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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

CYNTHIA HARVEY and STEVEN A. MILMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CENTENE CORPORATION, COORDINATED CARE CORPORATION, and SUPERIOR HEALTHPLAN, INC.,

Defendants.

NO. 2:18-cv-00012-SMJ

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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I. INTRODUCTION

Plaintiffs submit this consolidated brief in response to the motions to dismiss filed by Defendants Centene Corporation ("Centene") (ECF No. 16), Coordinated Care Corporation ("Coordinated") (ECF No. 17), and Superior Healthplan, Inc. ("Superior") (ECF No. 18). Notwithstanding Defendants' "kitchen sink" effort at paring down this case with whatever arguments they can devise, Defendants do not seek to dismiss Plaintiffs' claims against Coordinated under the Washington Consumer Protection Act ("WCPA"). In turn, Plaintiffs do not challenge Defendants' motion to dismiss the WCPA claim asserted against Superior. Defendants' remaining arguments are meritless and the remainder of their motions should be denied.

II. STATEMENT OF FACTS

This is a straightforward case. Defendants engaged in a classic bait-and-switch, enticing customers with the promise of good health coverage — including nonexistent physician networks — but providing woefully little coverage after they signed up. Compl. ¶¶ 13-16. Defendants' conduct violates not only the Affordable Care Act ("ACA"), but also state unfair business practices and consumer fraud statutes, and constitutes breaches of contracts with their insureds. Indeed, the December 2017 Washington State Consent Order with Defendant Coordinated reflects these deceptive and misleading practices. *Id.* ¶¶ 17-21.

Centene effectuated this deception by offering a "family" of health plans in the ACA marketplaces in various states under the name of Ambetter, Compl. *Id*. ¶¶ 27-30, and through its subsidiaries, Coordinated and Superior. Coordinated and Superior act as Centene's alter egos, *id.* ¶¶ 22-30, and collectively, Defendants engaged in a wide-variety of misconduct, including (1) misrepresenting who was in the provider network to make prospective insureds think many more quality providers were in the network than was actually the case, (2) routinely denying coverage for necessary health care for "insufficient diagnostic" evidence when adequate evidence existed, and (3) failing to provide medically necessary care on a reasonable basis, including by denying claims by out-of-network providers when no in-network provider was reasonably available. *Id.* ¶¶ 49-58.

III. AUTHORITY AND ARGUMENT

A. This Court Has Specific Jurisdiction Over Centene and Superior.

1. Standard for Assessing Jurisdiction.

A district court may consider evidence presented in affidavits to assist in its determination of jurisdictional issues." *Doe v. Unocal Corp*., 248 F.3d 915, 922 (9th Cir. 2011). When both parties support their respective positions with affidavits and the district court acts on the defendant's motion to dismiss without holding an evidentiary hearing, the plaintiff "need make only a prima facie showing of jurisdictional facts to withstand a motion to dismiss." *Ballard v. Savage*, 65 F.3d

1495, 1498 (9th Cir. 1995). Unless directly contravened, the plaintiff's version of the facts must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in plaintiff's favor. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd*., 328 F.3d 1122, 1129 (9th Cir. 2003).

Pellegrini v. Huyssen, Inc., No. 3:17-cv-00135-CAB-(JMA), 2017 U.S. Dist. LEXIS 105449 (S.D. Cal. July 7, 2017) is instructive. In *Pellegrini*, the defendant moved to dismiss for lack of either specific or general personal jurisdiction, asserting it did not conduct or solicit any business in California. Like Centene, the defendant maintained that its California connections were solely those of its subsidiaries. *Id*. at *7. Applying Ninth Circuit law, the court denied the defendant's motion to dismiss, finding plaintiff's counsel's declaration attaching evidence showing that defendant shared website information and other overlapping contacts with its local subsidiaries sufficient to establish personal jurisdiction. *Id*. at *15-17. The same result should occur here.

2. Plaintiffs Have Submitted Sufficient Evidence to Establish Jurisdiction.

Centene and Superior wrongly contend that Plaintiffs fail to establish specific personal jurisdiction. Centene Mem. 6-7; Superior Mem. 5-6. Specific jurisdiction is analyzed under a three-prong test: "(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails

himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1227-28 (9th Cir. 2011). All three prongs are satisfied here.

To determine whether a defendant "purposefully direct[s] his activities at the forum state," courts apply the "effects test," which requires that "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* at 1228 (internal quotations and citations omitted).

Centene repeatedly committed intentional acts expressly aimed at consumers in Washington which it knew would cause harm in the forum state. Centene operated a department called "WA Quality Dept." and responded to consumer complaints *via* a Centene email address. *See* Ex. 1 at 1-5, 8-11; Ex. 2 at 35.[1] Centene directly approved services for coverage under the Ambetter policy, Ex. 3 at 14, and providers reached out directly to Centene when they had coverage

[1] All Exhibits are to the Declaration of Beth E. Terrell filed in support of this memorandum.

questions. Ex. 4 at 18-19 (fax from service provider requesting authorization for a procedure in Washington that states "RECEIVED BY CENTENE" on the top). Centene also was directly involved in approving providers' designation as in-network providers. Ex. 5 at 8-10 (email correspondence showing Coordinated employee reached out to Centene when she had a question about why a provider had not been approved as an in-network Ambetter provider). The foregoing actions, taken in conjunction with Centene's website which specifically states that Coordinated offers Ambetter plans in Washington, Compl. ¶ 4, are sufficient to demonstrate that Plaintiffs meet the first prong of the specific jurisdiction analysis. *See Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002) ("[O]perating even a passive website in conjunction with 'something more' – conduct directly targeting the forum – is sufficient to confer personal jurisdiction.") (citation omitted).

