Brendan V. Sullivan, Jr.
Steven M. Cady
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel.: 202-434-5321
scady@wc.com

Maren R. Norton
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Tel.: 206-624-0900
maren.norton@stoel.com

Attorneys for Defendants

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

COORDINATED CARE'S MOTION TO DISMISS

(Oral Argument Requested)

Waiting on Plaintiffs' availability for oral argument.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

TABLE OF CONTENTS

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

TABLE OF AUTHORITIES

FEDERAL CASES

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

OTHER AUTHORITIES

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

Defendant Coordinated Care Corporation ("Coordinated Care"), by undersigned counsel, hereby moves to dismiss Counts I, II, and IV of the Complaint in this action pursuant to Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Since the passage of the Patient Protection and Affordable Care Act ("ACA") in 2010, the health insurance industry has operated under a complex patchwork of federal and state regulations. Governments at both levels work to ensure that health insurance plans sold on the ACA's Health Insurance Marketplace meet certain standards. Some of those standards address the networks of health care providers that insurers must make available to policyholders. The Department of Health and Human Services (HHS), along with its counterparts in the various states, is charged with setting those standards and enforcing them.

Plaintiffs are attempting to step into the shoes of federal and state regulators by using litigation to police network adequacy. This effort appears to be among the first of its kind. The crux of Plaintiffs' Complaint is that Centene Corporation ("Centene") and its Washington and Texas subsidiaries have maintained inadequate provider networks, thereby impeding policyholders' access to the care they needed. The four counts in the Complaint—for violation of the ACA, breach

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

of contract, and violations of Washington and Texas statutes prohibiting deceptive trade practices—are all variations on the same central allegation.

Counts I, II, and IV of the Complaint should be dismissed against Coordinated Care. *First*, there is no private right of action under the relevant provisions of the ACA. *Second*, the Complaint fails to adequately allege a breach of contract. *Third*, the claims arising under the Texas Deceptive Trade Practices Act (TDTPA) cannot be maintained against Coordinated Care. Plaintiffs have not alleged any actions by Coordinated Care that took place in Texas or had any effect on Texas residents.

BACKGROUND

A. Centene's Business.

Plaintiffs bring this action against Centene and its subsidiaries in Washington and Texas, Coordinated Care and Superior HealthPlan, Inc. ("Superior"), respectively. Centene's subsidiaries in various states provide health insurance through the ACA marketplace and other government-sponsored health care programs. Compl., ECF No. 1, ¶ 10. A central part of its mission has been to cover underserved populations that may otherwise lack adequate access to health care. *Id.* ¶ 11. To achieve that goal, Centene subsidiaries operate state-based

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

health plans focused on the needs of local communities. Among other things, these plans market and sell Centene's "Ambetter" brand. *Id.* ¶¶ 4–5.

B. Coordinated Care and Plaintiff Cynthia Harvey's Claims.

Cynthia Harvey is a Spokane, Washington resident. Compl. ¶ 1. Ms. Harvey alleges that she purchased an Ambetter plan from Coordinated Care on the Washington health care exchange website in December 2016. *Id.* ¶ 59. She alleges that, before doing so, she reviewed three documents posted on the exchange website that explained the benefits available under the Ambetter from Coordinated Care plan. *Id.* According to the Complaint, Ms. Harvey required a visit to an emergency room in 2017, where she was treated by an out-of-network physician, leading to a charge of $1,544. *Id.* ¶ 60. She alleges that there were no in-network emergency room doctors in Spokane at the time. *Id.* She also alleges that when she received a colonoscopy, which was a preventive care service available to her under her Coordinated Care plan, her claim was denied in part. *Id.* ¶ 61. Ms. Harvey alleges that other claims she made against her insurance were denied improperly as well. *Id.* ¶ 62.

ARGUMENT

Plaintiffs allege that, by maintaining inadequate provider networks, Coordinated Care violated various provisions of the ACA and its implementing

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

regulations, breached its contracts with policyholders, and ran afoul of the Washington and Texas statutes barring deceptive trade practices. The ACA claims must be dismissed because there is no private right of action under the statute. The breach-of-contract claim must be dismissed because it is pled inadequately. The Texas deceptive-trade practices claim must be dismissed as to Coordinated Care because Plaintiffs have failed to allege that Coordinated Care's conduct affected Texas residents.

