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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 MOTION TO DISMISS

(Oral Argument Requested)

Waiting on Plaintiffs' availability for oral argument.

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Defendant Superior HealthPlan, Inc. ("Superior"), by undersigned counsel, hereby moves to dismiss the Complaint in this action pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Superior is a Texas corporation whose principal place of business is in Texas. It is licensed to sell insurance in Texas, and that is the only state in which it does business. Its only contacts in this case are with Plaintiff Dr. Steven Milman, a Texas resident, who alleges that he bought insurance from Superior in Texas but did not get the coverage he expected. Put simply, Superior has zero contacts relevant to this case with Washington.

The Complaint's claims against Superior should be dismissed for lack of personal jurisdiction because Superior has no connections whatsoever with the state of Washington. The conclusory and implausible allegations in the Complaint that Superior is the alter ego of Defendant Centene Corporation ("Centene") do not change this result.

In addition, as to Count I, Plaintiffs fail to state a claim under the Affordable Care Act (ACA) for the reasons set forth in the motion to dismiss of Defendant Coordinated Care Corporation ("Coordinated Care"), and those reasons are incorporated herein by reference. As to Count II, the breach-of-contract claim

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must be dismissed because Dr. Milman failed to provide notice of his intent to sue as required by the contract and because he failed to plead the claim with adequate clarity. Finally, Count III must be dismissed as to Superior because Washington's Consumer Protection Act does not apply to conduct that does not touch Washington.

BACKGROUND

Superior is a Texas corporation with its headquarters in Austin, Texas, and is a wholly owned subsidiary of Centene. Complaint, ECF No. 1 ¶ 5. Superior sells Ambetter-branded plans on the Texas Health Insurance Marketplace. *Id.* Superior is licensed to do business and sell insurance in Texas. Decl. of Tricia Dinkelman, ECF No. 16.2, ¶ 24. Superior is managed by its own board of directors, which meets regularly and keeps its own minutes and agendas. *Id.* ¶ 28. Superior maintains its own accounts and is adequately capitalized to conduct its insurance business in Texas. *Id.* ¶ 29.

Plaintiff Steven Milman is a dentist who lives in Travis County, Texas. Compl. ¶ 2. He alleges that he purchased an Ambetter plan from Superior in January 2017 based on a representation that he viewed on Superior's website that the Austin Diagnostic Clinic was an in-network facility. *Id.* ¶ 63. In fact, according to the Complaint, the Austin Diagnostic Clinic was no longer accepting

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Ambetter patients. *Id.* ¶ 64. Dr. Milman alleges that he was unable to find an in-network primary care physician, was at one point assigned to an obstetrician, and therefore terminated his insurance with Superior on August 1, 2017. *Id.* ¶¶ 65–66.[1]

ARGUMENT

When challenged by a defendant under Federal Rule of Civil Procedure 12(b)(2), a plaintiff bears the burden of setting forth a prima facie case that personal jurisdiction is proper. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015). The plaintiff is entitled to inferences in his favor, and a complaint's uncontroverted allegations are taken as true, but where disputes exist "[a] plaintiff may not simply rest on the bare allegations of the complaint." *Id.* (internal quotation marks omitted). In the class action context, the named plaintiffs must demonstrate personal jurisdiction based on their own claims. *Senne v. Kansas City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 1022 (N.D. Cal. 2015).

To survive a motion under Rule 12(b)(6), a plaintiff must plead "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Threadbare recitals of the elements of a cause of action" or "formulaic

[1] There are no allegations in the Complaint suggesting that Superior ever interacted with the other named Plaintiff, Cynthia Harvey.

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recitation[s] of the elements of a cause of action" are not sufficient under the *Iqbal* standard. *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't*, 911 F. Supp. 2d 1118, 1123 (E.D. Wash. 2012) (internal quotation marks omitted), *aff'd*, 770 F.3d 834 (9th Cir. 2014).

I. This Court Lacks Personal Jurisdiction Over Superior.

The Court may exercise personal jurisdiction over Superior with respect to Dr. Milman's claims only to the extent that a Washington State court of general jurisdiction could do so. Fed. R. Civ. P. 4(k)(1)(A); *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014). Washington's long-arm statute permits the exercise of personal jurisdiction to the same extent that the Fourteenth Amendment's Due Process Clause allows. *See, e.g.*, *SeaHAVN Ltd. v. Glitnir Bank*, 226 P.3d 141, 149 (Wash. Ct. App. 2010). Accordingly, the question before the Court is whether the exercise of jurisdiction over Superior "comports with the limits imposed by federal due process on the State of [Washington]." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (internal quotation marks omitted). Because Superior has no jurisdictionally relevant contacts with Washington, the answer is no.

