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Honorable Salvador Mendoza, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

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

SUPERIOR HEALTHPLAN'S REPLY IN SUPPORT OF MOTION TO DISMISS

(Oral Argument: July 19, 10:00 AM)

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Defendant Superior HealthPlan, Inc. ("Superior") is a Texas corporation whose only acts relevant to this suit occurred in Texas. Plaintiffs have produced no facts that would justify the exercise of jurisdiction over Superior in Washington; indeed, their Response contains no additional facts specific to the relationship between Centene Corporation ("Centene") and Superior. All of the claims against Superior should be dismissed.

ARGUMENT

I. Superior Is Not Subject to Specific Jurisdiction in Washington.

Although it is apparently Plaintiffs' position that this Court has specific jurisdiction over Superior (*see* ECF No. 30 at 2, heading III.A ("Resp.")), they submit not a single fact or argument to support that assertion. Nor could they, in light of the undisputed facts set forth in the initial Declaration of Tricia Dinkelman—Superior is a Texas corporation headquartered in Texas; it is not licensed to sell insurance, and does not sell insurance, in Washington; and it has no employees, offices or accounts in Washington. *See* Decl. of Tricia Dinkelman, ECF No. 16-2, ¶¶ 21–26. There is, therefore, no basis to find that Superior has purposefully availed itself of the privilege of conducting activities in Washington, much less that Plaintiffs' claims arise out of any such contacts. *See Axiom Foods,*

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Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017). Absent any such facts, the Court cannot assert specific personal jurisdiction over Superior.

II. Superior Is Not Subject to Personal Jurisdiction on an Alter Ego Theory.

Plaintiffs also contend that Superior is the alter ego of Centene (*see* Resp. 6, heading III.B), but they supply no support for that theory either. Superior adopts the reasoning in Centene's reply, *see* Reply in Supp. of Centene's Mot. to Dismiss, ECF No. 33 at 3–7 ("Centene Reply"), and further notes that much of the new evidence proffered by Plaintiffs does not even pertain to Superior. Plaintiffs fail to overcome the strong presumption against piercing the corporate veil for jurisdictional purposes. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1071 (9th Cir. 2015) (recognizing that veil piercing theory will justify jurisdiction only "in certain limited circumstances").

In addition, even if Plaintiffs had established that Superior is not independent of Centene, they have failed to show that "failure to disregard their separate identities would result in fraud or injustice." *Ranza*, 793 F.3d at 1073 (internal quotation omitted); *see also In re Western States Wholesale Natural Gas Litig.*, 605 F. Supp. 2d 1118, 1134 (D. Nev. 2009) ("Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have not established a fraud

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or injustice would result if the Court failed to pierce the corporate veil."). As averred by Ms. Dinkelman—and not controverted by Plaintiffs—Superior and Centene are distinct corporate entities. Superior has its own board of directors, maintains its own accounts, and is adequately capitalized.

But even if the alter-ego theory applies here (which it does not), there is no personal jurisdiction over Superior, for two additional reasons. First, Plaintiffs' theory that the Court has personal jurisdiction over Superior because it is the alter ego of Centene fails because the Court does not have personal jurisdiction over Centene either, for all the reasons discussed in Centene's motion papers.

Second, even if Centene were subject to jurisdiction and Superior were its alter ego, there would still not be personal jurisdiction over Superior because none of the "suit-related conduct" underlying the claims against Superior occurred in Washington. *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014). Plaintiffs' alter-ego theory is that Centene controls each of its subsidiary's activities and therefore it should be subject to personal jurisdiction in the state where the subsidiary acts. *See* Resp. 6–14. If that were accurate (and it is not), then it might mean that Centene would be subject to personal jurisdiction in Texas based on Superior's contacts. But it provides no grounds for holding Superior to be subject to personal

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jurisdiction in Washington. Neither Superior nor Centene did anything *in Washington* that has any connection to Dr. Milman's claims against Superior.

III. There Is No Basis To Permit Jurisdictional Discovery

Superior adopts the reasoning set forth in Centene's reply on this issue. *See* Centene Reply 7–8. Jurisdictional discovery would serve no purpose because there is no reasonable prospect for Plaintiffs to uncover evidence that Superior had any contacts with Washington.

IV. Count I Should Be Dismissed Because No Private Right of Action Exists for Dr. Milman's Claim under the ACA.

Superior adopts the reasoning set forth in Coordinated Care's reply on this issue. *See* Coordinated Care Reply, ECF No. 34, at 4–11.

