any further amounts. FAC ¶¶53-54.

In sum, AmeriBen authorized 18 courses of treatment on 18 occasions between 9/25/19 and 2/18/21. Dedicato sent 15 invoices totaling $508,000 on

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which AmeriBen has paid $72,265, leaving Dedicato with $435,735 in unpaid services. Dedicato thus alleges six claims against the Community: Breach of contract, breach of implied contract, breach of the duty of good faith and fair dealing, promissory estoppel, quantum meruit, and unfair competition.

C. **Salt River Pima-Maricopa Indian Community.**

The Community is a federally-recognized Indian Tribe established by Executive Order on June 14, 1879, that operates as a full-service government. See 82 FR 4915-02 (Jan. 17, 2017). FAC ¶5. The Community maintains for the benefit of its members and employees a self-funded healthcare insurance plan known as the "Salt River Pima Maricopa Indian Community Self-Funded Health Plan" (the "Plan"). FAC ¶6.

On December 12, 2016, the Community entered into a Third-Party Administrative And Utilization Management Services Agreement ("TPA Agreement") with IEC Group, Inc., dba AmeriBen ("AmeriBen") to serve as "Plan Sponsor and/or Administrator." See FAC, Exhibit A.

Section 1.1 of the Agreement authorizes AmeriBen to administer all claims-related activity: "[r]eceive and review claims and claims-related documents," "confirm eligibility of participants," "recover monies paid to providers," "calculate amounts payable [to providers] under the Plan," "[c]orrespond with claimants and/or their providers to obtain any required additional information," send providers "explanations of benefits and benefit payment checks," advise providers of "information concerning Plan eligibility and benefits provisions," and – this is key – "make all final benefit determinations" on behalf of the Community.[2]

[2] The Community emphasizes that it funds the Plan, manages Plan assets, and has "final discretionary authority" on what benefits will be paid. Memo, at 6:3-10. In other words, it creates a pool of money and declares what benefits the pool will provide. *It is a purely passive payor*; it leaves all other duties to AmeriBen.

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Section 3.8 of the Agreement provides that the Community will be bound by the terms of all contracts AmeriBen makes with any third-party service provider:

> To the extent Client and/or the participants of Client's Plan access stop-loss insurers, pharmacy benefit management companies, preferred provider organizations, or any other third-party service providers or vendors directly contracted with AmeriBen, Client agrees to be bound by the terms of the agreement(s) between such vendor(s) and AmeriBen. Upon request, AmeriBen will provide copies of such contract(s) to Client. FAC ¶13.

Thus, to the extent AmeriBen entered into any contracts with Dedicato – a "third-party service provider" – the Community agrees to be so bound. FAC ¶14.

Section 4.2 of the Agreement creates reciprocal rights of defense and indemnity for any claim made against either the Community or AmeriBen based on alleged wrongful acts, errors or omissions in that party's performance of duties:

> Each party shall indemnify, defend and hold harmless the other party [sic] and its officers, directors, employees, elected officials, agents, successors and assigns ("Indemnified Parties"[)] from and against any and all liability, loss, damage, claims or expenses of any kind whatsoever, including without limitation, reasonable attorneys' fees and costs of defense, that may be sustained, suffered, recovered or incurred by any Indemnified Party that arise from or are in any way connected with any willful misconduct, gross negligence or other wrongful act, error or omission in the performance of duties and obligations under this Agreement by the Indemnifying Party, its subcontractors or anyone for whom the Indemnifying Party is responsible. FAC ¶17.

Notably, the Agreement contains no provision declaring the Community's right to sovereign immunity – either in relation to any civil suit the TPA might raise against the Community, or to any suit that any "third-party service provider" might raise against the TPA or the Community, such as for breach of contracts that the Community authorized the TPA to enter into on its behalf.

These provisions show the Community entered into the TPA Agreement knowing it would be subject to civil claims in state or federal court regarding the administration and payment of healthcare benefits, and it ensured that AmeriBen would defend and indemnify the Community for all such claims. FAC ¶19.

Assuming AmeriBen is not in breach of the TPA Agreement, AmeriBen will defend the Community against the instant action and, if necessary, indemnify the Community for all liability the Community incurs in relation to it. FAC ¶20. AmeriBen is not an Indian Tribe that enjoys sovereign immunity; it is an Idaho corporation with its principal place of business in Meridian, Idaho. FAC ¶21.

