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**Attorneys for Boise Dialysis**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF IDAHO**

BOISE DIALYSIS, LLC,

Plaintiff,

vs.

VICTOR NIETO, MS ADMINISTRATIVE  
SERVICES, INC., OMNIPURE FILTER  
COMPANY, INC., AND DIALYSIS COST  
CONTAINMENT INC.,

Defendants.

**Case No. 1:07-cv-00244-LMB**

**FIRST AMENDED COMPLAINT  
AND DEMAND FOR JURY**

Plaintiff, Boise Dialysis, LLC (“Boise Dialysis”) complains against Defendants Victor Nieto, MS Administrative Services Inc., Omnipure Filter Company, Inc., and Dialysis Cost Containment, Inc. as follows:

## **PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff Boise Dialysis, LLC, is an Idaho limited liability corporation that provides dialysis services to patients residing in Idaho.

2. Defendant, Victor Nieto, is a resident of Idaho who has received dialysis services from Boise Dialysis.

3. Defendant Omnipure Filter Company, Inc. (“Omnipure”) is an Idaho corporation that employs Mr. Nieto and funds a health insurance fund for the benefit of Mr. Nieto and its other employees.

4. Defendant, MS Administrative Services, Inc. (“MS”) is an Idaho corporation that acts as the third-party administrator of Omnipure’s employee health benefit plan.

5. Defendant Dialysis Cost Containment, Inc. is an Idaho corporation that represents itself as having the ability to lower the amounts health benefit plans must reimburse dialysis centers for the dialysis services these centers provide.

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1367. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

## **GENERAL ALLEGATIONS**

7. Mr. Nieto is a beneficiary of an employee health benefit plan (the “Plan”) funded by his employer, Omnipure.

8. Prior to providing dialysis services to Mr. Nieto, Boise Dialysis asked for proof of insurance. Mr. Nieto provided Boise Dialysis a card showing that he is a beneficiary of the Plan administered by MS

9. Boise Dialysis contacted MS to confirm Mr. Nieto’s eligibility and Plan coverage.

10. MS provided Boise Dialysis with a document entitled “General Summary of Benefits” that outlined the benefits Victor Nieto was entitled to under the Plan. This summary stated that the Plan had a \$350 calendar year deductible and that once this was paid, Mr. Nieto’s insurance carrier would pay for 80% of the “reasonable and customary” charges for out-of-network dialysis services up to \$10,000. Once the charges exceeded \$10,000 the insurer agreed to pay 100% of the “reasonable and customary” charges for dialysis services.

11. An employee of MS confirmed that the “General Summary of Benefits” applied to Mr. Nieto.

12. At all times, MS was acting as an agent of Omnipure in all matters related to the administration of the Plan. Similarly, at all times, MS was the fiduciary charged with administration of the Plan. At all times, MS held itself out as having authority to authorize and disperse payments for Mr. Nieto’s dialysis charges.

13. On February 10, 2006, Mr. Nieto signed an Assignment of Benefits (the “Benefits Contract”). Pursuant to the Benefits Contract, Mr. Nieto assigned to Boise Dialysis all benefits to which he was entitled to receive under the Plan for the services provided by Boise Dialysis. Mr. Nieto also agreed to personally pay for all the services not covered under the Plan.

14. From February 6, 2006 to March 31, 2007, Boise Dialysis provided dialysis services to Mr. Nieto. The total charges for these services were \$287,426.80.

15. The first charge of \$30,105.00 was paid in full by MS. Since that first charge, however, MS has only paid a small percentage of the fees for the dialysis services provided to Mr. Nieto by Boise Dialysis. In fact, of the \$287,426.80 charged by Boise Dialysis, MS had only paid \$73,291.13, leaving an unpaid balance of \$214,135.67.

16. In April 2006, Boise Dialysis was contacted by Betsy Rivas, representing Dialysis Cost Containment. Ms. Rivas sought to negotiate a discount of the fees owed to Boise Dialysis. Boise Dialysis declined to offer a discount.

17. The payments for Mr. Nieto's dialysis services declined sharply.

18. Boise Dialysis contacted MS numerous times to discuss the insufficient payments, and eventually MS informed Boise Dialysis that the payments for Mr. Nieto's services were based on the usual and customary charges for dialysis services. MS also stated that it was basing its determination on the usual and customary rates established by Dialysis Cost Containment.