Plaintiffs' claims also "arise out of" Defendants' forum-related activities. Indeed, the Washington State Office of the Insurance Commissioner investigated consumer complaints about Ambetter policies and, as a result, required both Centene and Coordinated to stop selling Ambetter policies in Washington. Compl. ¶¶ 17-21. Documents obtained from the Insurance Commissioner show that Centene was involved in decisions about which services to cover, which providers

to qualify as "in network," and how to handle consumer complaints. *See* Exs. 1-4. Centene's contacts thus directly relate to Plaintiffs' claims.

The exercise of jurisdiction also comports with fair play and substantial justice. As a result, this Court has specific jurisdiction over Defendants. *See Mavrix*, 647 F.3d at 1232 (reversing dismissal of complaint on basis of specific personal jurisdiction); *Rio*, 284 F.3d at 1021 ("[F]actors weigh overwhelmingly in favor of the reasonable exercise of personal jurisdiction."). The foregoing facts, along with the facts set out below, demonstrate that Centene has "continuous and systematic" connections with Washington and therefore, this Court also has general jurisdiction over Centene.

B. Coordinated and Superior Are Alter Egos of Centene.

Contrary to Centene's arguments (adopted by Superior), jurisdiction also exists based on an alter ego theory. Centene Mem. 10-14; Superior Mem. 7. In this Circuit, courts look at four factors to determine whether jurisdiction can be based on an alter ego theory: "(1)whether the officers and directors of the two are the same; (2) whether the subsidiary pays cash for products sold or service rendered to it by the parent; (3) whether separate books, bank accounts, tax returns, financial statements and the like are kept; and (4) whether the parent corporation holds the subsidiary out as an agent, either expressly or impliedly as by representing it is doing business in, or has an office in the state, when only the subsidiary is

present." *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 426 (9th Cir. 1977) (citation and quotation omitted). "The standard for personal jurisdiction under an alter ego theory is lower than the standard for liability under an alter ego theory." *TV Events & Mktg. v. AMCON Distrib. Co.*, 416 F. Supp. 2d 948, 962 (D. Haw. 2006) (citing *San Mateo County Transit Dist. v. Dearman, Fitzgerald & Roberts, Inc.*, 979 F.2d 1356, 1358 (9th Cir. 1992)).

Here, the Complaint adequately alleges facts that Coordinated and Superior are Centene's agents through which Centene does business in Washington and Texas. Plaintiffs allege, *inter alia*, that Centene controls and manages the policies, practices and conduct of its subsidiaries. Compl. ¶ 3. Centene incorporates the financial information of its subsidiaries into its consolidated financial statements and federal tax returns. *Id*. Centene also dictates the operations of its subsidiaries through their websites, which contain language describing Ambetter and Centene's involvement that is verbatim to the description on Centene's website. *Id.* ¶ 29.

Centene represented to the Securities and Exchange Commission ("SEC") in its most recent 10-K that it is a consolidated, uniform organization, refers to itself and its state subsidiaries as "we," and consolidates Centene's and its subsidiaries'

financial information. Ex. 6 p. 20.[2] Centene also centralizes its claims processing operations, further demonstrating the universal control that Centene exercises over its subsidiaries. Centene represents: "We provide member-focused services through locally based staff by assisting in accessing care, coordinating referrals to related health and social services and addressing member concerns and questions." *Id.*, p. 1. Centene also represents: "We combine our decentralized local approach for care with a centralized infrastructure of support functions such as finance, information systems and claims processing." *Id*. "We", in this context, refers to Centene's state subsidiaries, whose financial information and other operations are consolidated in the 10-K.

Centene's "Centralized Support Infrastructure" described in its 10-K includes centralizing "general and administrative functions" such as "finance,

[2] Federal Rule of Evidence 201(b)(2) permits courts to take judicial notice of facts "not subject to reasonable dispute" in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *See also Vancouver Alumni Asset Holdings Inc. v. Daimler AG*, No. CV 16-02942 SJO (KSx), 2017 U.S. Dist. LEXIS 83621, at *11 (C.D. Cal. May 31, 2017) ("A court may take judicial notice of court filings and other matters of public record . . . .") (internal citation and quotations omitted).

information systems and claims processing". *Id.* p. 5. This centralized administrative control by Centene allows the company and its subsidiaries to reduce state entities' expenses so that they can meet the ACA medical loss ratio rules, which require insurers to pay refunds if they do not spend eighty percent or more of premium dollars on health care expenditures or quality improvement. *Id.* at 73; *see also* 42 C.F.R. § 158.210 (current through Apr. 6, 2018).

Centene also reports in its 10-K filing that its central handling of finance, information systems, and claims processing [selling, general and administrative expenses or "SG&A"], allows it to absorb these costs on behalf of the subsidiaries. Ex. 6. p. 5. This, in turn, allows the subsidiaries to satisfy the medical loss ratio requirements in various states, including Washington and Texas, allowing them to continue business in those states and avoid rebate penalties.[3]

Centene continues in its 10-K that "Our centralized information systems support our core processing functions under a set of integrated databases and are

[3] If a health insurer fails to meet the Medical Loss Requirements in a state, it is required to pay rebates to its customers pursuant to the ACA. The Medical Loss Ratio refers to the percentage of premium dollars that an insurer must spend on paying for health care as opposed to advertising, selling, and administrative costs. *See* 42 C.F.R. § 158.240 (current through Apr. 6, 2018).

designed to be both replicable and scalable to accommodate organic growth and growth from acquisitions. We continue to enhance our systems in order to leverage the platform we have developed for our existing states for configuration into new states or health plan acquisitions. We believe our predictive modeling technology enables our medical management operations to proactively case and disease manage specific high risk members." Ex. 6 p. 4.

Coordinated, which is listed on the Washington State Insurance Commissioner's website, is considered part of a "corporate family group" with Centene Corp. Grp. Ex. 7. The Insurance Commissioner defines a "corporate family group" as a "group of companies owned or controlled by the same company." Ex. 8. Coordinated is a wholly-owned subsidiary of Centene Corporation and has a management services agreement with Centene Management Company, LLC ("CMC"), pursuant to which Coordinated pays CMC a management fee in exchange for CMC providing services necessary to manage Coordinated's business operations. Ex. 9 p. 15 (2016 Segregated Accounts Annual Report).

