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8 UNITED STATES DISTRICT COURT FOR THE
 9 EASTERN DISTRICT OF WASHINGTON

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

11 Plaintiffs,

12 v.

13 CENTENE CORPORATION,
 14 COORDINATED CARE
 CORPORATION, and SUPERIOR
 15 HEALTHPLAN, INC.,

16 Defendants.

NO. 2:18-cv-00012-SMJ

**JOINT STATUS REPORT AND
DISCOVERY PLAN**

Telephonic Scheduling Conference:
March 22, 2018 at 8:40 a.m.

17
 18 In accordance with Federal Rule of Civil Procedure 26(f), counsel for the
 19 parties conferred by telephone on March 5, 2018. Plaintiffs Cynthia Harvey and
 20 Steven A. Milman were represented by attorneys Beth E. Terrell, Elizabeth A.

1 Adams, and Seth Lesser. Defendants Centene Corporation (“Centene”),
2 Coordinated Care Corporation (“Coordinated Care”), and Superior HealthPlan, Inc.
3 (“Superior”) (collectively “Defendants”) were represented by William Murray,
4 Steven Cady, and Andrew McBride.¹ The parties discussed the topics identified by
5 the Court in its Notice Setting Court’s Telephonic Scheduling Conference dated
6 February 5, 2018. The parties jointly submit the following report setting forth the
7 topics discussed and agreements reached during the Rule 26(f) discussions:

8 **A. Consent to U.S. Magistrate.**

9 The Clerk’s Office has been notified that the parties do not consent to the
10 case being heard by a U.S. Magistrate Judge.

11 **B. Jurisdiction and Venue.**

12 1. Plaintiffs’ Position.

13 Plaintiffs’ position is that jurisdiction exists in this Court pursuant to 28
14 U.S.C. § 1332(d)(2). The amount in controversy, exclusive of interest and costs,
15 exceeds the sum or value of \$5,000,000 and at least one of the proposed class is a
16 citizen of a state other than Washington, Missouri, Indiana, Delaware, and Texas,
17 which are Defendants’ states of citizenship. Jurisdiction also lies with this Court

18
19
20

¹ Centene and Superior believe that this Court lacks personal jurisdiction over them in this matter because, among other things, neither has sufficient contacts with the State of Washington in connection with the allegations in this suit. Centene and Superior will file motions to dismiss, seeking to be dismissed from this action, at the time set by the Court.

1 pursuant to 28 U.S.C. § 1331 based on the federal Affordable Care Act, 42 U.S.C.
2 § 18001, et seq. (“ACA”) claims asserted by Plaintiffs.

3 Plaintiffs’ position is that venue is proper in this district pursuant to 28
4 U.S.C. §1391(a) and (b) because a substantial part of the events or omissions
5 giving rise to the Plaintiffs’ claims occurred in this judicial district. Venue is also
6 proper under 18 U.S.C. §1965(a) because Defendants transact substantial business
7 in this district.

8 2. Defendants’ Position.

9 Centene and Superior believe that this Court lacks personal
10 jurisdiction over them in this matter because, among other things, neither has
11 sufficient contacts with the State of Washington arising out of or relating to
12 Plaintiffs’ claims as to be subject to personal jurisdiction in the state.

13 **C. Service of Process.**

14 Service of process is complete.

15 **D. Claims and Defenses.**

16 1. Plaintiffs’ Claims.