19. On February 20, 2007, Boise Dialysis sent MS a letter appealing MS' decision to withhold payments to Boise Dialysis for dialysis services provided to Mr. Nieto. Boise Dialysis received no response. Accordingly, Boise Dialysis' counsel sent a letter to MS on March 28, 2007 demanding payment of the unpaid balance. Boise Dialysis also sent a letter to Mr. Nieto demanding payment for the unpaid balance owed for the dialysis services he received.

20. On March 28, 2007, MS denied Boise Dialysis' appeal and asserted that it would not pay Boise Dialysis any of the \$214,135.67 that is due and outstanding.

### **FIRST CAUSE OF ACTION**

#### **(ERISA Claim for Plan Benefits Against Omnipure and MS)**

21. Boise Dialysis incorporates the allegations of paragraphs 1 through 20 of this Complaint.

22. On information and belief, Omnipure agreed to pay usual and customary rates for the dialysis services provided to its employees under the Plan. Omnipure and MS have failed to authorize and disburse payments at the usual and customary rates for Mr. Nieto's dialysis services.

23. Boise Dialysis has exhausted its administrative avenues, and it continues to be owed \$214,135.67 for the dialysis services provided to Mr. Nieto.

24. Pursuant to 29 U.S.C. § 1132, Mr. Nieto has a right “to recover benefits due to him under the terms” of the Plan and to recover any other equitable relief stemming from Omnipure and MS’ failure to abide by the terms of the Plan.

25. Pursuant to the Benefits Contract, Boise Dialysis has been assigned Mr. Nieto’s rights to receive payments under the Plan. Omnipure and MS have a fiduciary duty to administer the Plan on behalf of the Plan’s members, including Mr. Nieto.

26. As the result of MS’ and Omnipure’s failure to authorize and disburse payments, Boise Dialysis has been damaged in the amount of \$214,135.67. Boise Dialysis is entitled to judgment in the principal amount of \$214,135.67 against Omnipure and MS, plus pre-and post-judgment interest on the foregoing amount at the statutory rate, together with reasonable costs and attorneys’ fees.

## **SECOND CAUSE OF ACTION**

### **(Breach of ERISA Fiduciary Duties Against MS)**

27. Boise Dialysis incorporates the allegations of paragraphs 1 through 26 of this Complaint.

28. MS is the administrator of the Plan. MS exercises discretionary authority and control over the management and administration of the Plan. Specifically, MS authorizes payments for services rendered to Omnipure employees covered by the Plan.

29. As the Plan administrator, MS has the fiduciary obligation to discharge its duties solely in the interest of the beneficiaries of the Plan. MS has failed to meet this obligation by paying less to Boise Dialysis than what the Plan required. As a result of MS’ breach of its

fiduciary obligation, Mr. Nieto is liable for the difference between what MS paid Boise and the charges for Mr. Nieto's dialysis services. Moreover, MS' failure to meet its payment obligation puts Mr. Nieto at risk of losing the services of his chosen dialysis provider.

30. MS' intentional decision to pay less than the usual and customary rates for Mr. Nieto's dialysis services was not an act done in the interest of Mr. Nieto, but rather, MS made the insufficient payments in an attempt to save the Plan's assets at Mr. Nieto's expense.

31. On information and belief, MS is using Omnipure's funds to pay another party to assist it in breaching the fiduciary duties MS owes the beneficiaries of the Plan. On information and belief, MS has used Plan assets to pay a third party, Dialysis Cost Containment, for its assistance in implementing a system for saving the Plan's assets at the expense of the Plan's beneficiaries. On information and belief, MS uses the Plan's funds to pay Dialysis Cost Containment 25% of the difference between what MS actually pays for dialysis services and the usual and customary rates for those services.

32. Boise Dialysis, as the assignee of Mr. Nieto's rights under the Plan, is entitled to appropriate equitable relief, including reimbursement according to the usual and customary rates, for the dialysis services Boise Dialysis rendered Mr. Nieto.

33. The Plan is entitled to appropriate equitable relief, including reimbursement of all funds paid Dialysis Cost Containment.

### **THIRD CAUSE OF ACTION**

#### **(Negligent/Intentional Misrepresentation Against MS and Omnipure)**

34. Boise Dialysis incorporates the allegations of Paragraphs 1 through 33 above.

35. MS represented in the General Summary of Benefits it provided to Boise Dialysis and in a subsequent telephone conversation that it would authorize 80% of the "reasonable and

customary” charges, up to \$10,000, for the dialysis services provided to Mr. Nieto. MS also represented that once Mr. Nieto’s dialysis charges exceed \$10,000, it would authorize 100% of the reasonable and customary charges for the dialysis services received by Mr. Nieto (the “reimbursement representations”).

