IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fox Insurance Company Incorporated, Plaintiff, vs. Humana Incorporated, Defendant.	No. CV-11-01507-PHX-ROS **ORDER**

Pending before the Court is Defendant's motion to dismiss the first amended complaint, or, in the alternative, to join indispensable parties. (Doc. 17). For the reasons below, the Court will deny the motion to dismiss and deny the motion to join indispensable parties.

BACKGROUND

A. Procedural History

On August 2, 2011, Fox Insurance Company ("Fox") filed its Complaint against Humana, Inc. ("Humana). (Doc. 1). On November 15, 2011, Fox filed its First Amended Complaint ("FAC") against Humana. (Doc. 8). On January 18, 2012, Humana moved to dismiss for failure to state a claim, or, in the alternative to join indispensable parties. (Doc. 17).

B. Factual Background

Fox contracted with the Centers for Medicare & Medicaid Services ("CMS") to provide prescription drug coverage under Medicare Part D to certain Medicare enrollees (the

"Enrollees"). (Doc. 9, ¶ 7-11). Enrollees obtained their prescription drugs from pharmacies, and those pharmacies applied to Fox for payment. After Fox paid the pharmacies, Fox would then apply for reimbursement from CMS. (Id.). Fox's contract with CMS ran from January 1, 2006 to March 9, 2010.

On January 1, 2010, CMS awarded contracts to Humana to operate as a Medicare Part D sponsor, including a contract to administer the Limited Income Newly Eligible Transition Program ("LI-NET"). (Id., ¶ 12). Effective March 10, 2010, CMS transferred the Enrollees from Fox to LI-NET. (Id., ¶ 13-15). CMS instructed pharmacies to discontinue billing Fox and instead process claims incurred on and after March 10, 2010 through LI-NET. (Id.).

Fox continued to pay the pharmacies for claims for Enrollees from March 1 through March 9, 2010 (the "March 1-9 Claims"). (Id., ¶ 16-18). Pursuant to its contract with CMS, Fox submitted a claim for reimbursement to CMS. (Id., ¶ 19). However, before CMS reimbursed Fox, Humana processed and paid the March 1-9 Claims and obtained reimbursement from CMS. (Id., ¶ 20-25). Therefore, when CMS reviewed Fox's request for reimbursement for the March 1-9 Claims, CMS denied Fox's request because it already reimbursed Humana for the March 1-9 Claims. (Id., ¶ 24).

Fox alleges Humana wrongfully accepted, processed, paid and was reimbursed for the March 1-9 Claims in an amount of $2,249,679.39. (Id., ¶ 16-20). Humana had no right to accept, process, pay and seek reimbursement for the March 1-9 Claims because its contract was not effective until March 10, 2010 (Id.). Humana knew or should have known the March 1-9 Claims fell under the Fox contract. (Id.). Thus, CMS paid the wrong party, the pharmacies were paid twice (once by Fox and once by Humana), Humana took Fox's business for the March 1-9 Claims, and Fox was damaged in the amount of $2,249,679.39 because it processed and paid the March 1-9 Claims but was never reimbursed. (Id., ¶ 25).

Fox asserts claims for declaratory relief (Count I), conversion (Count II), intentional interference with contractual relations (Count III), and unjust enrichment (Count IV) against Humana.

ANALYSIS

A. Motion to Dismiss

For purposes of a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the factual allegations and reasonable inferences in a complaint are taken as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). A plaintiff must allege facts sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Courts may dismiss a complaint either for "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).

1. Intentional Interference with Contract

Under Arizona law, intentional interference with contract requires: "(1) a contract between the plaintiff and a third party"; (2) defendant's knowledge of the contract; "(3) intentional interference by the defendant that caused the third party to breach the contract[;] (4) a showing that the defendant acted improperly"; and (5) damage resulting to the plaintiff. *Pasco Indus., Inc. v. Talco Recycling, Inc.*, 985 P.2d 535, 547 (Ariz. Ct. App. 1998). Humana argues the FAC fails to allege the first (existence of contract) and fourth (improper conduct) elements.

As to the first element, Humana does not dispute a contract existed between Fox and CMS, but argues that contract expired by the time Humana sought reimbursement for the March 1-9 Claims. Thus, Humana argues it could not have interfered with Fox's contract. However, as alleged in the FAC, if Fox's contract with CMS entitled Fox to reimbursement for the March 1-9 Claims, and Humana's contract with CMS was not effective until March 10, 2010, then Humana may have interfered with Fox's contract with CMS. The FAC alleges the existence of a contract between Fox and Humana.