Coordinated also filed consolidated federal income tax returns with Centene and its other subsidiaries. *Id.* "In accordance with the group's tax allocation agreement, the subsidiaries reimburse or recover from Centene their portion of the income taxes as calculated on a separate company basis." *Id.* Such payments are

due to Centene within 90 days of the date Centene files its consolidated federal income tax return. *Id.* p. 24. Centene's reliance on *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586 (9th Cir. 1996) to argue that filing consolidated financial statements or tax returns does not satisfy the alter ego test is misplaced. In *Compagnie*, AT&T based its alter ego theory only on a consolidated tax return and a "questionable transaction." 94 F.3d at 591. Plaintiffs here allege much more.

Coordinated receives surplus contributions from Centene. Ex. 9 p. 26. In addition, Coordinated's officers and executives receive approximately 50% of their total compensation from stock awards of Coordinated's holding company, Centene.[4] *Id*. Ex. 10. Centene publicly holds Coordinated out as an agent through its website, which contains language describing Ambetter and Centene's

[4] Centene's reliance upon *Sarkisyan v. CIGNA Healthcare, Inc*., No. 09-5-05010, 2009 WL 10671423 (C.D. Cal. Nov. 24, 2009) for the proposition that there is no alter ego jurisdiction where facts are consistent with a company's status as a holding company is inapplicable because Plaintiffs allege much more than statements in an annual report in support of their claims that Defendants have failed to maintain separate corporate identities. Moreover, unlike in *Sarkisyan*, Centene has asserted daily operational control over Coordinated, as recognized by the Insurance Commissioner and advertised through Coordinated's website.

involvement using the same language found on the universal Ambetter website, demonstrating that Centene controls and manages the activities of its subsidiaries. Compl. ¶¶ 29-30. Indeed, Coordinated is viewed as "the operating arm of Centene Corporation in Washington." Ex. 11.

The pervasiveness of Centene's involvement in Coordinated's financial activities and daily management also demonstrates that Centene failed to abide by corporate formalities over its subsidiary. Among other things, Coordinated "pays cash for . . . service[s] rendered to it" by Centene, Centene fails to maintain separate financial statements, and Centene holds Coordinated out as its agent, "expressly", through its public website. *Wells Fargo*, 556 F.2d at 426 (citation and quotation omitted). Moreover, the Insurance Commissioner recognizes that Coordinated is "controlled" by the Centene corporate family. *See* Ex. 8.

Documents included in consumer complaint files publicly available through the Insurance Commissioner's office confirm Plaintiffs' alter ego allegations. As noted above, these documents show that Centene operated a department called WA Quality Dept, responded to consumer complaints via a Centene email address, directly approved services for coverage under the Ambetter policy, responded to providers who would reach out to Centene directly with coverage questions, designated providers as "in-house" providers, jointly with Coordinated issued receipts for services from Centene's St. Louis headquarters, and set coverage

policies. *See* Ex. 1 at 1-5, 8-11; Ex. 2 at 33-35; Ex. 3 at 14; Ex. 4 at 18-19; Ex. 5 at 8-10; Ex. 12 at 12; Ex. 13 at 13. Plaintiffs have established far more than a "single-event involvement" by Centene and thus have demonstrated personal jurisdiction based on alter ego. *See In re Hydroxycut Mktg. & Sales Prac. Litig.*, 810 F. Supp. 2d 1100, 1125 (S.D. Cal. 2011) (finding personal jurisdiction where company acted as alter ego of subsidiary which sold products that were "critical to the success of the . . . business enterprise"); *TV Events & Mktg.*, 416 F. Supp. at 964 ("allegations [that] are more than just conclusory allegations . . . sufficient to support the Plaintiff's assertion of alter ego personal jurisdiction").

Centene wrongly relies on *Ranza v. Nike, Inc.*, 793 F. 3d 1059, 1074 (9th Cir. 2015), which is factually distinct. In *Ranza,* "[e]ach entity . . . maintains its own accounting books and records . . . and pays its own taxes." In contrast, Centene adopts financial information of its subsidiaries in its financial statements and tax returns, among other things, which is sufficient to establish jurisdiction based on the alter ego theory. *See Wells Fargo,* 556 F.2d at 426 (vacating dismissal for lack of personal jurisdiction based on "well-recognized" alter ego theory).

At this pleading stage, drawing all inferences in Plaintiffs' favor, Defendants' motions should be denied. *See Exxon Mobil Corp. v. Freeman Holdings of Wash. LLC*, No. CV-09-0390-EFS, 2011 U.S. Dist. LEXIS 14064, at *7-8 (E.D. Wash. Feb. 10, 2011) (denying motion to dismiss claim alleging alter-

ego theory of liability, holding that party "cannot intentionally fail to abide by corporate formalities and then utilize the corporate form to evade a legal responsibility"). In the alternative, the Court should allow discovery on this issue and hold an evidentiary hearing regarding its ability exercise of personal jurisdiction over Centene. *See, e.g.*, *Harris*, 328 F.3d at 1135 ("discovery on this issue might well demonstrate facts sufficient to constitute a basis for jurisdiction and in the past [the Ninth Circuit has] remanded in just such a situation") (citations omitted); *River City Media, Ltd. Liab. Co. v. Kromtech All. Corp*., No. 2:17-cv-00105-SAB, 2017 U.S. Dist. LEXIS 137938, at *18 (E.D. Wash. Aug. 28, 2017) (permitting jurisdictional discovery because "Washington has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors").