36. MS made its reimbursement representations to Boise Dialysis, with the intent that Boise Dialysis render dialysis services to Mr. Nieto and thereby meet the obligations imposed on Omnipure by the Plan.

37. MS’ representations were false and misleading, as MS made the reimbursement representations knowing that it did not intend to pay in accordance with the reimbursement representations. Instead, upon information and belief, MS has a business model of paying a third party, Dialysis Cost Containment, to renegotiate the charges for the dialysis services rendered to the beneficiaries of the plans that MS administers. Upon information and belief, MS has a business model of paying for dialysis services pursuant to Dialysis Cost Containment’s fee structure, which is significantly less than the region’s usual and customary charges for dialysis services.

38. MS is Omnipure’s agent in all matters related to the administration of the Plan. MS had authority to make the reimbursement representations on behalf of the Plan. Moreover, MS had authority to authorize and disperse payments for Mr. Nieto’s dialysis charges from the Omnipure health benefit fund. Accordingly, at all times MS was acting within the scope of its agency when it made the reimbursement representations and subsequently authorized and dispersed the payments to Boise Dialysis.

39. Boise Dialysis reasonably relied upon the reimbursement representations and agreed to provide dialysis services to Mr. Nieto. These reimbursement representations were

material as Boise Dialysis would not have agreed to provide Mr. Nieto with dialysis services without having received these representations from MS.

40. Boise Dialysis was unaware of the falsity of MS' reimbursement representations.

41. Boise Dialysis has been injured as a result of its reliance on MS' reimbursement representations because Boise Dialysis has provided dialysis services to Mr. Nieto for which it has not been paid. Specifically, Boise Dialysis has only been paid \$73,291.13 of the \$287,426.80 charged by Boise Dialysis for Mr. Nieto's dialysis services, leaving an unpaid balance of \$214,135.67.

#### **FOURTH CAUSE OF ACTION**

##### **(Promissory Estoppel Against Omnipure and MS)**

42. Boise Dialysis incorporates the allegations of Paragraphs 1 through 41 above.

43. Boise Dialysis reasonably relied upon MS' reimbursement representations and provided a substantial amount of dialysis services to Mr. Nieto in reliance thereon.

44. MS did foresee or should have foreseen that Boise Dialysis would rely upon MS' reimbursement representations.

45. MS is Omnipure's agent in all matters related to the administration of the Plan, and accordingly, MS had authority to make the reimbursement representations on behalf of Omnipure. At all times, MS was acting within the scope of its agency when it made the Reimbursement Representations.

46. Boise Dialysis suffered substantial economic losses as a consequence of its reliance on MS' reimbursement representations. Specifically, Boise Dialysis has only been paid \$73,291.13 of the \$287,426.80 charged by Boise Dialysis for Mr. Nieto's dialysis services, leaving an unpaid balance of \$214,135.67.

**FIFTH CAUSE OF ACTION**

**(Breach of Contract Against Victor Nieto)**

47. Boise Dialysis incorporates the allegations of paragraphs 1 through 46 of this Complaint.

48. The Benefits Contract is a legally binding contract pursuant to which Mr. Nieto agreed to personally pay the balance owed Boise Dialysis for any dialysis services that were not paid in full to Boise Dialysis.

49. In reliance upon this Benefits Contract, Boise Dialysis provided dialysis services to Mr. Nieto from February 2006 to the present.

50. Mr. Nieto has breached the Benefits Contract by failing to pay the balance owed Boise Dialysis for the dialysis services rendered to Mr. Nieto and for which the Plan has not paid.

51. As the result of Mr. Nieto's breach of contract, Boise Dialysis has been damaged in the amount of \$214,135.67. Boise Dialysis is entitled to judgment for this amount, plus pre- and post-judgment interest on the foregoing amounts at the statutory rate, plus reasonable costs and attorneys' fees incurred in collecting these amounts.

**SIXTH CAUSE OF ACTION**

**(Unjust Enrichment Against Victor Nieto)**

52. Boise Dialysis incorporates the allegations of paragraphs 1 through 51 above.

53. Boise Dialysis conferred a benefit upon Mr. Nieto when it provided him with dialysis services.

54. Mr. Nieto knew of and appreciated the benefit which Boise Dialysis conferred upon him. Mr. Nieto accepted Boise Dialysis' dialysis services, and as such, has received full benefit under circumstances that impose a legal duty of restitution.