As to the fourth element, Humana argues its conduct could not have been improper because it was reimbursed for the March 1-9 Claims under its own contract with CMS. This

argument assumes Humana was entitled to be reimbursed for the March 1-9 Claims. The FAC alleges Humana was not entitled to this reimbursement because Humana's contract was not effective until March 10, 2010. Therefore, FAC alleges improper conduct.

2. Conversion

To prevail on a conversion claim under Arizona law, the plaintiff must show it "had a legal right to use the property and was in a position to use it and was prevented from such use only by the defendant's wrongful detention." *John A. Artukovich & Sons, Inc. v. Reliance Truck Co.*, 614 P.2d 327, 328-29 (Ariz. 1980). Conversion "requires conduct intended to affect property of another. The intent required is an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." *Miller v. Hehlen*, 104 P.3d 193, 203 (Ariz. Ct. App. 2005) (quotations omitted). The FAC alleges, "[a]fter the submission to CMS of its claim for reimbursement, Fox had the exclusive right to receive the amount of $2,249,679.39 from CMS as reimbursement for the March 1-9 Claims." (Doc. 8, ¶ 30). Fox alleges it had the immediate right to possess the funds, and Humana intentionally interfered with and denied Fox's right to receive and possess the funds. (Id., ¶ 31-33).

Humana moves to dismiss the conversion claim because there can be no claim for conversion against disbursements made from a general fund. *Universal Mktg. & Entm't, Inc. v. Bank One of Arizona, N.A.*, 53 P.3d 191, 194 (Ariz. Ct. App. 2002). A "conversion claim cannot be maintained . . . to collect on a debt that could be paid by money generally." *Case Corp. v Gehrke*, 91 P.3d 362, 366 (App. 2004). The "money must be described, identified or segregated, and an obligation must exist to treat the money in a specific manner." *Id.*; *see also Autoville, Inc. v. Friedman*, 510 P.2d, 400, 403 (Ariz. Ct. App. 1973).

In *Universal Marketing*, Universal planned to acquire a company called Superbull through their agent Wensel. *Universal Mktg.*, 53 P.3d at 193. Universal transferred money to Wensel's bank account for Wensel to release to Superbull after the loan agreement and note were signed. *Id.* Before documents were finalized, Wensel's bank account, including the funds transferred by Universal, was garnished by Bank One, a judgment creditor. *Id.* Universal sued Bank One for conversion. *Id.* at 192. The trial court dismissed for failure to

state a claim. *Id.* On appeal, the Arizona Court of Appeals affirmed, stating there was no conversion claim for garnishment of unsegregated funds Universal deposited into Wensel's account. *Id.* at 193. The Arizona Court of Appeals stated Bank one had "immediate right to possession" of the money, not Universal, because the money in question "consisted exclusively of unsegregated money that Universal had deposited into Wensel's general bank account." *Id.* The deposit gave "rise to a debt that [Bank One] owed to Wensel." *Id.*

Fox alleges CMS owed it reimbursement for payments made to the pharmacies for the March 1-9 Claims. The FAC alleges Fox had the "exclusive right to receive the amount of $2,249,679.39 . . . ." (Doc. 8, ¶ 30). There is no allegation this money was segregated and could not be paid by CMS's general funds. Further, at the time of the alleged conversion, the party with the "immediate right to possession of the chattel" was not Fox, but CMS because the money in question "consisted exclusively of unsegregated money." *Id.* Under *Universal Marketing*, Fox cannot bring a claim for conversion.

Likewise, in *Autoville*, the Arizona Court of Appeals held a lender had no possessory interest in car sales proceeds made on behalf of a dealer who promised the lender commissions. *Autoville*, 510 P.2d at 402. The lender was an ordinary creditor, and could not bring a claim for conversion, despite the fact the parties anticipated the lender would be paid from proceeds from car sales. *Id.*. The Arizona Court of Appeals stated, "the sale itself was merely the triggering device which brought into existence the obligation of Autoville to pay its debt." *Id.* at 403. Although car sales were Autoville's primary source of income, the debt could have "been discharged from a source other than the sale proceeds. In this regard, defendants correctly contend that conversion does not lie to enforce the mere obligation to pay a debt which may be discharged by the payment of money generally." *Id.*

Similarly, Fox's payment to the pharmacies was the "triggering device which brought into existence the obligation of [CMS] to pay" Fox, but that debt could have been paid with any of CMS's funds. *Id.* Thus, *Autoville* also supports dismissing Fox's conversion claim. *See also Cellco P'ship v. Hope*, 2012 WL 260032, *18 (D. Ariz. Jan. 30, 2012) (dismissing conversion claim and rejecting argument that funds were "easily segregable on basis of . .

