WO IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| AARON and BREANNE CHEATWOOD, individually and as Next Best Friend of D.C., a minor child,<br><br>Plaintiffs,<br><br>vs.<br><br>CHRISTIAN BROTHERS SERVICES, et al.,<br><br>Defendants. | ) | No. 2:16-cv-2946-HRH |

O R D E R

Motion to Dismiss

Defendant Sentinel Air Alliance moves to dismiss plaintiffs' claim against it.[1] Defendants Christian Brother Services and Christian Brothers Employee Benefit Trust join in Sentinel's motion.[2] The motion to dismiss is opposed.[3] Oral argument was requested but is not deemed necessary.

[1]Docket No. 23.

[2]Docket No. 24.

[3]Docket No. 31.

## Background

Plaintiffs are Aaron and Breanne Cheatwood, individually, and as next best friend of D.C., a minor child. Defendants are Christian Brothers Services ("CBS"); Christian Brothers Employee Benefit Trust ("the Trust"); and Sentinel Air Medical Alliance.

Plaintiffs allege that "Christian Brothers Services ... provides and/or administers health coverage and other benefits, including insurance."[4] Plaintiffs allege that CBS's website provides that "[o]ver time, the company has grown to administer and serve 7 trusts, which provide a variety of programs to congregations, organizations, and dioceses both in the United States and Canada."[5] Plaintiffs further allege that "CBS's website .. states Christian Brothers Services and these trusts are not insurance companies but are plans in which member organizations pool their financial contributions to realize greater financial strength and increased purchasing power, which translates to better coverages at significantly reduced rates."[6] However, plaintiffs allege that "[a]lthough CBS's website says its trusts are not insurance companies, because the trusts collect[] member premiums to pool their financial contributions and pool risk, it [the Trust] provides health insurance under any reasonable definition of that term."[7]

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[4]First Amended Complaint at 2, ¶ 12, Docket No. 11.

[5]Id. at 4, ¶ 21.

[6]Id. at ¶ 22.

[7]Id. at ¶ 23.

Plaintiffs allege that "[b]enefits under the CBS health plan are funded by the Trust."[8] Plaintiffs further allege that "[t]hrough Aaron's employment with Yuma Catholic High School ..., plaintiffs were covered under the CBS medical plan and/or the Trust."[9]

In April 2015, D.C. was transported from Yuma Regional Medical Center to Banner Cardon Children's Medical Center by helicopter after his doctors determined that emergency transport was necessary.[10] The cost of this emergency transport was allegedly $61,566.00.[11] CBS and/or the Trust denied plaintiffs' claim for coverage of this emergency medical transport.[12] Plaintiffs allege that this decision was based "on an opinion obtained from Sentinel Air."[13] Plaintiffs allege that Sentinel's website provides that "Sentinel Air Medical Alliance is an alliance of healthcare payors established in response to the rapid escalation of air medical transport rates. Our goal is to provide solutions to effectively control rates and ensure proper utilization for air transport services."[14]

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[8]Id. at 3, ¶ 13.

[9]Id. at ¶ 14.

[10]Id. at 7, ¶¶ 33-35. D.C. has Hirschsprung's disease, a serious congenital disease. Id. at 6, ¶¶ 28-30.

[11]Id. at 8, ¶ 46.

[12]Id. at 7, ¶¶ 39-40.

[13]Id. at ¶ 41.

[14]Id. at 8, ¶ 43.

In their amended complaint, plaintiffs allege breach of contract and breach of the duty of good faith and fair dealing claims against CBS and the Trust. In support of their bad faith claim, plaintiffs allege that CBS and/or the Trust 1) "ignored information in the file that supported payment of [p]laintiff's claim[,]"[15] 2) "had no reasonable basis to deny payment of [p]laintiffs' claim[,]"[16] 3) "failed to give [p]laintiffs' interests at least as much consideration as its own, and instead, elevated its interests above [p]laintiffs'[,]"[17] 4) "deliberately conducted a biased, outcome-focused investigation in order to deny [p]laintiffs' claim[,]"[18] 5) "acted unreasonably by relying on personnel who did not treat or examine D.C. ... to deny his claim[,]"[19] 6) "acted unreasonably by disregarding the medically sound opinions of D.C.'s treating physicians[,]"[20] and 7) "acted unreasonably by relying upon the opinion of Sentinel Air, an obviously biased and anti-claimant medical reviewer, to deny [p]laintiffs' claim."[21]

Plaintiffs allege an aiding and abetting claim against Sentinel. Plaintiffs allege that Sentinel aided and abetted CBS's and the Trust's breach of the duty of good faith and fair dealing. More specifically, plaintiffs allege that "[i]n administering [p]laintiffs' claim,

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[15]Id. at 9, ¶ 55.