I. The Affordable Care Act Claims Must Be Dismissed for Lack of a Private Right of Action.

Plaintiffs cite a host of ACA sections and related regulations as part of their factual allegations but neglect to base their ACA claim on any particular provision of that statute. Compl. ¶¶ 31–37 (related factual allegations), ¶¶ 77–85 (Count I). This sweeping approach does Plaintiffs no favors because the ACA provides no private right of action to enforce any of the cited provisions. Count I of the Complaint must therefore be dismissed for failure to state a claim upon which relief can be granted. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002) (affirming dismissal under Rule 12(b)(6) where federal statute provided no private right of action).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

"Where a federal statute does not explicitly create a private right of action, a plaintiff can maintain a suit only if Congress intended to provide the plaintiff with a[n implied] private right of action." *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1230 (9th Cir. 2008) (internal quotation marks and citation omitted). There is no express right of action written into any of the ACA provisions and regulations cited in the Complaint, and Plaintiffs point to none. The only question then is whether a private right of action can be implied under any of the provisions. The answer is no.

Although Plaintiffs cite many provisions, the alleged ACA violations in Count I appear to turn on only a few, namely those requiring insurers to maintain adequate provider networks, 42 U.S.C. § 18031(c)(1)(B) and 45 C.F.R. § 156.230, and those requiring insurers to include "essential community providers" within those networks, 42 U.S.C. § 18031(c)(1)(C) and 45 C.F.R. § 156.235. The following analysis thus focuses on these provisions. The conclusion applies equally, however, to all provisions cited in the Complaint.

When considering an implied private right of action, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *In re Digimarc*, 549 F.3d at 1231 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). While

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

the Supreme Court has created a four-factor test for implying a private right of action, *Cort v. Ash*, 422 U.S. 66, 78 (1975), congressional intent is the "key inquiry," and the starting point lies in the statute's text and structure. *In re Digimarc*, 549 F.3d at 1231 (internal quotation marks and citation omitted). Without clear evidence of intent, a court cannot find an implied private right of action "no matter how desirable that might be as a policy matter, or how compatible with the statute." *C.O. v. Portland Pub. Schs.*, 679 F.3d 1162, 1167 (9th Cir. 2012) (quoting *Sandoval*, 532 U.S. at 286–87).

For the statutory provisions underlying Plaintiffs' claims, all signs point against implying a private right of action. Plaintiffs primarily rely on a single section of the ACA, 42 U.S.C. § 18031(c). That section requires the Secretary of HHS to set minimum requirements for plans sold on the Health Insurance Marketplace, which are known as qualified health plans (QHPs):

> *The Secretary shall, by regulation, establish criteria* for the certification of health plans as qualified health plans. Such criteria shall require that, to be certified, a plan shall, at a minimum—
>
> . . .
>
> (B) ensure a sufficient choice of providers (in a manner consistent with applicable network adequacy provisions under section 2702(c) of the Public Health Service Act [42 U.S.C. 300gg-1(c)]), and provide information to enrollees and prospective enrollees on the availability of in-network and out-of-network providers;

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

> (C) include within health insurance plan networks those essential community providers, where available, that serve predominately low-income, medically-underserved individuals, such as health care providers defined in section 340B(a)(4) of the Public Health Service Act [42 U.S.C. 256b(a)(4)] and providers described in section 1927(c)(1)(D)(i)(IV) of the Social Security Act [42 U.S.C. 1396r-8(c)(1)(D)(i)(IV)] as set forth by section 221 of Public Law 111-8, except that nothing in this subparagraph shall be construed to require any health plan to provide coverage for any specific medical procedure; . . . .