. billing statements" because party did not allege facts showing it was owed "a specifically secured amount from a definite source") (internal quotation omitted).

The parties also cite *Case*, in which the Arizona Court of Appeals permitted a conversion claim for funds obtained from the sale of equipment where the plaintiff had a security interest in the equipment. *Case*, 91 P.3d at 368. *Case* distinguished *Autoville* and *Universal Marketing* because of the security interest. The security interest allowed "the proceeds to be identified even when they [were] commingled with other funds." *Id.* "We cannot accept the [defendant's] argument that a security interest in proceeds is destroyed when the debtor commingles the proceeds with other funds. Such a decision would give the debtor the ability to unilaterally cancel a creditor's security interest in the proceeds of sale . . . ." *Id.* at 367-68. *Case* is distinguishable because Fox does not allege a security interest. Under Arizona law, Fox fails to state a claim for conversion.

3. Unjust Enrichment

Under Arizona law, a claim for unjust enrichment must allege: an enrichment; an impoverishment; a connection between the enrichment and impoverishment; the absence of justification for the enrichment and impoverishment; and the absence of a legal remedy. *E.g.*, *Loiselle v. Cosas Mgmt. Group, LLC*, 228 P.3d 943, 946 (Ariz. Ct. App. 2010). Fox has alleged Humana was enriched by taking the March 1-9 Claims, and that this act also impoverished Fox. Fox alleges Humana had no justification for taking the March 1-9 Claims because Humana's contract was not effective until March 10, 2010, and Fox may be without a legal remedy because there was no contract between Fox and Humana.

Humana argues it cannot have been unjustly enriched by acting in accordance with its contract with CMS, and received only what it was entitled to under that contract. (Doc. 17 at 8-9). However, it remains to be determined if Humana acted outside the scope of its contract with CMS. The FAC states a claim for unjust enrichment.

4. Declaratory Relief

Humana argues Fox's claim for declaratory relief should be dismissed as moot because Fox failed to state any claims against Humana. Fox has stated a claim for intentional

interference with contract and unjust enrichment against Humana. Therefore, Humana's argument fails. The motion to dismiss the declaratory judgment claim will be denied.

B. Rule 19 Joinder

In the alternative, Humana moves to dismiss for failure to join CMS and the pharmacies under Rule 19. The Rule 19 joinder analysis is a "three-step process." James Wm. Moore, Moore's Federal Practice § 19.02[3][a] (3d ed. 2011). First, the Court determines whether the absentee is necessary. *Id.* Second, if the absentee is necessary, the next question is whether joinder is feasible. *Id.* at § 19.02[3][b]. Third, if an absentee is necessary but joinder is not feasible, the Court determines whether the absentee is indispensable. *Id.* at § 19.02[3][c].

Rule 19(a)(1) sets forth three situations in which an absentee is necessary. Rule 19(a)(1) provides:

> A person . . . must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among the existing parties; or
> >
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > >
> > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

1. Rule 19(a)(1)(A) "Complete Relief"

The first situation in which an absentee is necessary under Rule 19 is where the Court "cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). Judgment in favor of Humana or Fox will fully and completely determine the parties' rights and obligations with respect to each other. Neither CMS nor the pharmacies are necessary to accord complete relief among the existing parties.

In its motion to dismiss for failure to join, Humana relies on *Pit River Home and Agric. Co-Op Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994). *Pit River Home*

involved a land dispute in which the plaintiff failed to join a party with a legal interest in the land. A judgment would not have provided "complete relief" because the plaintiff and absentee would have had competing interests in the land. *Id.* at 1099. Here, the Court is not faced with adjudicating a land dispute in the absence of a landowner. Nor are Fox's claims analogous to those in *Pit River Home*. *Pit River Home* is distinguishable. Unlike the parties in *Pit River Home*, Fox and Humana will be able to obtain complete relief "among existing parties." At this time, Humana has not shown CMS and the pharmacies are necessary under the "complete relief" provision of Rule 19(a)(1)(A).

2. Rule 19(a)(1)(B)(i) "Impair or Impede"

The second situation in which an absentee is necessary under Rule 19 is where the absentee claims an interest in the subject matter of the litigation and "disposing of the action in the person's absence may . . . as a practical matter impair or impede [the absentees'] ability to protect [their] interest[s]." Fed. R. Civ. P. 19(a)(1)(B)(i).