C. *Bristol-Myers Squibb* Does Not Apply to This Case.

Centene also asserts that *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) ("*BMS*"), prohibits this Court form exercising personal jurisdiction over Centene for claims that arose outside the state of Washington". Centene Mem. 14-16. *BMS*, however, was a state court mass action, not a federal court class action. Following the decision of *Fitzhenry –Russell v. Dr. Pepper Snapple Group*, 2017 U.S. Dist. LEXIS 155654 (N.D. Cal. Sept. 22, 2017), numerous courts have

concluded that *BMS* does not apply to federal court class actions. Two separate compelling reasons have been put forth.

First, courts note that in a mass tort action, each plaintiff is a real party in interest to the complaints; by contrast, in a putative class action, one or more plaintiffs seek to represent the rest of the similarly situated plaintiffs, and the "named plaintiffs" are the only plaintiffs actually named in the complaint. This "material difference[]" makes *BMS* inapplicable to a case like the present. *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods.*, No. 17-2161, 2018 U.S. Dist. LEXIS 43974, at *13 (E.D. La. Mar. 19, 2018); *accord, e.g., Feller v. Transam. Life*, No. 2:16-cv-01378-CAS-AJW, 2017 U.S. Dist. LEXIS 206822, at *47-48 (N.D. Cal. Sept. 22, 2017) (following *Fitzhenry-Russell*), interlocutory appeal granted, No. 17-80257 (9th Cir. Mar. 27, 2018); *Branch v. Gov't Emples. Ins. Co.*, No. 3:16-cv-1010, 2018 U.S. Dist. LEXIS 4790, at *35, n. 10 (E.D. Va. Jan. 10, 2018) (same; "It is not necessary to consider GEICO's rather unique argument about personal jurisdiction, which is based on a rather strained reading of *BMS* that has been soundly rejected by other courts." (full citation omitted; citing *Day v. Air Methods Corp.*, 2017 U.S. Dist. LEXIS 174693 (E.D. Ky. Oct. 23, 2017); *Fitzhenry-Russell*, *supra*)); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, Civil Action, MDL No. 09-2074, Section L(5), 2017 U.S. Dist. LEXIS 197612, at *31-37 (E.D. La. Nov. 30, 2017) (agreeing with *Fitzhenry-Russell* and

also discussing how due process concerns were mitigated by Rule 23's procedural analyses and how concerns of federalism did not exist in the federal court setting – yet two other reasons *BMS* is inapplicable.).

Second, as Judge Chen ruled in *Sloan v. General Motors, LLC*, 287 F. Supp. 3d 840 (N.D. Cal. Feb. 7, 2018), *BMS* only applies to state courts because interstate federalism/state sovereignty concerns are not present in federal court cases involving a federal question, so due process is determined by the Fifth Amendment and "traditional notions of fair play and substantial justice." *Id*. at 858-59. To the extent a class action involves non-forum state law claims, such as the Texas claims alleged here, a court has discretion to exercise pendent jurisdiction over these claims. *Id*. at 860 (citation omitted).

The sole other case cited by Defendants, *DeBernardis v. NBTY, Inc.*, 2018 U.S. Dist. 7947 (N.D. Ill. Jan. 18, 2018), is not persuasive. It not only stated that the applicability of *BMS* to class actions "was a close question" and cited *Fitzhenry-Russell* and *In Chinese-Manufactured Drywall*; it entirely failed to refute their logic in conclusorily reaching a contrary conclusion.

D. The ACA Provides for a Private Right of Action.

1. The Standard for Inferring a Private Right of Action.

Defendants argue that the ACA does not afford a private right of action for when insurers, like Defendants, blatantly misrepresent the physicians and/or

physician practice groups identified in their networks of medical providers in disclosures required by the ACA. Coordinated Mem. 4-11, Superior Mem. 8, Centene Mem. 16-17. Defendants' argument is without merit. Although the ACA itself does not expressly create a private right of action for violations of these provisions (Compl. ¶¶ 35-36), it is well-settled that a private right of action is created by inference from a federal statute in these circumstances.

The Ninth Circuit set forth the applicable standard for analyzing whether an implied private right of action exists for violations of a federal statute in the absence of such an express provision in *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 979 (9th Cir. 2010). The Ninth Circuit applied the three-part test established in *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), focusing on:

> (1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the plaintiff has demonstrated that the asserted right is not so vague and amorphous that its enforcement would strain judicial competence; and (3) whether the provision giving rise to the right is couched in mandatory, rather than precatory, terms.

Cal State, 624 F.3d at 979 (inferring a private right of action from the amendments because 1) they specified a benefit to a group (foster parents) that included plaintiffs, 2) the provisions were not vague at all, and 3) the statutes were stated in mandatory, not discretionary terms).

Plaintiffs here meet the three-pronged test enunciated in *Blessing* and *Cal State*. First, Congress clearly intended the ACA provisions here to benefit insureds. The ACA mandates that insurers, like Defendants, provide the Essential Health Benefits to all insureds, like Plaintiffs. Congress intended to prevent insureds from having to choose between bearing massive expenses or foregoing care when their conditions turned out not to be covered under their policies. *See, e.g.,* Ex. 14 (H.R. Rep. No. 111-299 pt. 2. (2009)). Further, the purpose of requiring that insurers provide accurate information about their provider networks is to allow potential insureds to shop among insurers' plans, increasing competitive pressure on insurers to boost the quantity and improve the quality of care while simultaneously reducing costs. *See* Tom Baker, *Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act*, 159 U. Penn. L. Rev. 1577 (2011).

Second, the rights that Plaintiffs seek to vindicate are not "so vague and amorphous as to strain judicial competence." *Cal State*, 624 F.3d at 979. The ACA provisions cited above spell out exactly what health benefits are deemed essential and mandate that provider networks be sufficient for the purpose and that information about those networks be accurate. Compl. ¶¶ 35-36, 79, 82. Courts routinely determine whether a defendant's disclosures are accurate or misleading in a multitude of contexts as varied as initial stock offerings, false advertising

claims, and common law fraud. Making such a determination here would be no different from such routine instances of judicial competence.