There are two types of personal jurisdiction—general and specific. Because Superior is a Texas corporation headquartered in Texas, *see* Compl. ¶ 5, general jurisdiction does not apply here. *See Bauman*, 134 S. Ct. at 754; *see also* Centene

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Mot., ECF No. 16, at 6–14. Nor is there specific personal jurisdiction over the company, as explained below.

A. This Court Does Not Have Specific Personal Jurisdiction Over Superior.

For specific personal jurisdiction to be permissible, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121. This substantial connection exists when three requirements are met. First, the defendant must "purposefully direct his activities" toward the jurisdiction or "purposefully avail himself of the privileges of conducting activities in the forum." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (internal quotation marks omitted) (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)). Second, the plaintiff's claims must "arise[] out of or relate[] to the defendant's forum-related activities." *Id.* Third, the exercise of jurisdiction must be reasonable. *Id.* (internal quotation marks omitted). The plaintiff bears the burden of proving the first two requirements. *Id.*

The Complaint does not suggest that Superior has any contacts in Washington at all. It recognizes that Superior is a Texas corporation, headquartered in Texas, which sells insurance in Texas. Compl. ¶ 5. All of the

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events surrounding Dr. Milman's allegations against Superior occurred in Texas, where he lives. *Id.* ¶ 2. He alleges that he bought his plan in reliance on a representation that a Texas group of providers was in-network, which was allegedly false. *Id.* ¶¶ 63–64. He further alleges that he struggled to find a primary care provider and ultimately canceled his contract with Superior, all apparently in Texas. *Id.* ¶¶ 65–66.

Nothing about selling a Texas insurance plan to a Texas resident suggests that Superior has "purposefully avail[ed] [it]self of the privileges of conducting activities in [Washington]." *Axiom Foods*, 874 F.3d at 1068 (internal quotation marks omitted). And in fact, Superior has no relevant contacts with Washington. It does not have offices, employees, or bank accounts in the state. Dinkelman Decl., ECF No. 16.2, ¶ 25–26. Without even the barest contact with the state, much less the level of contacts that the Due Process Clause requires, Superior simply cannot be haled into court in Washington.

B. Superior and Centene Are Not Alter Egos.

The Complaint may also to be read to suggest that the Plaintiffs assert personal jurisdiction over Superior as the alter ego of Centene. As an initial matter, this argument would fail because personal jurisdiction does not lie in this state over Centene either. *See* Centene Mot., ECF No. 16, at 6–14. But even

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assuming that personal jurisdiction were appropriate over Centene, Plaintiffs have failed to demonstrate that Centene and Superior are alter egos.

To reduce redundancy, Superior adopts the legal reasoning from Centene's motion explaining why Centene and Coordinated Care are not alter egos, as that reasoning applies equally here. *See* Centene Mot., ECF No. 16, at 10–14. Put simply, the Plaintiffs cannot show that Centene exercised "pervasive control" over Superior, or that a "failure to disregard their separate identities would result in fraud or injustice." *Ranza*, 793 F.3d at 1073 (internal quotation marks omitted). Below, Superior addresses those factual aspects of the alter ego inquiry that are specific to it.

Superior is governed by its own board of directors, all but one of whom are not directors of Centene. Dinkelman Decl., ECF No. 16.2, ¶ 27. Centene does not manage Superior's day-to-day operations. *Id.* ¶¶ 11–12. Superior's board meets regularly and keeps its own minutes. *Id.* ¶ 28. Superior has its own accounts and is adequately capitalized to conduct an insurance business in Texas. *Id.* ¶ 29.

In sum, there is simply no basis for finding that the Court has personal jurisdiction over Superior under an alter ego theory.

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

Even if the Court were to find that personal jurisdiction is appropriate over Superior, it should nonetheless dismiss Count I because there is no private right of action under the ACA for Dr. Milman's claims. Superior adopts the reasoning set forth in Coordinated Care's motion on this issue. *See* Coordinated Care Mot., ECF No. 17, at 4–11.

III. Count II Should Be Dismissed Because Dr. Milman Failed To Provide Superior with the Contractually Required Notice and Because Dr. Milman Failed To Adequately Plead that Superior Breached Its Contract With Him.

The Court should likewise dismiss Count II for two distinct reasons. *First*, although Dr. Milman alleges that Superior breached its contract with him, prior to commencing this action he failed to comply with an explicit notice requirement in his contract with Superior, which provides:

> Therefore, with a view to avoiding litigation, *you* must give written notice to *us* of *your* intent to sue *us* as a condition prior to bringing any legal action. *Your* notice must:
>
> 1. Identify the coverage, benefit, premium, or other disagreement;
>
> 2. Refer to the specific *contract* provision(s) at issue; and

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> 3. Include all relevant facts and information that support *your* position.