CMS and the pharmacies do not have an interest in Fox's claims against Humana. If Humana was unjustly enriched or intentionally interfered with CMS's contract with Fox, it is Fox, not CMS or the pharmacies, who will be entitled to recover. CMS and the pharmacies would have no interest in recovery for such harms. CMS is not claiming an interest in the funds it paid to Humana, and the pharmacies could not claim such an interest. (Doc. 20, 13-14).

Even if CMS and the pharmacies did claim an interest in the subject matter of the litigation, they would not be necessary parties under the "impair or impede" clause. The "impair or impede" clause focuses on the *absentee's* ability to protect its interest. This litigation will not be binding on CMS or the pharmacies with respect to payments to or from Fox or Humana. CMS's ability to pursue any contract claims against Fox or Humana will not be impaired or impeded. The pharmacies' rights to defend their receipt of payment from Fox and Humana will not be impaired or impeded. Humana does not set forth what causes of action Fox or Humana would assert against the absentees, nor what causes of action the absentees would assert against Fox or Humana.

Humana relies on *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir.1975) for the proposition that all parties who may be affected by a determination of the validity of a contract are *indispensable*. (Doc. 21). The Court does not reach the indispensable argument because CMS and the pharmacies are not necessary, nor have the parties briefed the feasability of joinder. Thus, Humana's citation to *Lomayaktewa* is out of place.

Humana argues CMS has an interest in the litigation because Fox alleges "CMS's failure to reimburse Fox for the March 1-9 Claims is a breach of [CMS's] contract with Fox." (Doc. 8, ¶ 1). However, Fox is not asserting a breach of contract claim. Instead, Fox alleges a contract existed between CMS and Fox, and Humana interfered with it. Disposing of this action will not "impair or impede" CMS's ability to protect its interests under its contracts. At this time, Humana has not shown CMS and the pharmacies are necessary parties under 19(a)(1)(B)(i).

3. Rule 19(a)(1)(B)(ii) "Substantial Risk"

Under Rule 19(a)(1)(B)(ii), an absentee is a necessary party where the absentee claims an interest in the subject matter of the litigation and "disposing of the action in the person's absence may . . . leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1)(B)(ii).

As discussed above, CMS and the pharmacies do not have an interest in the subject matter of the litigation. Even if CMS and the pharmacies did claim an interest in the subject matter of the litigation, they would not be necessary parties under the "substantial risk" clause. The focus of the "substantial risk" clause is risk to the *existing* parties. The "substantial risk" factor "almost invariably" analyzes the harm to the *defendant*. Moore's Federal Practice § 19.02[3][b]. Humana, however, does not set forth the double, multiple or inconsistent obligations it would face if CMS and the pharmacies are not joined. (Docs. 17 and 21, at 10). Instead, Humana argues if Fox recovers from Humana, it could then pursue CMS or the pharmacies. (Id.). Humana improperly focuses on Fox's potential for double or multiple *recovery*, not obligations. Humana has not shown any double, multiple or inconsistent obligations that would be imposed on the existing parties absent joinder. In its

Rule 19 motion, Humana references other litigation between Fox and CMS, but does not inform the Court how such litigation would impose double, multiple or inconsistent obligations on Fox or Humana. (Doc. 17, at 4-5).

Humana again relies on *Pit River Home*. In *Pit River Home* the court found a judgment for the plaintiff would have subjected the defendant to inconsistent obligations because after the adjudication of the plaintiff's rights, the absentee would still claim a right to the land. *Pit River Home*, 30 F.3d at 1099. As such, the absent landowner was necessary because there was a substantial risk defendant would be obligated to recognize inconsistent land ownership rights between the plaintiff and the absentee. *Id.* By contrast, a judgment against Humana will not conflict with another obligation imposed on Humana.

Fox's claims against Humana are for unjust enrichment and intentional interference with contract, not breach of contract. If Fox or Humana sues the pharmacies or CMS following this litigation, it will be for harms not litigated in this action. Humana has not shown a substantial risk to existing parties of double, multiple, or otherwise inconsistent obligations in the absence of CMS and the pharmacies. At this time, Humana has not shown CMS and the pharmacies are necessary parties under 19(a)(1)(B)(ii).

Accordingly,

IT IS ORDERED Defendant's motion to dismiss the first amended complaint, or, in the alternative, to join indispensable parties **(Doc. 17)** is **GRANTED IN PART AND DENIED IN PART**. The motion to dismiss for failure to state a claim is granted as to the conversion claim and denied as to the remaining claims. The motion to join the pharmacies and CMS as indispensable parties under Rule 19(a) is denied.

DATED this 17th day of May, 2012.

Roslyn O. Silver
Chief United States District Judge