IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LYDELL MARVIN BEGAY, individually and for and on behalf of LATISSIA BEGAY, a minor, and natural born daughter of LYDELL MARVIN BEGAY, MARTIN ("MARTY") BEGAY, individually, and LORENE BEGAY, individually,

Plaintiffs,

vs. USDC No. 1:15-CV-00500 KK/SC

MEDICUS HEALTHCARE SOLUTIONS, LLC,

Defendant.

MOTION TO DISMISS COUNTS III AND IV OF PLAINTIFFS' COMPLAINT

Defendant Medicus Healthcare Solutions, LLC, ("Medicus") by and through counsel of record, Dixon, Scholl, & Bailey, P.A. and pursuant to Fed.R.Civ.P. 12(b)(6) respectfully asks this Court to dismiss Counts III and IV of Plaintiffs' Complaint for Damages and Demand for Jury Trial ("Complaint.") In support of this Motion, Medicus states as follows:

I. PLAINTIFFS LACK STANDING TO RAISE ANY CLAIM FOR AN ALLEGED BREACH OF THE CONTRACT BETWEEN NORTHERN NAVAJO MEDICAL CENTER ("NNMC") AND MEDICUS.

Plaintiffs allege a contract exists between NNMC and Medicus. Plaintiffs do not identify the contract or any specific terms but allege that, generally, the contract contained terms which required Medicus to "(i) provide thorough background investigation and research with respect to its physicians; (ii) provide 'high quality' physicians to [NNMC]; (iii) ensure that its physicians had adequate credentials and licenses." (*See* Complaint, ¶50.) Plaintiff claims that, because Lydell Begay was a "Navajo patient of NNMC" he was "expressly or impliedly the intended beneficiary" of the contract between NNMC and Medicus. (*See* Complaint, ¶52.)

New Mexico recognizes that "[o]rdinarily, the obligations arising out of a contract are due only to those with whom it was made; a contract cannot be enforced by a person who is not a party to it or in privity with it ...." *See Tarin's, Inc. v. Tinley*, 2000-NMCA-048, ¶12, 129 N.M. 185, 190 (internal citations and quotations omitted.) In order to enforce the contract between NNMC and Medicus, Plaintiffs must allege sufficient facts which—if true—would indicate that Medicus *intended* to benefit Plaintiff Lydell Begay in entering into a contract with NNMC. *Id.* "There must be not just a desire or a purpose to confer a benefit on a third person, nor a desire to advance his interests. There must also be a showing of an intent that the promisor shall assume a direct obligation to the third party." *Montoya ex rel. S.M. v. Espanola Pub. Sch. Dist. Bd. of Educ.*, 861 F. Supp. 2d 1307, 1311 (D.N.M. 2012)(citations and quotations omitted.)

The *Tarin* court noted that, in the construction context, an owner of a property is not usually the third-party beneficiary of any contract between the general contractor and subcontractors. *Id.* at ¶14. "Certainly property owners derive benefit from the contracts between general contractors and subcontractors. But those contracts are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted." *Id.* (internal citations and quotations omitted.) Similarly, in this case, while NNMC patients may derive some benefit from Medicus' contract with NNMC, the contract was made to enable NNMC to perform its obligations. NNMC's obligations to Plaintiff Lydell Begay were not discharged by virtue of the contract with Medicus. There is nothing about the alleged contractual provisions cited by Plaintiffs which evidence any intent to directly benefit Plaintiff Lydell Begay rather than simply describing the services to be provided to NNMC. *See Montoya*, 861 F. Supp. 2d at 1311-12 (granting motion to dismiss where "[t]he language in the contract describes the general benefits conferred on students, teachers and

staff as a result of Defendants performing their duties under the contract, and describes the objectives behind the services they offer and intend to provide. However, the language in the contract cannot fairly be read to allow these incidental beneficiaries the right to enforce the contract.")

Indeed, courts that have considered similar contracts have concluded the patients are not third-party beneficiaries. *Oetting v. Wehbe*, 1997 WL 33354408 (Mich. Ct. App, Feb. 14, 1997)(unpublished opinion cited for purposes of analysis only)(concluding that patient was not the third-party beneficiary under either the Medical Services Agreement or Physician Affiliation Agreement); *Daniel Boone Clinic, P.S.C. v. Dahhan*, 734 S.W.2d 488, 491 (Ken.Ct.App., 1987)("This is an employment contract involving professional services. Although the patients are the ones served, they are only incidental beneficiaries of this contract."); *Bozeman v. Hernando County*, 548 So.2d 300, 301 (Fla.Ct.App 1989)("Application of the proper standard of review to the instant case reveals that dismissal of count I (the third party beneficiary count) of Bozeman's complaint is warranted because the complaint, standing alone, indicates that Harrington was at most an incidental third party beneficiary of the stated employment contract.")