42 U.S.C. § 18031(c)(1)(B) & (C) (emphasis added).

By their plain text, these provisions do not confer any individual rights or define a class of persons entitled to certain benefits. For that reason, they lack the hallmarks of congressional intent to create a private right of action. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 690–91 n.13 (1979). Indeed, these provisions are "twice removed from the individuals who will ultimately benefit from [the provisions'] protection." *Sandoval*, 532 U.S. at 289. This section of the ACA is focused not on the policyholders covered by the insurance plans or the insurers being regulated but rather "on the agenc[y] that will do the regulating." *Id*. There is no basis to infer any congressional intent to create rights for individual policyholders, like Plaintiffs here, from language that instructs a federal agency to regulate insurers.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

The more natural reading of these provisions is that Congress intended for the agency, HHS, to enforce the ACA's standards for health insurance plans by promulgating and enforcing regulations. Where, as here, the statute expressly contemplates administrative rather than private enforcement, courts should be reluctant to infer individual rights. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289-90 (2002); *Sandoval*, 532 U.S. at 289–90. This is particularly true where the statute calls for a "complex[] and nonjudicial" task for which "administrative agencies are far better suited . . . than judges." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1388 (2015) (Breyer, J., concurring in part and concurring in the judgment).

The ACA requirements at issue fall into that category. The Centers for Medicare & Medicaid Services (CMS), an agency within HHS, works with state regulators to review and certify health insurance plans for compliance with those requirements and can penalize non-compliant issuers with fines or even decertification from the Health Insurance Marketplace. *See* 45 C.F.R. § 156.805(a) (authorizing civil money penalties); 45 C.F.R. § 156.810(a) (authorizing decertification). What is more, the agencies have the necessary expertise to assess the adequacy of a particular insurer's provider network based on local conditions

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

and myriad other factors.[1] By all indication, Congress intended no private right of action.

No court has ever recognized a private right of action under the ACA provisions governing network adequacy and essential community providers. Courts have on occasion dealt with other ACA provisions that similarly do not reference individual rights or that call for administrative enforcement, and those cases invariably found no private right of action.

In one case, the court considered § 2706, which bars insurers from discriminating against providers acting within the scope of their state licenses, and concluded that providers could not sue insurers under that provision. *Ass'n of N.J. Chiropractors, Inc. v. Horizon Healthcare Servs., Inc.*, No. 16-08400 (FLW), 2017 WL 2560350, at *4 (D.N.J. June 13, 2017). In another case, the court declined to imply a private right of action under § 18113, which prohibits discrimination against individuals who refuse to assist in causing death through assisted suicide or other means. *Vt. All. for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227, 240 (D. Vt. 2017). The court recognized that Congress had provided an

[1] Administrative regulations or actions with respect to QHPs are subject to challenges brought under the Administrative Procedures Act, which explicitly authorizes a private right of action. *See* 5 U.S.C. § 702.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

administrative mechanism for dealing with complaints of discrimination. *Id.* In a third case, the court commented broadly that the ACA's requirements for QHPs are to be enforced by the states and by HHS, thereby leaving no room for a private right of action. *Mills v. Bluecross Blueshield of Tenn. Inc.*, No. 3:15-cv-552-PLR-HBG, 2017 WL 78488, at *6 (E.D. Tenn. Jan. 9, 2017). These decisions are well-reasoned and persuasive.

By contrast, some courts *have* implied a private right of action under only one ACA provision, § 1557, which protects individuals participating in certain health programs and activities from discrimination. That section defines the protected class by cross-referencing four federal civil rights statutes and expressly incorporates both their rights-creating language and their private enforcement mechanisms. 42 U.S.C. § 18116(a). Courts have found that these textual cues all but spell out a private right of action, and thus they have allowed private parties to sue under § 1557. *See, e.g., Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698–99 (E.D. Pa. 2015); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 847–48 (D.S.C. 2015). The provisions in the Complaint make no reference to private rights or remedies and therefore are fundamentally different than § 1557. Since the cited provisions lack the rights-creating language that Congress deliberately included in another section of the same statute, this Court

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

should be especially wary of conjuring a private right of action from the congressional silence. *See Walls*, 276 F.3d at 508–09.

Perhaps sensing that the statutory provisions lend little support to their cause, Plaintiffs also allege violations of certain regulations promulgated under the ACA. That gets them no closer to a private right of action: "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.18 (1979)). Therefore, because the ACA creates no private right of action under the cited provisions, whether express or implied, Plaintiffs cannot bring a claim under the related regulations. For these reasons, Count I of the Complaint must be dismissed.