Third, the ACA provisions cited above are mandatory, not precatory. *See, e.g.*, 42 U.S.C. § 300gg-6(a) ("A health insurance issuer . . . *shall ensure* that such coverage includes the essential health benefits package required under" [§ 18022(a)]) (emphasis added); § 300 gg-9 ("A health insurer *shall make* a reasonable disclosure to such . . . individual . . . as part of its solicitation and sales materials, of the availability of the information . . . concerning . . . the benefits . . . available . . ."") (emphasis added). Accordingly, under *Cal State*, a private right of action should be inferred from the relevant ACA provisions.

2. Courts Agree an Implied Cause of Action Exists under the ACA.

Putting aside the fact that an implied private right of action exists here in accordance with *Cal State*, since the ACA's passage in 2010, several courts have held a private right of action exists under the ACA for insureds asserting violations of other provisions of the ACA. Indeed, Defendants acknowledge that courts have held that a private right of action exists under Section 1557 of the ACA (42 U.S.C. § 18116(a)), which bars discriminating against insureds on the basis of race, sex, age, disability, *etc.* Coordinated Mem. 10-11 (discussing *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 847 (D.S.C. 2015) and *Se. Pa. Trasp. Auth. v. Gilead Scis., Inc.*, 2012 F. Supp. 3d 688 (E.D. Pa. 2015)). Those courts based their

decisions in part on the fact that Section 1557 expressly incorporates four federal civil rights statutes and includes the kind of rights-creating language found in those statutes. *See Callum*, 137 F. Supp. 3d at 847 ("[W]hen a federal statute does not expressly create a private right of action but references and incorporates another federal statute, it is possible to find an implied right of action in the statute."); *Gilead*, 2012 F. Supp. 3d at 698 (same).

Contrary to the argument that "the provisions in the Complaint . . . are fundamentally different than § 1557" (Coordinated Mem. 10), the ACA provisions at issue here similarly reference another federal statute that provides for a private right of action. Specifically, the ACA explicitly referenced and modified ERISA so that plans covered by ERISA would comply with the new ACA requirements contained in 42 U.S.C. §§ 300gg1-19a. *See* Ex. 15 (29 U.S.C. § 1185d). ERISA contains a private right of action provision. 29 U.S.C. § 1132. As shown above, Plaintiffs assert two of the Section 300gg provisions – Sections 300gg-6 and 300gg-9 – which are now incorporated into ERISA *via* 29 U.S.C. § 1185d. The ACA's cross-reference to ERISA for the Section 300gg1-19 requirements is just like the ACA's cross-reference to anti-discrimination statutes that justifies a private right of action for Section 1557 claims. Accordingly, a private right of action should be inferred here since Plaintiffs seek to enforce Section 300gg-6 and -9 claims. *See New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp.*, 980 F.

Supp. 2d 527, 544 (S.D.N.Y. 2013), *aff'd in part, vacated in part on other grounds*, 798 F.3d 125 (2d Cir. 2015) ("ACA . . . is incorporated into ERISA and so is enforceable by ERISA plan participants" pursuant to 29 U.S.C. § 1132); *see also King v. Blue Cross & Blue Shield of Illinois*, 871 F.3d 730, 739 (9th Cir. 2017) (noting that certain protections included in the ACA were expressly incorporated into ERISA).

Cases involving another Section 300gg provision support this conclusion. For example, in *Briscoe v. Health Care Serv. Corp*., 281 F. Supp. 3d 725 (N.D. Ill. 2017), plaintiffs sued their health service plan for refusing to cover lactation counseling services even though Section 300gg-13 requires health care service plans to cover preventative services and HHS guidelines specified that lactation counseling services were preventative. *Id*. at 728-729. Defendant sought to dismiss on the basis that the ACA provided no private right of action, but the Court denied the motion because it could "see[] no reason why health plans could offer illusory coverage without running afoul of the ACA". *Id*. at 732-34. A similar conclusion was reached in *Condry v. UnitedHealth Grp., Inc.*, No. 17-cv-00183-VC, 2017 U.S. Dist. LEXIS 130089, at *5-6 (N.D. Cal. Aug. 15, 2017). As in *Briscoe* and *Condry*, Plaintiffs should also be permitted to recover under the ACA.

The cases relied upon by Defendants are inapposite. In *Gonzaga Univ.* and *Alexander*, the particular statutory provisions at issue made it clear that they were

to be enforced by a specific administrative body created for that purpose, not by citizens. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289-90 (2002) ("Pursuant to these provisions, the Secretary created the Family Policy Compliance Office (FPCO) to act as the Review Board required under the Act and to enforce the Act with respect to all applicable programs.") (internal citations and quotations omitted); *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (42 U.S.C. §2000d-1 made clear that federal agencies, not private plaintiffs, were the ones to effectuate the language in §2000d barring discrimination in federal financial assistance programs and activities). Notably, Defendants have pointed to no unit in the Department of Health and Human Services to which insureds can go as a class for recompense for failure to receive what they are entitled to under Sections 300gg-6 and -9.

The other cases cited by Defendants are similarly inapplicable. For example, Defendants cite *Ass'n of N.J. Chiropractors, Inc. v. Horizon Healthcare Servs.*, No. 16-08400 (FLW), 2017 U.S. Dist. LEXIS 90545 (D.N.J. June 13, 2017), but that case denied an ACA private right of action to *provider* plaintiffs, not to *insureds*, a result that is hardly surprising since, as shown above, the ACA was designed to benefit consumers and reduce health care costs, which later goal requires reducing provider payments, not benefitting providers. *Vt. All. for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227, 240 (D. Vt. 2017), is similarly off-point because it concerned a claim by providers, not insureds, and did not relate to

a claim under Section 300gg claim. Lastly, *Marlena Mills v. Bluecross Blueshield of Tenn., Inc.*, No. 3:15-cv-552-PLR-HBG, 2017 U.S. Dist. LEXIS 2730, at *14-15 (E.D. Tenn. Jan. 9, 2017), broadly held that "customers of individual plans cannot sue to enforce the Affordable Care Act" but failed to acknowledge any of the authority to the contrary or the intertwining of Section 300gg1-19a standards with ERISA, which are applicable here.