[16]Id. at ¶ 56.

[17]Id. at ¶ 58.

[18]Id. at ¶ 59.

[19]Id. at 10, ¶ 60.

[20]Id. at ¶ 61.

[21]Id. at ¶ 62.

Sentinel Air ignored information in the file that supported payment and coverage of [p]laintiffs' claim."[22] Plaintiffs further allege that Sentinel "had no reasonable basis to find [that p]laintiffs' claim was not covered or payable."[23] Plaintiffs allege that in investigating or evaluating their claim, Sentinel 1) "failed to give [p]laintiffs' interests at least as much consideration as its own and instead, elevated its interests above [p]laintiffs'[,]"[24] 2) "deliberately conducted a biased, outcome-focused investigation in order to deny [p]laintiffs' claim[,]"[25] 3) "acted unreasonably by relying on personnel who did not treat or examine D.C.[,]"[26] and 4) "acted unreasonably by disregarding the medically sound opinions of D.C.'s treating physicians despite having no reasonable basis for rejecting them[.]"[27]

Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, Sentinel now moves to dismiss plaintiffs' aiding and abetting claim. CBS and the Trust join in this motion and request that plaintiffs' breach of the duty of good faith and fair dealing claim against them be dismissed.

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[22] Id. at 11, ¶ 72.

[23] Id. at ¶ 73.

[24] Id. at ¶ 76.

[25] Id. at 12, ¶ 78.

[26] Id. at ¶ 79.

[27] Id. at ¶ 80.

## Discussion

"'To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Zixiang Li v. Kerry, 710 F.3d 995, 999 (9th Cir. 2013) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Iqbal, 556 U.S. at 678). "The plausibility standard requires more than the sheer possibility or conceivability that a defendant has acted unlawfully." Id. "'Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Iqbal, 556 U.S. at 678). "[T]he complaint must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" In re Rigel Pharmaceuticals, Inc. Securities Litig., 697 F.3d 869, 875 (9th Cir. 2012) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff." Adams v. U.S. Forest Srvc., 671 F.3d 1138, 1142-43 (9th Cir. 2012). However, the court does not "'necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" Coto Settlement v. Eisenberg, 593 F.3d 1031, 1034 (9th Cir. 2010) (quoting Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009)).

Sentinel moves to dismiss plaintiffs' aiding and abetting claim against it.

> Claims of aiding and abetting tortious conduct require proof of three elements:
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> > "(1) the primary tortfeasor must commit a tort that causes injury to the plaintiff;
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> > (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and
> >
> > (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach."

Federico v. Maric, 226 P.3d 403, 405 (Ariz. Ct. App. 2010) (quoting Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 23 (Ariz. 2002)).

Sentinel argues that plaintiffs' aiding and abetting claim is subject to dismissal because plaintiffs cannot, as a matter of law, state a bad faith claim against CBS and/or the Trust. CBS and the Trust join in this argument. If plaintiffs cannot state a bad faith claim against CBS and/or the Trust, then plaintiffs cannot establish the first element of an aiding and abetting claim.

In Arizona, "tort recovery for breach of the implied covenant is well established in actions brought on insurance contracts...." Rawlings v. Apodaca, 726 P.2d 565, 574 (Ariz. 1986). But, Sentinel argues that this case does not involve an insurance contract because CBS and/or the Trust do not provide "insurance" as that term is defined under Arizona law. In Arizona, "insurance" is defined as "a contract by which one undertakes to indemnify another

or to pay a specified amount upon determinable contingencies." A.R.S. § 20-103(A). Arizona courts look to five factors to determine whether a contract is an "insurance contract." Those factors are:

> 1. An insurable interest
> 2. A risk of loss
> 3. An assumption of the risk by the insurer
> 4. A general scheme to distribute the loss among the larger group of persons bearing similar risks
> 5. The payment of a premium for the assumption of risk.