STANDARD OF REVIEW

A. Standard Under Rule 12(b)(1).

"A motion to dismiss for lack of subject matter jurisdiction [under Fed. R. Civ. P. 12(b)(1)] may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When a party brings a facial attack to subject matter jurisdiction, that party contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. *See Sea Vessel Inc. v. Reyes*, 23 F.3d 345, 347 (11th Cir. 1994). The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n. 1 (9th Cir. 2003).

B. Standard Under Rule 12(b)(2).

In deciding a motion for lack of personal jurisdiction under Rule 12(b)(2), plaintiff need only make a prima facie showing that personal jurisdiction exists. *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1066 (9th Cir. 2014). The Court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction; no evidentiary hearing or factual determination is necessary. Uncontro-

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verted allegations in the complaint are deemed true, and factual conflicts in the parties' declarations are resolved in plaintiff's favor. *Harris Rutsky & Co. Ins. Svs., Inc. v. Bell & Clements Ltd*., 328 F.3d 1122, 1129 (9th Cir. 2003).

Plaintiff bears the burden of proof on the necessary jurisdictional facts; for example, the existence of "minimum contacts" between defendant and the forum state. *In re W. States Wholesale Nat. Gas Antitrust Litig*., 715 F.3d 716, 741 (9th Cir. 2013). If plaintiff makes the requisite jurisdictional showing, the burden shifts to defendant to set forth a "compelling case" that the exercise of personal jurisdiction "would not be reasonable." *CollegeSource, Inc. v. Academyone, Inc*., 653 F.3d 1066, 1076 (9th Cir. 2011).

C. Standard Under Rule 12(b)(6).

A Rule 12(b)(6) motion tests the legal sufficiency of the pleader's claims for relief; therefore the motion admits, for purposes of the motion only, the factual allegations of the pleading, but asserts that those allegations cannot support any claim for relief. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

ARGUMENT

I. Subject Matter Jurisdiction Exists, Because (1) The Plan Is Not An "Arm Of The Tribe" That Enjoys Sovereign Immunity; (2) Dedicato's Claims Arise In Relation To An ERISA Plan; And (3) The Community Has Waived Sovereign Immunity.

The Community argues that no subject matter exists. It does.[3] First, the Community declares that the Plan has sovereign immunity because it is an "arm of the Community," which itself has sovereign immunity. The statement begs the question, because it presumes the Community itself has sovereign immunity and

[3] Whether Dedicato's Complaint included "no less than a dozen allegations" denying sovereign immunity (as the Community tallys), is irrelevant. Fed. R. Civ. P 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency"). Further, an amended pleading – as opposed to a motion or other filing – supersedes the original. *Ferdik v. Bonzelet* 963 F.2d 1258, 1262 (9th Cir. 1992), *as amended* (May 22, 1992).

neglects to meet its separate burden of proving the Plan is an "arm of the Tribe."

Second, subject matter jurisdiction exists, because Congress authorized ERISA-related suits against entities, including Indian tribes, that establish ERISA plans. The Community is not exempt from such suits.

Third, subject matter jurisdiction exists, because the Community waived sovereign immunity through its TPA Agreement. There, the Community expressly agreed to be subject to suit in state and federal courts.

A. The Community Has Not Met Its Burden In Proving The Plan Is An "Arm Of The Tribe."

The California Supreme Court has made clear that "a tribally affiliated entity claiming immunity bears the burden of proving by a preponderance of the evidence that it is an arm of the tribe." *People ex rel. Owen v. Miami Nation Enters*., 2 Cal. 5th 222, 244 (Cal. 2016). To meet that burden, the Community must prove the Plan is an "arm of the tribe" based on a five-part test that considers: "(1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity." *Id*. at 236-37. The Community has not done so here.

First, "[f]ormation under tribal law weighs in favor of immunity, whereas formation under state law has been held to weigh against immunity." *Id*. at 245 (internal citation omitted). The Community formed the Plan, not under tribal law, but under Federal law. Second, "it may be possible to infer the tribe's intent, even where it is not express, from the tribe's actions or other sources." *Id*. at 246. Here, the Community's intent is, at best, mixed. While the Community identified language in the Plan purporting to reserve rights to sovereign immunity, it undermined that language by its TPA Agreement in which it granted the TPA *carte blanche* authority to contract with healthcare providers and to defend and indemnify AmeriBen in civil courts for claims made against it.