Defendants also contend that the ACA "expressly contemplates administrative rather than private enforcement" but fail to point to any provision in the ACA expressly setting forth an administrative enforcement mechanism that exists in other statutes.[5] Coordinated Mem. 8. And, as outlined above, courts recognize that the ACA may be enforced judicially.

[5] For example, the Federal Trade Commission has a regulatory review process concerning mergers of companies of sufficient size, 16 C.F.R. Parts 801, 802, and 803, but private plaintiffs may also sue to block mergers as anticompetitive, *see, e.g., Am. Sugar Co. v. Cuban-Am. Sugar Co.*, 152 F. Supp. 387, 400 (S.D.N.Y. 1957) *aff'd*, 259 F.2d 524. The Securities and Exchange Commission is empowered to impose fines on publicly traded companies that make misleading statements in its administrative proceedings, 17 C.F.R. §201.1001, but private plaintiffs can also sue for the harm caused by those misleading statements, *see*

Lastly, Coordinated's reliance on *Alexander v. Sandoval*, 532 U.S. 275 (2001) to argue that regulations are not relevant to the analysis of whether a private right of action exists is incorrect, as discussed *supra*. Coordinated Mem. 11. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), an agency's reasonable interpretation of the statute it is entrusted with administering is entitled to deference, and courts have thus cited to HHS regulations stating that a private right of action exists under the ACA as support for ruling to that effect. *See Griffin v. Verizon Communs. Inc.*, No. 1:16-CV-00080-AT, 2017 U.S. Dist. LEXIS 219034, at *8, n.3 (N.D. Ga. Sep. 26, 2017).

E. Plaintiffs' Breach of Contract Claims Are Adequately Pled.

1. Plaintiffs adequately plead breach of contract against Centene.

Centene argues that since Plaintiffs had contracts with its subsidiaries Coordinated and Superior, Plaintiffs cannot allege a breach of contract claim against Centene. Centene Mem. 17. Centene is wrong. "Where the alter ego doctrine applies . . . the two corporations are treated as one for purposes of determining liability." *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1490 (9th Cir. 1983). Under the alter ego doctrine the corporation and

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Superintendent of Ins. v. Bankers Life & Casualty Co. , 404 U.S. 6, 13, n. 9, 92 S.Ct. 165, 169 (1971).

the individual who dominates it are treated as one, "so that any act committed by one is attributed to both, and if either is bound, by contract, judgment, or otherwise, both are equally bound . . . ." *Brown v. Kinross Gold U.S.A., Inc*., 531 F. Supp. 2d 1234, 1241 (D. Nev. 2008) (citation omitted). Indeed, "the Ninth Circuit held recently that a breach of contract claim could proceed if a defendant was an alter ego or successor in interest to a party to the contract." *Brown*, 531 F. Supp. 2d at 1241 (citing *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc*., 336 F.3d 801, 803 (9th Cir. 2003); *see also Sheet Metal Workers Int'l Ass'n, Local No. 359, AFL-CIO v. Ariz. Mech. & Stainless, Inc*., 863 F.2d 647, 651 (9th Cir. 1988). In contrast, the cases upon which Centene relies, *Park v. Ross Edwards* and *T.O. Stanley Boot Co. v. Bank of El Paso*, are inapplicable because they did not involve a defendant being the alter ego of its subsidiaries. Accordingly, as discussed in Section III.B. above, Coordinated is sufficiently alleged to be the alter ego of Centene and Plaintiffs' breach of contract claim has been pled adequately against Centene.

2. Plaintiff Milman Is Excused From Complying with Any Statutory Notice Requirement.

Superior contends that Count II should be dismissed against it because (i) there was an explicit notice requirement with which Plaintiff Milman failed to comply; and (ii) the breach of contract argument was improperly pled as against Superior. Superior Mem. 8-11. Superior is wrong on both points. As demonstrated

below, under established law, Plaintiff Milman's performance of the condition precedent was excused and his contract claims have been properly alleged.

Superior's reliance on *El Paso Cty. v. Sunlight Enterp. Co.*, 504 S.W.3d 922, 927 (Tex. App. 2016) is misplaced. Superior Mem. 9. Plaintiff Milman is the recipient of an insurance policy governed by Texas law. Compl. ¶ 2; Ex. 16 (Milman Policy p. 82). Insurance policies, like the one Plaintiff Milman purchased, are contracts of adhesion under Texas law. *See Vought Aircraft Indus. v. Falvey Cargo Underwriting*, 729 F. Supp. 814, 824 (N.D. Tex. 2010). By contrast, *El Paso* involved a jointly executed construction contract, which the parties negotiated. *See El Paso*, 504 S.W.3d at 930 ("What we do consider significant is that by entering into the construction contract, Sunlight agreed to the seven-day notice requirement and had actual knowledge that failure to provide timely notice would result in waiver of the claim"). Only "[w]hen 'the occurrence of a condition is required by the agreement of the parties . . . [does] a rule of strict compliance traditionally applies.'" *HDS Retail N. Am., L.P. v. PMG Int'l, Ltd.*, No. H-10-3399, 2012 U.S. Dist. LEXIS 139346, at *5 (S.D. Tex. Sep. 27, 2012) (quoting E. Allan Farnsworth, Farnsworth on Contracts § 8.3 at 422-23 (3d ed. 2004)). Milman did not participate in negotiating the terms of his policy with Superior and is therefore is excused from complying with the notice requirement.