II. The Complaint Fails To Adequately Plead Breach of Contract.

"In order to establish a breach of contract claim, the plaintiff must demonstrate proof of four elements: duty, breach, causation, and damages." *Burlington Insurance Co. v. Blind Squirrel*, LLC, 228 F.Supp.3d 1160 (E.D. Wash. 2017) (citation omitted). 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,

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

1216 (9th Cir. 2011). Put slightly differently, the complaint's 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. The Complaint then lays out a scattering of instances in which Ms. Harvey was dissatisfied with her insurance coverage, as well as conclusory statements alleging that Coordinated Care failed to maintain an adequate network. Taking that tack, any policyholder could transform small scale grievances into a federal case of breach of contract. This approach gives Coordinated Care no notice of *how* the alleged conduct breached the cited contractual provisions or *how* Coordinated Care 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 Ms. Harvey paid Coordinated Care represents her damages. Moreover, Ms. Harvey

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

acknowledges that "[i]n many cases" she successfully appealed the denials of her claims, *id.* ¶ 62, adding further uncertainty to the allegations. Such an undefined claim provides no notice of what compensation Plaintiff is seeking or what specifically was breached, making it impossible for Coordinated Care 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 quotation marks omitted)). This facially inadequate breach-of-contract claim should be dismissed.

III. The Texas Deceptive Trade Practices Act Claims Must Be Dismissed as to Coordinated Care.

Count IV alleges that Defendants violated the TDTPA. Coordinated Care does not read the Complaint as asserting Count IV against it, because the TDTPA does not apply to Coordinated Care's actions as alleged by Plaintiffs. To the extent that Plaintiffs do intend to bring the TDTPA claim against Coordinated Care, the claim fails.

The TDTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Tex. Bus. & Com. Code Ann. § 17.46(a)

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

(West 2017). The conduct covered under the statute "shall include any trade or commerce directly or indirectly affecting *the people of this state*." Tex. Bus. & Com. Code Ann. § 17.45(6) (emphasis added). In interpreting this language, courts have found the TDTPA inapplicable where the alleged actions "occurred outside of Texas and it could not have been anticipated that they would have an effect on a Texas resident." *Bass v. Hendrix*, 931 F. Supp. 523, 536 (S.D. Tex. 1996); *see also Cogan v. Triad Am. Energy*, 944 F. Supp. 1325, 1336 (S.D. Tex. 1996) (dismissing a TDPTA claim where "every operative fact occurred outside of the state of Texas").

Here, Plaintiffs do not allege that Coordinated Care's actions had any connection with Texas. To the contrary, the Complaint describes how Centene operates through separate subsidiaries focused on particular states, specifically Coordinated Care in Washington and Superior in Texas. Compl. ¶¶ 22–30. It explains how Plaintiff Milman researched the insurance policy on Superior's website and dealt exclusively with Superior. *Id*. ¶¶ 63–66. Nowhere in the Complaint do Plaintiffs allege any conduct by Coordinated Care that affected Dr. Milman or any other Texas residents. There is thus no allegation that Coordinated Care engaged in "trade" or "commerce" as defined under the TDTPA. Therefore, Count IV should be dismissed as to Coordinated Care.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts I, II, and IV of the Complaint.

Dated: March 12, 2018

Respectfully submitted,

STOEL RIVES LLP

By: */s/ Maren R. Norton*
Maren R. Norton
600 University Street, Suite 3600
Seattle, WA 98101
Tel.: 206-624-0900
maren.norton@stoel.com

Brendan V. Sullivan, Jr.
(*Pro Hac* application pending)
William R. Murray, Jr.
(*Pro Hac* application forthcoming)
George A. Borden
(*Pro Hac* application forthcoming)
Steven M. Cady
(*Pro Hac* application pending)
Andrew C. McBride
(*Pro Hac* application forthcoming)
Meng Jia Yang
(*Pro Hac* application forthcoming)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel.: 202-434-5321
Fax: 202-434-5029
scady@wc.com

Attorneys for Defendants

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.

s/Sherry R. Toves
Sherry R. Toves, Practice Assistant
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Phone: (206) 624-0900
Email: sherry.toves@stoel.com