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Third, "evidence that the entity engages in activities unrelated to its stated goals or that the entity actually operates to enrich primarily persons outside of the tribe or only a handful of tribal leaders weighs against finding that the entity is an arm of the tribe." *Id*. at 247. The Plan aims to provide healthcare services to its members through external contractual arrangements. This purpose has nothing to do with tribal government. Fourth, "[e]vidence that the tribe actively directs or oversees the operation of the entity weighs in favor of immunity; evidence that the tribe is a passive owner, neglects its governance roles, or otherwise exercises little or no control or oversight weighs against immunity." *Id*. Here, the Community exercises little or no control or oversight of the Plan; it delegates that to AmeriBen. While it may fund the Plan, it gives AmeriBen final authority on all claims determinations. Fifth, "direct tribal liability for the entity's actions is neither a threshold requirement for immunity nor a predominant factor in the overall analysis." *Id*. Unless the Community can show that "a judgment against the entity would significantly affect the tribal treasury," *id*. at 248, this factor will not weigh in favor of immunity.

While "no single factor is universally dispositive," *id*. at 248, the above factors demonstrate that the Plan is not an "arm of the Community." The Community cut off its arm to let AmeriBen administer, manage, and control it.

Accordingly, the Community has not established that the Plan is an "arm of the tribe" and enjoys sovereign immunity from civil suit.

B. <u>Subject Matter Jurisdiction Exists, Because Congress Authorized ERISA-Related Actions Against Indian Tribes That Establish ERISA Plans</u>.

"As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). "In general, in the absence of an expressed exemption for Indians, a general statute in terms applying to all

persons includes Indians and their property interests." *Centre for Neuro Skills v. Blue Cross of Cal. dba Anthem Blue Cross*, 2013 WL 5670889 (E.D. Cal. Oct. 15, 2013), *quoting*, *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir.1991) (internal quotations omitted). *See also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. ___, 143 S.Ct. 1689 (2023) (Bankruptcy Code unambiguously abrogates the sovereign immunity of federally-recognized Indian tribes). "ERISA is a statute of general applicability." *Centre for Neuro Skills*, 2013 WL 567009 at *11. "The self[-]government exception applies only where the tribe's decision-making power is usurped." *Id*.

To borrow phrasing (and reasoning) from *Centre for Neuro Skills*, permitting Dedicato to sue the Community will subject the Community "to possible liability for money damages, but will not usurp the tribe's decision-making power." The Community is free "to form and operate a tribal pension plan available to all members of the tribe." In fact, the Community "chose to form and operate a Plan governed by ERISA that expressly provides for civil enforcement in state or federal court." "By failing and refusing to pay a healthcare provider for authorized treatment services rendered to its member," the Community "exposed itself to possible liability for that treatment." *Centre for Neuro Skills*, 2013 WL 567009 at *11; *Lumber Indus. Pension Fund*, 939 F.2d at 685.

In short, the Community is simply not protected from civil liability under the self-government exception for claims arising out of an ERISA plan it has voluntarily established. It knew when it established the Plan that it would be subject to civil suits arising from its implementation. Dedicato's claims would have never arisen had the Community not established a Plan and authorized its TPA to enter into contracts with healthcare providers for the benefit of its members. As explained below in Section III, Dedicato's claims are not ERISA

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claims; they are contract-based claims that arose necessarily and exclusively because the Community had an ERISA Plan in place.

C. The Community Waived Its Right To Sovereign Immunity Because It Agreed To Be Bound By AmeriBen's Contracts With Healthcare Providers And To Defend And Indemnify AmeriBen In Relation To Its Claims Administrative Activity.

While Native American tribes and certain of their wholly owned economic arms enjoy sovereign immunity from suit, they may relinquish that immunity pursuant to a "clear" waiver. *Kiowa Tribe of Okla.,* 523 U.S. at 754; *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla*. 532 U.S. 411, 418 (2001). Clear waiver may be found in a contract clause even where the clause does not specifically mention waiver but otherwise assumes that disputes under the contract may be remedied by resort to judicial proceedings. *See C & L*, 532 U.S. at 418–19 (finding clear waiver in provisions of construction contract providing for application of Oklahoma law, binding arbitration, and enforcement of arbitration decisions in any state or federal court with jurisdiction).