Guaranteed Warranty Corp., Inc. v. State ex rel. Humphrey, 533 P.2d 87, 90 (Ariz. Ct. App. 1975).

Plaintiffs have alleged that all of these factors are present here. They have alleged that they have an insurable interest in covered health care claims and a risk of financial loss if CBS and/or the Trust refuse to pay a covered loss.[28] They have alleged that CBS and/or the Trust have assumed the risk of loss.[29] Plaintiffs have also alleged that CBS and/or the Trust has a general scheme to distribute loss among a large group of covered, premium-paying people, and that they and Yuma Catholic pay premiums for CBS and/or the Trust's assumption of risk.[30] Plaintiffs have also alleged that CBS and/or the Trust "pool[] financial resources and contributions" to cover claims and "spread[] the risk of coverage among numerous employees

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[28]First Amended Complaint at 5, ¶ 24, Docket No. 11.

[29]Id.

[30]Id.

and employers[.]"[31] And, plaintiffs offer Yuma Catholic's participation agreement with CBS and the accompanying "contribution rate" exhibit,[32] which provide that Yuma Catholic makes the same monthly contribution each month, regardless of the amount paid out each month for claims by Yuma Catholic's employees.[33] The agreement also provides that Yuma Catholic's monthly contribution amount will be adjusted annually.[34]

Sentinel, however, argues that there has been no assumption of risk by CBS and/or the Trust. Sentinel argues that CBS and/or the Trust have not promised to pay anything from their own funds and thus they have not assumed any risk. But simply because Sentinel says it is so, does not make it so. Sentinel has pointed to no evidence that shows that CBS and/or the Trust have not assumed any of the risk of covered losses. There is nothing before the court that tells it what happens if covered losses exceed the contributions. Perhaps that is unlikely to happen given that the Trust "pools" the resources of the employers participating in the Trust, but the

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[31]Id. at 3, ¶ 19.

[32]The court may consider this exhibit without converting the instant Rule 12(b)(6) motion into a motion for summary judgment because they have alleged the contents of this document in their amended complaint. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (citation omitted) (in considering a Rule 12(b)(6) motion, the court may "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading").

[33]Exhibit 1, Plaintiffs' Response to Sentinel's Motion to Dismiss and CBS's and The Trust's Joinder, Docket No. 31.

[34]Christian Brothers Employee Benefit Trust Participation Agreement at 2, Exhibit 1, Plaintiffs' Response to Sentinel's Motion to Dismiss and CBS's and The Trust's Joinder, Docket No. 31.

court has no way of knowing at this point. It is at least plausible that CBS and/or the Trust may assume some of the risk of loss.

It is also plausible that what Yuma Catholic pays are premiums, rather than contributions to a self-funded plan as Sentinel contends. Sentinel argues that Yuma Catholic is simply making contributions to a self-funded benefit plan. As Sentinel points out, Arizona's Department of Insurance does not regulate "self-insured program[s] operated by a single employer for the benefit of its employees or the employees of a wholly-owned subsidiary." A.R.S. § 20-115(F). Sentinel argues that because self-funded programs are not regulated by the Arizona Department of Insurance, those programs cannot be considered "insurance."

But the court cannot determine from what is currently before it that, as a matter of law, the Trust is a self-funded program. Under Arizona law, a self-funded plan is maintained by "a single employer...." A.R.S. § 20-115(F). Plaintiffs have alleged that CBS accepts premiums from multiple employer and their employees.[35] Sentinel has offered evidence, in the form of an IRS group exemption letter,[36] in support of its contention that all of these employers could be considered a single employer. But the court is not persuaded that this letter establishes that the Catholic Church is the single employer for purposes of plaintiffs'

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[35]First Amended Complaint at 3-4, ¶ 21, Docket No. 11.

[36]Exhibit A, Defendant Sentinel Air Medical Alliance's Reply [etc.], Docket No. 32. The IRS letter is a public document and thus the court may consider it without converting the instant motion into a motion for summary judgement. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

health benefit plan. Because plaintiffs' health plan may involve multiple employers, it is plausible that it is not a "self-funded program" as that term is defined under Arizona law.