Exhibit 1 at 82–83.

Under Texas law, which governs the contract between Superior and Dr. Milman, contractual provisions that require notice as a condition precedent to suit are enforceable as long as they are reasonable.[2] The provision here is reasonable; it simply requires written notice prior to initiating suit, which allows for the possibility of resolving the matter without resort to litigation.

Dr. Milman does not allege that he provided the required notice to Superior. Although Rule 9(c) allows plaintiffs to "allege generally that all conditions

[2] The relevant Texas statute provides that "[a] contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void." Tex. Civ. Prac. & Rem. Code Ann. § 16.071(a). Texas courts construe this language narrowly to avoid infringing on the freedom to contract. *See El Paso Cty. v. Sunlight Enterps. Co.*, 504 S.W.3d 922, 927 (Tex. App. 2016). In any event, that statutory provision is satisfied here. The pre-condition in Superior's contract imposes no time limit on those seeking to bring suit.

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precedent have occurred or been performed," the allegations here fall short of even that modest bar. Fed. R. Civ. P. 9(c). Plaintiffs merely allege that "[p]laintiffs and the members of the Classes have performed all conditions precedent to the application of the policies." Compl. ¶ 91. Even assuming that to be true, satisfying the conditions for insurance coverage has nothing to do with satisfying the notice requirement for suing on the contract. Without any allegation that the relevant notice provision has been met, Dr. Milman is barred from bringing a breach-of-contract claim against Superior.

Second, even if the notice requirement were satisfied, the breach-of-contract claim would still fail because it is inadequately pled. To survive a motion to dismiss, Plaintiffs' claims "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Put slightly differently, the complaint allegations must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (internal quotation marks omitted). Here, the allegations fail under these standards.

The Complaint plucks from the plan contract some broad language delineating members' rights, and then lists a number of instances in which Dr.

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Milman was dissatisfied with his insurance coverage, as well as conclusory statements about how Superior failed to maintain an adequate network. Taking that approach, any policyholder could transform small scale grievances into a federal case of breach of contract. This approach gives Superior no notice of *how* the alleged conduct breached the cited contractual provisions or *how* Superior fell short of its obligations.

Plaintiffs' allegation of damages is similarly deficient. Plaintiffs describe their monetary loss as "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." Compl. ¶ 92. This vague approach amounts to saying that some undefined portion of what Plaintiff paid Superior represents his damages. Such an undefined claim provides no notice of what compensation Plaintiff is seeking or what specifically was breached, making it impossible for Superior to respond. *See Adolf Jewelers, Inc. v. Jewelers Mut. Ins. Co.*, No. 3:08-CV-233, 2008 WL 2857191, at *4 (E.D. Va. July 21, 2008) ("[A]llegations that [plaintiff] (1) incurred unnecessary and considerable costs and other damages, (2) was inconvenienced, and (3) lost time do not give [defendant insurance company] fair notice of the grounds for [plaintiff's] claim." (internal

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quotation marks omitted)). For both lack of notice and facial inadequacy, the breach-of-contract claim should be dismissed.

IV. Count III Should Be Dismissed Because Superior's Acts Are Not Subject to the Washington Consumer Protection Act.

Count III of the Complaint alleges that defendants violated Washington residents' rights under the Washington Consumer Protection Act (CPA). *See* Compl. ¶¶ 97–105. Superior does not interpret this claim as being pled against it, because there are no allegations in the Complaint that Superior ever took any actions in Washington or harmed a Washington resident.

But to the extent that Plaintiffs are attempting to bring this claim against Superior, the claim fails because the CPA does not apply to claims that do not touch Washington. The CPA applies to "trade" and "commerce," which it defines as including "any commerce directly or indirectly affecting the people of the state of Washington." Wash. Rev. Code Ann. § 19.86.010(2) (West 2018). Superior is a Texas company that sells insurance in Texas to Texas residents, like Dr. Milman. These wholly out-of-state transactions with wholly out-of-state parties do not affect Washington residents, even indirectly, and therefore the CPA does not apply. *See Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 977 (9th Cir. 2016) (holding that CPA does not apply to claim in which no party is a Washington resident and

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the operative acts occurred outside the state). Count III therefore should be dismissed against Superior.

CONCLUSION

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

Dated: March 12, 2018

Respectfully submitted,
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By: */s/ Maren R. Norton*

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 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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