In *C & L*, the Court explained exactly why and how a Native American tribe waived its right to claim sovereign immunity. There, the Tribe entered into "a standard form construction contract" with C & L in which C & L was to install a foam roof on a tribally owned, off-reservation building. *Id*. at 414. The contract contained an arbitration clause stating that "[a]ll claims or disputes between [C & L] and [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration . . . The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id*. at 415 (internal quotation omitted). Importantly, neither the arbitration clause nor the remainder of the contract mentioned sovereign immunity by name. *Id*. at 421. Nonetheless, the Supreme Court reasoned that the contract's arbitration provision amounted to the

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Tribe's agreement "to adhere to certain dispute resolution procedures" and as a result it found that "the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit." *Id*. at 420, 423.

In other words, the Court held that by consenting to a particular type of dispute resolution through contract, the Tribe *clearly* waived its sovereign immunity. *Id*. The Court specifically rejected the Tribe's argument that the arbitration clause was not an express waiver of immunity because it merely provided for arbitration and did not expressly reference a court trial or allow enforcement of the arbitration award in any court having jurisdiction. *Id*. at 421. The Court noted that the arbitration clause "no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime, [which] . . . has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration." *Id*. at 422.

Here, the Community acknowledged the "real world end" in being subjected to civil suits when it entered into its TPA Agreement with AmeriBen. Notably, it did not include any right to sovereign immunity in that contract. To the contrary, it gave every indication that it knew, anticipated, and agreed it could be hauled into state and federal courts. And its claim that it never acknowledged this is fiction as demonstrated by the provisions of the TPA Agreement.

First, the Community expressly authorized AmeriBen (under Section 3.8) to enter into contracts with "third-party service providers" and it expressly agreed to be "bound by the terms of the agreement(s)" AmeriBen makes with them. If the Community agreed to be "bound" by whatever contracts AmeriBen enters into on its behalf, the Community necessarily agreed to be subject to *enforcement* of those contracts, and enforcement can only be done in state or federal courts. To admit,

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on the one hand, that the Community will be "bound" by AmeriBen's contracts, and then to deny, on the other hand, it could be "bound" to those same contracts by reason of sovereign immunity, violates the principle of non-contradiction. To the contrary, the plain meaning of the language is that whatever contract AmeriBen declares is binding on the Community will be binding on the Community.

Indeed, such language works for the Community's benefit. No doubt the Community wishes to have the opportunity to enforce its own contracts in state or federal courts. The Community's clear intent to have rights of contract enforcement against others must mirror its understanding that others may wish to have rights of contract enforcement against it. If the Community expected to have the former, without the latter, it should have been expected to say so, as anomalous as that intent would be.

Second, the Community agreed (under Section 4.2) to be subject to state and federal courts, because it agreed to "indemnify, defend and hold harmless" AmeriBen (as well as each of its "officers, directors, employees, elected officials, agents, successors and assigns") "from and against any and all liability, loss, damage, claims or expenses of any kind whatsoever." And it emphasized these "*claims*" of "*any kind whatsoever*" by proceeding to list all of the events that could give rise to those duties, all of which would arise out of "*the performance of duties and obligations under this Agreement*," which, of course, included the screening, securing, and authorizing healthcare services for its members. The Community could not have agreed to this language without understanding it was agreeing to be subject to the jurisdiction of state or federal courts. Conversely, if sovereign immunity always protected *the Tribe* from civil suit, there would be no liability for which AmeriBen would need to indemnify the Community. But the provision,

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plainly, declares AmeriBen's duty to indemnify the Community. In short, this Agreement is a clear waiver of sovereign immunity. *C & L*, 532 U.S. at 422-23.[4]

The Community parses words and argues that this language involves the "past-tense form of the word contract" and only applies to providers with a "pre-existing agreement with AmeriBen." Memo, at 9:21-25. Section 4.2, of course, makes no mention of "preexisting agreement" and the past-tense form of "contract" (that is, "contracted") necessarily includes those contracts that AmeriBen has already formed of "*any kind whatsoever*" with any healthcare provider whatsoever, just like it did with Dedicato.

The Community cites Section 4.1 of the TPA Agreement, which states that it, and not AmeriBen, has the final authority to determine what benefits will be paid by the Plan. Memo, 11:13-18. One wonders how to square that with the authority the Community gives AmeriBen in Section 1.1(i) to make "all final benefit determinations." In any case, Section 4.1 is of additional import, because it addresses the Community's duty to defend and indemnify AmeriBen against claims for payment of benefits under the Plan. Presumably, the Community agrees to defend AmeriBen in more forums than simply its own courts.