Sentinel also argues that CBS and/or the Trust cannot be offering "insurance" because they are a "health care sharing ministry", which by definition is not "insurance." In Arizona,

> "health care sharing ministry" means a nonprofit organization that is exempt from federal income tax under section 501 of the internal revenue code and that:
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> 1. Limits its participants to those who share a common set of ethical or religious beliefs.
>
> 2. Meets the requirements of 26 United States Code section 5000A(d)(2)(B).
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> 3. Acts as a facilitator among participants who have financial or medical needs and matches those participants with other participants who have the ability to assist those with financial or medical needs consistent with the criteria established by the health care sharing ministry.
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> 4. Provides for the financial and medical needs of a participant through contributions from one participant to another.
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> 5. Suggests amounts that participants may contribute with no assumption of risk or promise to pay among the participants and no assumption of risk or promise to pay by the health care sharing ministry to the participants.
>
> 6. Provides a written monthly statement to all participants that lists the total dollar amount of qualified needs submitted to the health care sharing ministry and the amount actually published or assigned to participants for their contribution.
>
> 7. Provides a written disclaimer on or accompanying all applications and guideline materials distributed by or on behalf of the ministry that reads, in substance:

> Notice: The organization facilitating the sharing of medical expenses is not an insurance company and the ministry's guidelines and plan of operation are not an insurance policy. Whether anyone chooses to assist you with your medical bills will be completely voluntary because participants are not compelled by law to contribute toward your medical bills. Therefore, participation in the ministry or a subscription to any of its documents should not be considered to be insurance. Regardless of whether you receive any payment for medical expenses or whether this ministry continues to operate, you are always personally responsible for the payment of your own medical bills.

A.R.S. § 20-122(B).

But, the health plan at issue cannot be a "health care sharing ministry." In a "sharing ministry", the participating individuals chose to help others in the group with their medical costs and thus coverage is completely voluntary. In contrast here, the Trust must pay covered claims; coverage is not voluntary.

But even if plaintiffs have stated a plausible bad faith claim against CBS and the Trust, which they have, Sentinel argues that plaintiffs' aiding and abetting claim should still be dismissed because plaintiffs have failed to sufficiently plead separate, secondary conduct. In order to state a plausible aiding and abetting claim against Sentinel, plaintiffs must allege "a separate tortious act was committed by" Sentinel. Young v. Liberty Mut. Group, Inc., Case No. CV–12–2302–PHX–JAT, 2013 WL 840618, at *3 (D. Ariz. March 6, 2013).

Sentinel argues that the alleged bad faith conduct by CBS and/or the Trust is the exact same conduct as that which purportedly supports the aiding and abetting claim. Sentinel

argues that plaintiffs allege that both CBS and/or the Trust and Sentinel "ignored information,", failed to put plaintiffs' interests first, "deliberately conducted a biased investigation," relied on opinions of doctors who did not examine D.C., and disregarded the "sound" medical advice offered by D.C.'s doctors. Sentinel insists that plaintiffs have not alleged any conduct by Sentinel that is separate and distinct from that of CBS and/or the Trust.

Although plaintiffs' first amended complaint does contain similar allegations about CBS and/or the Trust's conduct and Sentinel's conduct, plaintiffs have sufficiently alleged that Sentinel engaged in separate tortious conduct. Plaintiffs have alleged that CBS and/or the Trust engaged in tortious conduct by knowingly hiring a biased claims administrator and then denying their claim by relying on an opinion obtained from Sentinel. As for Sentinel, plaintiffs have alleged that Sentinel conducted a biased investigation, during which it unreasonably ignored the evidence provided by D.C.'s treating physicians. In short, plaintiffs allege that Sentinel provided an unfounded and unreasonable opinion, which is different conduct from CBS and/or the Trust actually denying plaintiffs' claim by relying on that opinion.

## Conclusion

Based on the foregoing, Sentinel's motion to dismiss[37] is denied.

DATED at Anchorage, Alaska, this 6th day of April, 2017.

/s/ H. Russel Holland
United States District Judge

[37]Docket No. 23.