"Texas courts [also] excuse non-performance of a condition precedent if the condition's requirement '(a) will involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance.'" *Varel v. Banc One Capital Partners*, 55 F.3d 1016, 1018 (5th Cir. 1995) (quoting *Lesikar Constr. Co. v. Acoustex, Inc.*, 509 S.W.2d 877, 881 (Tex. Civ. App.--Fort Worth 1974, writ ref'd n.r.e.) (quoting Restatement (First) of Contracts § 302)); *see also* Restatement (Second) of Contracts § 229 (replacing First Restatement's § 302) cmt. b (1981) ("In determining whether the forfeiture is 'disproportionate,' a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if the non-occurrence of the condition is excused to the extent required to prevent forfeiture.").

Texas courts construing this test have focused on its second part, examining whether performing the condition precedent was the object of the contract or merely incidental to it, and whether not performing it caused any loss. *Varel*, 55 F.3d at 1018 (citing, *inter alia*, *Huff v. Speer*, 554 S.W.2d 259, 261 (Tex. Civ. App.--Houston [1st Dist.] 1977) (plaintiffs' failure to comply with condition precedent by tendering pledged stock to court registry instead of to debtor excused under Restatement § 302, where non-compliance caused defendants no loss)).

Disallowing Plaintiff from bringing this lawsuit against Defendants based on the notice requirement in the contract would be an "extreme" penalty. Defendants' misrepresentations regarding Centene's provider network and their consistent failure to reimburse legitimate medical claims would result in "extreme forfeiture" of Plaintiff Milman's claims, which courts disfavor. *Varel*, 55 F. 3d at 1018 ("Texas courts disfavor forfeitures") (citing *Huff*, 554 S.W.2d at 261). Nor has Superior demonstrated as a matter of law that the notice requirement "form[ed] [an] essential part of the exchange for the promisor's performance.'" Moreover, Superior has not identified any loss it has suffered as a result of Plaintiff Milman's non-compliance with the contract's condition precedent.

Plaintiff Milman's non-performance of the notice requirement is excusable under well-established Texas law for multiple reasons. *See, e.g.*, *Varel*, 55 F.3d at 1018; *Huff*, 554 S.W.2d at 261. Superior's motion to dismiss should be denied.

3. Plaintiffs Have Properly Alleged Claims for Breach of Contract Against Coordinated and Superior.

Contrary to Superior and Coordinated's arguments, the Complaint provides Defendants with fair notice of Plaintiffs' claims. Defendants' alleged violations of Plaintiffs' rights under the insurance policies, including their rights to a current list of network providers, their rights to adequate access to physicians and medical practitioners and treatments or services, and their rights to medically necessary urgent and emergency services 24 hours a day, 7 days a week (Compl. ¶ 88), are

detailed throughout the Complaint. Plaintiffs have further described how Defendants have failed to provide them with the care and coverage they are entitled to under their policies. *Id.* ¶¶ 59-68. Indeed, Coordinated's consent order with the Washington State Insurance Commissioner refers to many of the same improper actions Plaintiffs allege here, thereby demonstrating the farcical nature of Defendants' arguments.

At this stage of the litigation, the Court "does not engage in debating the terms of the applicable contract. Rather the Court is only concerned with whether the Complaint alleges facts that, if proven, are sufficient to state a claim for relief." *Gordon v. Impulse Mktg. Grp., Inc*., No. CV-04-5125 (FVS), 2006 U.S. Dist. LEXIS 14658, at *14 (E.D. Wash. Mar. 9, 2006). As in *Gordon*, Plaintiffs have alleged what contractual provisions Superior has breached and claimed a loss of monetary damages as a consequence of Defendants' breaches. *Id.* For this reason, Plaintiffs' contract claims are properly pled.

Superior's and Coordinated's reliance on *Starr v. Baca* supports Plaintiffs here. In *Starr*, the Ninth Circuit held that the complaint need only satisfy the pleading standard under F.R.C.P. Rule 8(a) which "need only plausibly suggest an entitlement to relief." *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S.662, 129 S. Ct. 1937, 1951 (2009)) (reversing dismissal of plaintiff's claim stating, "Rule 8(a) 'does not impose a probability

requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' to support the allegations") (quoting *Bell Atlantic v. Twombly*, 550 U.S. 554, 556 (2007)).

Pickern v. Pier 1 Imps. (U.S.), Inc. is likewise inapposite. In *Pickern*, plaintiff alleged "hypothetical, possible barriers" as "substitute for investigating and alleging the grounds of a claim," which the court deemed insufficient to provide adequate notice of the claims alleged. 457 F.3d 963, 969 (9th Cir. 2006). Unlike *Pickern*, Plaintiffs here have provided "notice of the specific allegations" upon which their claims are based. *Id.* at 964; *see, e.g.*, Compl. ¶¶ 59-68, 88. As such, Defendants' contention that they had "no notice of *how* the alleged conduct breached the cited contractual provisions or *how* [Defendants] fell short of [their] obligations" is disingenuous at best. Superior Mem. 11; Coordinated Mem. 12.

Defendants also wrongly assert that Plaintiffs' description of their monetary losses, Comp. ¶ 92, is "vague" and "undefined." Superior Mem. 11; Coordinated Mem. 12. "Uncertainty as to the quantum of damages is not fatal to a litigant's right to recover." *Heller v. McClure & Sons, Inc.*, No. 49788-0-I, 2004 Wash. App. LEXIS 1480, at *5 (Ct. App. July 19, 2004) (citation omitted). It is well-settled that "[w]hen the evidence establishes a right of recovery, but the amount of damages cannot be determined with reliable specificity, nonetheless damages will

be awarded if the evidence is sufficient to afford a reasonable basis for estimating loss." *Id*. at *5.

Superior even admits that Plaintiffs in fact plead monetary loss "consisting of all or part of the amount of the premiums they paid as well as amounts they paid pursuant to improper billings by Defendants and expenses incurred in seeking or obtaining medical services." Superior Mem. 11. This is adequate pleading for an initial complaint under Rule 8. *See, e.g., Echostar Satellite L.L.C. v. Persian Broadcasting Co.*, 2006 U.S. Dist. LEXIS 8955 at *16 (D. Co. Feb. 22, 2006) (rejecting argument that allegation that "as a direct and proximate result of Echostar's breach, Tapesh suffered damages" sufficient for pleading purposes).