Third, the Community agreed (under Section 3.9) to be to be "solely responsible for all government compliance obligations." The Community could not intend by this agreement to be subject to government *compliance* obligations and not also be subject to government *enforcement* of those obligations. If one admits a duty to comply with legal requirements, one admits it may be compelled

[4] The Community did not address whether it would claim sovereign immunity in any contract dispute with AmeriBen. The Agreement includes a list of acknow-ledgments (Article III – Authority) declaring AmeriBen's organizational status and disclaimers; nowhere is sovereign immunity declared. The silence speaks volumes. If an *internal* agreement acknowledged their mutual rights to be hauled into federal and state courts, clearly the *external* agreements they enter into with healthcare providers reflect this same acknowledgment, too.

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to comply with those requirements, and it is only state and federal civil courts that may compel compliance with those requirements. Why the Community asserts that this argument is "false" is left unexplained. Memo, 10:14-19.

The Community's additional argument, that Dedicato was "well aware that it had no guarantee of payment," Memo, at 9:25-10:7, is without factual support and inadmissible.[5] At no time did AmeriBen *ever* give Dedicato the Plan document or the Administration Services Agreement, which was the gravamen of Dedicato's misrepresentation claims against AmeriBen. ECF#1, at ¶64.

Finally, the Community's citation to Section 3.3 that AmeriBen is "under no circumstances" its "agent" is self-serving fiction. It is impossible to read the many actions the Community authorized AmeriBen to undertake in Section 1.1 to claim that AmeriBen was *not* its agent in dealing with third party healthcare providers. AmeriBen was the Community's *agent*. See Cal. Civ. Code §2285 ("An agent is one who represents another, called the principal, in dealings with third persons").

For all of the above reasons, the Community's motion to dismiss under Rule 12(b)(1) must be denied.

II. <u>The Community Is Subject To Personal Jurisdiction, Because (1) It Purposefully Directed Its Activities Here; (2) Dedicato's Claims Arise Out Of The Community's Forum-Related Activities; and (3) Exercise Of Jurisdiction Would Be Fair</u>.

Personal jurisdiction is analyzed under a three prong test: (1) Whether the non-resident defendant has purposely directed its activities or consummated some transaction with the forum or resident thereof, or performed some act by which it purposefully availed itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (3) Whether the claims arise out of or relate to the defendant's forum-related activities; and (3) The

[5] Dedicato objects to the Community's citation to Plan excerpts, attached as Exhibit 1 to the Declaration of Patty Powers. ECF # 36-2. The excerpts are presumptively misleading according to the rule of completeness. See F.R.E. 106.

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exercise of jurisdiction must comport with fair play and substantial justice, that is, it must be reasonable. *CollegeSource, Inc*, 653 F.3d at 1076.

The Community has moved to dismiss under Rule 12(b)(2) on grounds this Court has no personal jurisdiction over it. But the Community cannot prevail on the basis of this three-prong test.

A. <u>The Community Purposefully Directed Its Activities Here</u>.

The "purposeful availment" requirement is satisfied where the forum-related contacts proximately result from actions by the defendant itself that create a "substantial connection" with the forum State. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985). That the Community has a healthcare policy that purports to cover members seeking treatment in California is alone sufficient to find that it "purposefully directed" its activities in California. *See McGow v. McCurry*, 412 F.3d 1207, 1214 (11th Cir. 2005) (abrogated on other grounds by *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc*., 593 F.3d 1249 (11th Cir. 2010) (Including the forum state in a liability insurance policy's "covered territory" is a sufficient contact to subject a nonresident insurer to local jurisdiction on a liability covered by the policy).

Moreover, courts will readily find a "substantial connection" where nonresident defendants "purposefully direct" their activities toward forum residents. Such out-of-state acts have an effect in the forum and thus constitute purposeful availment. *Calder v. Jones*, 465 U.S. 783, 790 (1984). Contracting parties who "reach out beyond one state to create continuing relationships and obligations with citizens of another state" may be found to have "purposefully availed" themselves of benefits and protections under the other state's laws. *Burger King*, 471 U.S. at 474.