V. The Claim for Breach of Contract Must Be Dismissed.

Count II should be dismissed on either of the following grounds: Plaintiff Milman failed to satisfy the condition precedent to asserting a breach of contract claim against Superior, and the breach-of-contract claim is inadequately pled. As to the condition precedent, Plaintiffs effectively concede that Dr. Milman did not serve Superior with the contractually required notice prior to filing suit. Without proper notice, Superior was denied the opportunity to investigate or address Dr.

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Milman's claims. Contrary to Plaintiffs' arguments, the notice requirement applies in this case, and Dr. Milman's violation of that requirement should not be excused.

Plaintiffs argue that Dr. Milman was not required to comply with the notice requirement because the insurance policy was a contract of adhesion. That is incorrect. The sole case that Plaintiffs cite does not stand for the proposition that conditions precedent are binding *only* in agreements negotiated by the parties; it simply states that "when the occurrence of a condition is required by the agreement of the parties, rather than as a matter of law, a rule of strict compliance traditionally applies." *HDS Retail North America, L.P. v. PMG Intern., Ltd.*, No. H-10-3399, 2012 WL 4485332, at *2 (S.D. Tex. 2012) (internal quotation marks and citation omitted). The word "only" was inserted by Plaintiffs. Moreover, the full quotation makes clear that the case was drawing a distinction between a contractual condition and a condition imposed as a matter of law, not between contracts of adhesion and negotiated contracts. Plaintiffs therefore have no support for their argument against applying the condition precedent in this case.

Nor should Dr. Milman's failure to provide notice be excused. Non-performance of a condition precedent can be excused 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

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performance." *Varel v. Banc One Capital Partners*, 55 F.3d 1016, 1018 (5th Cir. 1995) (internal quotation marks and citation omitted). The first requirement for excusal is not satisfied here. Texas courts have found that pre-suit procedural requirements do not impose extreme forfeiture or penalty on plaintiffs and have accordingly dismissed breach of contract claims for failure to meet those requirements. For example, in *Round Rock Research, LLC v. Dell, Inc.*, the court enforced a contractual requirement that the plaintiff attempt to resolve a dispute before filing suit, noting that the plaintiff could comply with the provision and then file a new action. No. 4:11-CV-332, 2012 WL 12893868, at *3 (E.D. Tex. Sept. 17, 2012) (report and recommendation); *see also Cajun Constructors, Inc. v. Velasco Drainage Dist.*, 380 S.W.3d 819, 826 (Tex. App. 2012) (granting summary judgment on breach of contract claim because plaintiff failed to satisfy notice requirements that were conditions precedent to filing suit).

The same logic applies here: enforcing the condition precedent involves no extreme forfeiture or penalty, because Dr. Milman could provide the requisite notice to Superior and, if he were still dissatisfied with Superior's response, file a new complaint. Otherwise, if courts routinely gave plaintiffs a pass on pre-suit procedural requirements at the earliest stage of litigation, as Plaintiffs appear to suggest, those requirements would become meaningless. Because the condition

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precedent applies here and because performance should not be excused, Dr. Milman's failure to provide notice is fatal to his breach of contract claim.

Even assuming *arguendo* that the notice requirement were satisfied or excused, Plaintiffs' breach of contract claim still must be dismissed. The claim does not "give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests," a pleading requirement that Plaintiffs do not contest. *Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (internal quotation omitted). As with the allegations as to Coordinated Care, *see* Coordinated Care Reply at 7–10, the Complaint as to Superior merely raises a few isolated grievances without stating how those grievances reflect the necessary elements of breach, causation, and damages. That is not enough to state a claim.

The only specific allegations related to Dr. Milman's care are one instance in which a particular provider was listed as within network when it was not and one other instance in which Dr. Milman was assigned to a primary care provider that he deemed unsuitable. Compl. ¶¶ 64–65. Plaintiffs do not explain how these two examples, even if true, show that Superior's provider network as a whole was inadequate.

The Superior health insurance contract itself shows that minor grievances like Dr. Milman's do not rise to the level of breach of contract. Like the

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Coordinated Care contract (*see* Coordinated Care Reply at 8), the Superior contract anticipated issues with access to providers and includes a complaint and appeal process to address those issues. Superior Mot. to Dismiss, Ex. 1, ECF No. 18-2 at 76–78. The parties to the contract did not intend for issues that could be handled through the appeal process to become the fodder for federal court litigation.

Dr. Milman's damages claim is also defective. The alleged damages include essentially all the costs that Dr. Milman paid for covered care yet he does not allege that he received no services at all under his insurance plan. Plaintiffs have failed to connect the damages sought with the alleged breach. For all these reasons, the Complaint fails to state a claim for breach of contract.

CONCLUSION

For the foregoing reasons, the Complaint against Superior should be dismissed.

Dated: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

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