55. Boise Dialysis is entitled to judgment against Mr. Nieto, on an unjust enrichment theory, in the amount of \$214,135.67, plus pre- and post-judgment interest at the statutory rate, plus reasonable costs and attorneys' fees incurred in collecting these amounts, as subsequently established by affidavit.

### **SEVENTH CAUSE OF ACTION**

#### **(Tortious Interference with Contract Against Dialysis Cost Containment)**

56. Boise Dialysis incorporates the allegations of paragraphs 1 through 55 above.

57. A valid and enforceable contract existed between Mr. Nieto and Omnipure wherein Omnipure agreed to pay for the usual and customary charges for health services covered by the Plan in exchange for Mr. Nieto's services as an employee. The benefits under this Plan, including the right to receive the payments for the usual and customary charges of Mr. Nieto's dialysis services were assigned to Boise Dialysis.

58. The Benefits Contract by which Mr. Nieto assigned to Boise Dialysis the right to receive payments for the dialysis services provided to Mr. Nieto is a valid and enforceable contract.

59. Dialysis Cost Containment was aware of the Benefits Contract between Mr. Nieto and Boise Dialysis. In fact, Dialysis Cost Containment contacted Boise Dialysis, not Mr. Nieto, in an attempt to negotiate the payments Boise Dialysis was entitled to pursuant to the contract.

60. Dialysis Cost Containment represented to MS that it could help MS reduce the amount it was paying for dialysis services provided to Victor Nieto. On information and belief,

Dialysis Cost Containment provided a rate structure to MS that does not correspond to the region's usual and customary rates and caused MS to pay Boise Dialysis pursuant to this rate structure and not pursuant to the region's usual and customary rates.

61. As a result of Dialysis Cost Containment's tortious interference with the Benefits Contract between Boise Dialysis and Victor Nieto, Boise Dialysis has not been paid for the dialysis services provided to Mr. Nieto. In fact, Boise Dialysis has been paid \$214,135.67 less than what Boise Dialysis would have been paid if MS had paid in accordance with the region's usual and customary rates.

### **EIGHTH CAUSE OF ACTION**

#### **(Tortious Interference with Business Relations Against Dialysis Cost Containment)**

62. Boise Dialysis incorporates the allegations of paragraphs 1 through 61 above.

63. On information and belief, Dialysis Cost Containment intentionally interfered with Boise Dialysis' business relations with MS by representing to MS that it could help MS reduce the amount it was paying for dialysis services provided to Victor Nieto and by providing a rate structure to MS that does not correspond to the region's usual and customary rates. Dialysis Cost Containment caused MS to pay Boise Dialysis pursuant to this rate structure and not pursuant to the region's usual and customary rates.

64. On information and belief, Dialysis Cost Containment's purpose in causing this interference was wrongful. Specifically, Dialysis Cost Containment's purpose was to obtain a 25% kickback of any reductions in the amount paid to Boise Dialysis for dialysis services rendered to Mr. Nieto. Dialysis Cost Containment's purpose was to profit from Omnipure and MS' breach of contract and from their breach of their fiduciary duties to Mr. Nieto and the Plan.

65. As a result of Dialysis Cost Containment wrongful interference, Boise Dialysis has been paid \$214,135.67 less than what Boise Dialysis would have been paid if MS had paid in accordance with the region's usual and customary rates.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiff respectfully requests this Court to enter judgment against Defendant as follows:

1. On its First Cause of Action, for payment of the benefits owed pursuant to the Plan in an amount to be proven at trial but not less than \$214,135.67, and for reasonable attorneys' fees, costs, prejudgment interest, and post-judgment interest.

2. On its Second Cause of Action, for appropriate equitable relief, including reimbursement to Boise Dialysis of \$214,135.67 for the dialysis services Boise Dialysis provided to Mr. Nieto. For additional appropriate equitable relief, including reimbursement to the Plan of all funds paid to Dialysis Cost Containment.

3. On its Third Cause of Action, for general damages in an amount to be proven at trial but not less than \$214,135.67, and for reasonable attorneys' fees, costs, prejudgment interest, post-judgment interest, and other damages for an amount to be proven at trial.

4. On its Fourth Cause of Action, for general damages in an amount to be proven at trial but not less than \$214,135.67, and for reasonable attorneys' fees, costs, prejudgment interest, and post-judgment interest.

5. On its Fifth Cause of Action, for general damages in an amount to be proven at trial but not less than \$214,135.67, and for reasonable attorneys' fees, costs, prejudgment interest, and post-judgment interest.