Here, the Community purposefully directed its activities toward Dedicato in California and created a continuing relationship with it for the treatment of one of

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1 its members. When the Patient sought treatment, Dedicato contacted AmeriBen
2 and confirmed the Patient's eligibility, Dedicato's eligibility, and a specific course
3 of treatment. On 18 occasions between September, 2019, and December, 2020,
4 Dedicato asked for, and AmeriBen authorized, 18 courses of treatment. Dedicato
5 sent AmeriBen nine invoices and AmeriBen made partial payments on them.
6 Whether Dedicato provided treatment to only one of the Community's
7 members is irrelevant for personal jurisdiction. If a "substantial connection" with
8 the forum is created thereby, even a single act may support limited personal
9 jurisdiction over a nonresident. *McGee v. Int'l Life Ins. Co*., 355 U.S. 220, 223
10 (1957); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d
11 1199, 1210 (9th Cir. 2006) (*en banc*). Moreover, jurisdiction will exist if the
12 subject of the contract would have "continuing and extensive involvement with the
13 forum." *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991). AmeriBen's
14 multiple authorizations and partial payments over a 15-month period did so here.
15 Not only did the Community purposefully direct its activities at Dedicato, it
16 specifically availed itself of California law that ensured Dedicato was a properly
17 licensed treatment facility and met the Community's own standards (as adjudged
18 by AmeriBen) for the provision of treatment services. The Community
19 intentionally consulted, relied on, and enjoyed, the benefits of California law for
20 the provision of treatment to one of its members. *See Latshaw v. Johnston*, 167
21 F.3d 208, 213 (5th Cir. 1999) (Evidence that the nonresident defendant entered into
22 an ongoing business relationship with a local resident and his company and made
23 multiple trips and phone calls to the forum state in furtherance of that relationship,
24 showed "purposeful availment" of the benefits and protection of local law).
25 The Community gets it exactly wrong when it says that allowing jurisdiction
26 to exist based on "the contacts of a single member or employee, let alone a single
27 contact by a single member or employee . . . would permit an absurd result and
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allow for an unreasonable exercise of jurisdiction virtually anywhere due to the actions of just one of thousands of members."[6] Memo, at 5:17-22. The contacts here are not based on the contacts of any single member or employee. They are based on the multiple contacts by AmeriBen in making multiple confirmations, authorizations, promises, and payments to a California healthcare provider over an extended period based on the provisions of a federally-regulated healthcare plan that covers members' treatment in California, if not anywhere in the nation.

B. Dedicato's Claims Arise Out Of The Community's Forum-Related Activities.

This second prong is directly established. The Community sought Dedicato's provision of treatment here in California. It approved that treatment on 18 occasions. It lured Dedicato into providing 18 treatment sessions through partial payment. And it, in fact, made partial payments. Dedicato's claims all arise out of these activities which occurred here in California.

C. Exercise Of Jurisdiction Would Be Fair.

The burden is on the nonresident to prove that the forum's exercise of jurisdiction would not comport with "fair play and substantial justice." *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 (9th Cir. 1993); *Schwarzenegger v. Fred Martin Motor Co*., 374 F.3d 797, 802 (9th Cir. 2004). If a nonresident has deliberately engaged in significant activities within the forum state, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. at 477.

[6] If the Community has "thousands" of members participating in its healthcare plan – a fact not supported by any evidence – then the Community is likely entering into binding contracts with healthcare providers all across the country for the provision of healthcare services to those members. The Community's submission to jurisdiction in all of those venues would not be "an absurd result," but the same kind of expectation insurance companies everywhere have.

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The mere fact local litigation is inconvenient (or some other forum more convenient) is not enough. Litigating locally must be so gravely difficult that it puts defendant at a severe disadvantage in comparison to defendant's opponent. Requiring the nonresident to defend locally is not constitutionally unreasonable "in this era of fax machines and discount air travel." *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998); *AirWair Int'l Ltd. v. Schultz*, 73 F.Supp.3d 1225, 1239 (N.D. Cal. 2014) (modern technological advances make litigating outside defendant's home forum less burdensome).

The Community, whether it is representing itself in this action, or at the expense of AmeriBen (as indicated in the TPA Agreement), is not subject to any unfair burden in defending against this action here. Indeed, the Community makes no argument that jurisdiction would be more appropriate in Arizona, presumably because it would then concede sovereign immunity to Arizona courts. For this reason, the Community's personal jurisdiction claim is a sham; it concedes no jurisdiction anywhere except in its Tribal Court.