The single case relied upon by Superior, *Adolf Jewelers, Inc. v. Jewelers Mut. Ins. Co.*, No. 3:08-cv-233, 2008 U.S. Dist. LEXIS 55791 (E.D. Va. July 21, 2008) does not support its argument. *Adolf Jewelers* involved allegations regarding an insurer's bad faith conduct in violation of the applicable policy, the plaintiff claiming that the defendant violated the duty of good faith and fair dealing by "refusing to pay the full amount of the policy"; and the court concluded that references to "considerable costs and other damages" and that plaintiff was "inconvenienced, lost time and incurred other expenses," without any further elaboration was insufficient. *Id*. at *2-3, *12. Plaintiffs' allegations here not only have nothing to do with bad faith but Plaintiffs alleged that their damages include,

among other things, the amount of their premiums (which alone would suffice), in addition to the out-of-pocket losses Plaintiffs sustained. Compl. ¶¶ 59-68, 88. Such allegations amply fulfill the requirements of Rule 8.

F. Centene Is Liable Under the Washington Consumer Protection Act.

Centene may be held liable for the violations of the Washington Consumer Protection Act that Plaintiff Harvey pleaded in her Complaint. Under the WCPA, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to the plaintiff's business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Centene argues that because Plaintiff Harvey did not buy her policy from Centene directly, Centene cannot be liable under the WCPA. Centene Mem. 18. Centene is incorrect. "An actionable [WCPA] violation can occur without any consumer or business relationship between the particular plaintiff … and the actor." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 39, 204 P.3d 885 (2009); *see also Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 219-220, 135 P.3d 499 (2006) (finding no privity of contract between plaintiff and defendant was required in order to state a CPA claim); *see also* RCW 19.86.090 (stating that "[a]ny person who is injured in his or her business or property" may bring a WCPA claim). This rule furthers the WCPA's purpose "to

protect the public and foster fair and honest competition." RCW 19.86.920. As a result, the fact that Centene did not directly sell Plaintiff Harvey an insurance policy is not fatal to Plaintiff Harvey's WCPA claim against Centene.

Centene further argues that it did not "cause" Plaintiff Harvey's injury. But Plaintiff Harvey alleges that she "viewed information supplied by *Centene* and Coordinated Care through www.wahealthfinder.org" when deciding whether to purchase her policy. Compl. ¶ 59 (emphasis added). Plaintiff further alleges that this information she viewed misrepresented the provider network for the insurance policy that she ultimately purchased and that she was thereby harmed by the misrepresentations. *See id*. ¶¶ 99-103. Centene's statement that none of these documents could constitute representations made by *Centene*, rather than by Coordinated alone, is a question of fact to be resolved at a later stage. Thus, Plaintiff Harvey's allegations against Centene are sufficient at the pleading stage.

G. Centene and Superior Are Liable Under the Texas Deceptive Trade Practices Act ("TDTPA").

"The elements of a TDTPA claim are (1) the plaintiff is a consumer; (2) the defendant committed a false, misleading, or deceptive act; and (3) the act caused the consumer's damages." *Kersh v. UnitedHealthcare Ins. Co.*, 946 F. Supp. 2d 621, 643 (W.D. Tex. 2013) (citing Tex. Bus. & Com. Code Ann. §§ 17.45(4), 17.50(a)). The TDTPA allows a consumer to "maintain an action if he has been

adversely affected by … any unconscionable action or course of action by any person." *Flenniken v. Longview Bank & Tr. Co.*, 661 S.W.2d 705, 706 (Tex. 1983).

The TDTPA provides a cause of action for a consumer to remedy "the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code." TDTPA § 17.50(a)(4). Texas Insurance Code § 541.060(a)(2)(A) provides that an insurer engages in "an unfair or deceptive act or practice" when it "fail[s] to attempt in good faith to effectuate a prompt, fair, and equitable settlement" of a claim for which "the insurer's liability has become reasonably clear." Tex. Ins. Code § 541.060(a)(2)(A).

Plaintiffs meet each of the elements required to establish a claim under the TDTPA. Plaintiffs allege that "Plaintiff Milman and the Texas State Class Members are 'persons' within the meaning of the statutes. Tex. Bus. & Com. Code § 17.45(4)" and were at all relevant times consumers who were in privity of contract with Superior and Centene. Compl. ¶ 108. Plaintiffs also allege that "Defendants were engaged in unfair acts or practices in the conduct of its business by intentionally and knowingly misrepresenting or concealing material facts related to the benefits and coverage of the Ambetter plan, including by misrepresenting the providers within the Ambetter network; by failing to pay legitimate medical claims on behalf of their insureds; by failing to provide the benefits and coverage represented by Defendants to be within the plan; by failing

to address Plaintiff Milman's and Texas State Class members' complaints; by violating state laws and regulations governing the conduct and operations of health insurers, by violating the ACA; and by omitting material facts regarding the benefits and coverage of Ambetter policies". *Id*. ¶ 110.

Where, as here, "an insurer or agent does more than represent that a policy provides full coverage—such as representing that coverage exists in a specific situation—the insurer [] may be liable for a misrepresentation under the [T]DTPA." *Atl. Cas. Ins. Co. v. PrimeLending*, Civil Action No. 3:15-CV-1475-D, 2017 U.S. Dist. LEXIS 34425, at *14 (N.D. Tex. Mar. 10, 2017) (citing *Wyly v. Integrity Ins. Solutions*, 502 S.W.3d 901, 908 (Tex. App. 2016, no pet.) (holding that trial court erred finding no misrepresentation where insurer represented policy provided certain coverage)). Superior and Centene are liable under the TDTPA.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions should be denied.

RESPECTFULLY SUBMITTED AND DATED this 30th day of April, 2018.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on April 30, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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