In *Tarin*, the court acknowledged the operative compliant was "not a paragon of clarity" and "thin on facts". 2000-NMCA-048 at ¶15, 129 N.M. at 191. Nonetheless, based on the very liberal standard applied by the New Mexico state courts, denied a motion to dismiss since the complaint alleged a third-party beneficiary status. *Id.* The United States Supreme Court has, more recently, reiterated what is required to sustain a complaint in the federal courts. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009.) The *Iqbal* court noted a complaint cannot be sustained where it offers only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," without "further factual enhancement." 556 U.S. at 678-679, 129 S. Ct. at 1949

(citations omitted.) Thus, where a complaint does not point to any specific contractual provisions or other extrinsic evidence pointing to an intent to establish plaintiff as a third-party beneficiary, such claims are subject to a dismissal based on the pleadings. *See, e.g., Gomez v. Las Cruces Pub. Sch.*, 2012 WL 4497785, at *8 (D.N.M. Sept. 19, 2012); *see also Montoya*, 861 F. Supp. 2d at 1311-12. Plaintiffs' Complaint does not identify any contractual provisions which indicate an intent to benefit Plaintiff Lydell Begay or any other facts by which this Court could reach such a conclusion. Thus, Count III of Plaintiffs' Complaint should be dismissed as a matter of law.

Moreover, even if Plaintiffs had standing to sue under the contract between NNMC and Medicus, their damages would be limited to what was allegedly lost by the breach and NNMC could have reasonably been expected to gain but for the alleged breach. *See* NMRA 13-843. Any breach of the contract, with related solely to staffing, would not have resulted in personal injuries. These are not damages, therefore, that Plaintiffs can claim under the contract. For this reason as well, Count III of Plaintiffs' Complaint should be dismissed as a matter of law.

II. PLAINTIFFS' COMPLAINT DOES NOT STATE A VIABLE CLAIM UNDER THE NEW MEXICO UNFAIR PRACTICES ACT ("UPA.")

Plaintiffs allege Medicus' advertising, via a website, states Medicus is "laser focused on quality"; "constantly ensure[s] that [it is] producing quality solutions that meet [a healthcare facility's] particular goals"; "believes accountability is the key to creating long-term partnerships with our key stakeholders, providers, and clients"; and "will ensure [its clients] have the high-quality medical staff [they] need" (*See* Complaint, ¶¶12-13.) Plaintiffs further allege Medicus' website contains language indicating Medicus "maintain(s) a deep understanding of government specific credentialing and background investigation processes." (*See* Complaint, ¶14.)

Plaintiffs interpret this language as advertising representations that Medicus "properly interviewed, screened, and vetted prior to placement" and that all medical staff would be "high

quality" and practice under unrestrictive licenses. (*See* Complaint, ¶62.) Plaintiffs' interpretation of the alleged statements on the website is, facially, unreasonable and is not based on any objective reading of the statements actually cited. (For example, it would not be a fair reading of the assertion Medicus is familiar with credentialing and investigation processes to allege it is a promise to make sure no provider has an unrestrictive license.) Regardless, however, this Court need not consider Plaintiffs' conclusions derived from the Medicus' website but, rather, only the actual factual allegations cited with specificity. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949.

The purported Medicus' representations cited by Plaintiffs do not support a claim under the UPA for two reasons.

First, the language is puffery or too vague to sustain any such action. "Puffery is a somewhat amorphous concept ... defined alternately as 'an exaggeration or overstatement expressed in broad, vague, and commendatory language' ... and as an 'exaggerated, blustering, and boasting statement upon which no reasonable buyer would rely.' " *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶84, 84 150 N.M. 283, (internal citations omitted) Vagueness is a separate concept. *Id.* The language cited by Plaintiffs is both puffery ("laser focused"; "high-quality"; and "deep understanding") and vague. Some language, "laser focused"; "high-quality"; and "deep understanding", are puffery. Other statements are vague. For example, what does it mean to believe that "accountability is key" or that a particular set of services is a "quality solution"? As a matter of law, these statements are too vague as to create any reasonable reliance and cannot support a UPA claim.

Second, the UPA does not apply to claims based on alleged professional negligence or malpractice. *See Grassie.*, 2011-NMCA-024 at ¶86, 150 N.M. 283 ("The inquiry thus hinges on whether the medical negligence and UPA claims are coterminous or indistinguishable; that is,

whether they rely on the same facts and rely on a judgment as to the "actual competence of the medical practitioner" for resolution.. If they do, a UPA claim is not appropriate.")(internal citations omitted.) In this case, however, the allegations which Plaintiffs assert support a statutory UPA claim are *the very same allegations* which give rise to their claims of medical negligence. Plaintiffs' allege violations of the UPCA because they assert Dr. Marrocco was not "high quality" and was not qualified. (*See* Complaint, ¶¶62-63.) Because these claims necessarily rely on the actual competence of Dr. Marrocco, they are not claims under the UPA and Count IV of Plaintiffs' Complaint should be dismissed as a matter of law.

CONCLUSION

For the above stated reasons and authorities, Medicus respectfully asks that this Court dismiss Counts III and IV of the Complaint and for such other relief as the Court deems proper and just.

Respectfully submitted,

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I hereby certify that a copy of the foregoing pleading was filed and served through the Court's electronic filing system and emailed to counsel this 17th day of, July, 2015 to:

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