In sum, Dedicato can make a prima facie case showing that the Community is subject to personal jurisdiction; the Community cannot show a "compelling case" to the contrary. Its motion under Rule 12(b)(2) must be denied.[7]

III. Dedicato's Claims Are Contract Claims, Not ERISA Claims, In Which Case ERISA Does Not Preempt Them.

The Community makes a misdirected effort to dismiss Dedicato's claims on grounds that Dedicato has no claims against it as Plan Sponsor, citing cases that have nothing to do with Dedicato's claims here. Memo, at 12:22-14:7. Even a cursory review of the Community's cited cases shows why its argument is completely off the mark. *See e.g. DB Healthcare, LLC v. Blue Cross Blue Shield*

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[7] If the Court intends to grant the Community's motion under Rule 12(b)(2), Dedicato requests an opportunity to undertake discovery on the Community's contacts with California healthcare providers. *See Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 672-73 (S.D. Cal. 2001).

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of Ariz., Inc., 852 F.3d 868, 872 (9th Cir. 2017) (in-network providers generally alleged that claims administrators violated ERISA when they unilaterally determined that the blood testing procedures and related services were not reimbursable and used various strategies to recoup payments already made). Admittedly, Dedicato is not allowed to bring a direct cause of action against a plan administrator under ERISA, nor as an assignee of any Plan member. Dedicato does not allege any claims under ERISA, nor as an assignee of the Patient.

Dedicato alleges contract-related claims here, and the Ninth Circuit has confirmed that such claims are *not* claims under ERISA. *Marin Gen. Hosp. v. Modesto & Empire Traction Co*., 581 F.3d 941 (9th Cir. 2009). In *Marin General Hospital*, the Ninth Circuit expressly rejected the ERISA Plan Administrator's argument that ERISA governed the healthcare providers common law claims and preempted them; those claims included breach of an implied contract, breach of an oral contract, negligent misrepresentation, quantum meruit, and estoppel. These, the Court said, were not ERISA claims:

> The Hospital does not contend that it is owed this additional amount because it is owed under the patient's ERISA plan. Quite the opposite. The Hospital is claiming this amount precisely because it is not owed under the patient's ERISA plan. The Hospital is contending that this additional amount is owed based on its alleged oral contract with [the administrator].

Id. at 947. See also *John Muir Health v. Windsor Cap. Group, Inc*., 2017 WL 5991862 at * 2 (N.D. Cal. Dec. 4, 2017); *Cmty. Hosp. of the Monterey Peninsula v. Aetna Life Ins. Co.*, 2015 WL 138197 at * 2-3 (N.D. Cal. Jan. 9, 2015); *IV Solutions, Inc. v. United Healthcare Svs., Inc*., No. 2:12-cv-04887-FMO-MRW at 5-8 (C.D. Cal. Nov. 19, 2012).

Whether ERISA preempts Dedicato's claims (which it does not) is a different issue than whether Dedicato has subject matter jurisdiction over the Community (which it does). As noted in Section I, subject matter jurisdiction exists because the Community adopted and implemented a healthcare plan

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governed by ERISA. The Community waived sovereign immunity as to ERISA and ERISA-related claims. Dedicato's claims here are ERISA-related claims, but they are not ERISA claims.

Dedicato's claims are ERISA-*related*, because they never would have arisen had the Community not adopted and implemented an ERISA Plan. The existence of the Plan is the genesis of the claims. The Community member requested treatment services, because the member was covered under the Community's Plan. AmeriBen confirmed that the member was eligible for treatment services and that Dedicato was eligible to provide those services. Dedicato expected to be paid for those services and reasonably believed AmeriBen would pay for those services.

When AmeriBen strung Dedicato along through small partial payments, and then stiffed it of all further payment, Dedicato thus had claims against the Community (because of AmeriBen's actions as agent) which arose out of the Community's conduct, and not because of any provisions of the ERISA Plan. Thus, Dedicato's claims arose because of the existence of an ERISA Plan, but they are not ERISA claims. And the Community consented to jurisdiction of those claims, because it consented to the existence of the Plan and to all claims that could arise out of the existence of that Plan. Thus, no conflict exists in recognizing that Dedicato has subject matter jurisdiction over the Community, because of the existence of the ERISA Plan, and that Dedicato's claims are not claims that are subject to ERISA.

CONCLUSION

Based on the above-mentioned points and authorities, Dedicato respectfully requests that the Court deny the Community's motions to dismiss under Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6).

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DATED: September 1, 2023 **THE ALVAREZ FIRM**

/s/ David A. Shaneyfelt
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