17 Plaintiffs bring this class action pursuant to Federal Rule of Civil Procedure
18 23(a), (b)(2), and (b)(3), individually and on behalf of persons who were or are
19 Ambetter policyholders from January 11, 2012 to the present, against Defendants.
20 Plaintiffs allege that Centene is one of the nation’s largest insurers providing

1 coverage through the ACA. Plaintiffs allege that Centene targets low-income
2 customers who qualify for substantial government subsidies while simultaneously
3 providing coverage well below what is required by law and by its policies.
4 Plaintiffs allege that the provider network Centene represented was available to
5 policyholders was in material measure fictitious. Plaintiffs allege that members
6 have difficulty finding medical providers who will accept Ambetter insurance.
7 Plaintiffs further allege that Centene misrepresents the number, location, and
8 existence of purported providers by listing physicians, medical groups, and other
9 providers as participants in their network and by listing nurses and other non-
10 physicians as primary care providers. Plaintiffs further allege that Ambetter
11 policyholders learn of the limitations on available providers only after they commit
12 to the insurance and are locked into the Ambetter policy. Plaintiffs allege that
13 Defendants' sales materials omit to state that Centene and its subsidiaries do not
14 adequately monitor their network of providers nor do they provide required reports
15 of their inadequate network to the Insurance Commissioners in their respective
16 states. Plaintiffs allege the Ambetter documentation also fails to disclose that
17 Centene does not consistently provide access to "medically necessary care on a
18 reasonable basis" without charging for out-of-network services. Plaintiffs allege
19 that Defendants also fail to reimburse medical providers' legitimate claims,
20 routinely citing "insufficient diagnostic" evidence as the reason. Plaintiffs allege

1 that as a result of Centene failing to pay providers for legitimate claims, a large
2 number of medical providers reject Ambetter insurance, further reducing the
3 provider network available to Ambetter's members.

4 Based on these allegations, Plaintiffs bring the following claims: (1) Breach
5 of the Affordable Care Act, 42 U.S.C. §§ 18001, *et seq.*; (2) Breach of Contract;
6 (3) Unfair Business Practices under RCW §§ 19,86.010, *et seq.* (on behalf of
7 Washington State Class); Unfair Business Practices and Consumer Fraud under
8 Texas Bus. & Prof. Code §§ 17.41, *et seq.* (on behalf of Texas State Class).

9 Plaintiffs seek to certify a Nationwide Class defined as "All persons in the
10 United States who were insured by Defendants' Ambetter insurance product which
11 was purchased through an ACA HIE from January 11, 2012 to the present (the
12 "Nationwide Class"). Excluded from the Nationwide Class are Defendants,
13 Defendants' employees, Defendants' subsidiaries, the Judge(s) to which this case
14 is assigned and the immediate family of the Judge(s) to which this case is
15 assigned." In the alternative, Plaintiffs seek to certify a State of Washington Class
16 defined as "All persons in the state of Washington who were insured by
17 Defendants' Ambetter insurance product which was purchased through an ACA
18 HIE from January 11, 2012 to the present (the "Washington State Class").
19 Excluded from the Washington State Class are Defendants, Defendants'
20 employees, Defendants' subsidiaries, the Judge(s) to which this case is assigned

1 and the immediate family of the Judge(s) to which this case is assigned. In the
2 alternative, Plaintiffs seek to certify a Texas State Class defined as: All persons in
3 the state of Texas who were insured by Defendants' Ambetter insurance product
4 which was purchased through an ACA HIE from January 11, 2012 to the present
5 (the "Texas State Class"). Excluded from the Texas State Class are Defendants,
6 Defendants' employees, Defendants' subsidiaries, the Judge(s) to which this case
7 is assigned and the immediate family of the Judge(s) to which this case is assigned.

8 Plaintiffs further allege that the elements of Fed. R. Civ. P. 23(a) and
9 23(b)(2) and 23(b)(3) are satisfied. Plaintiffs seek economic and compensatory
10 damages, restitution, actual damages sustained or treble damages, injunctive and
11 declaratory relief, punitive damages where allowed under governing law,
12 reasonable attorneys' fees, and reimbursement of all costs incurred prosecuting this
13 action.

14 2. Defendants' Defenses.

15 Defendants Centene and two of its subsidiaries, Coordinated Care and
16 Superior intend to raise a number of defenses in response to Plaintiffs' allegations.
17 *First*, there is no private right of action under the ACA. *Second*, the Complaint
18 fails to adequately allege a breach of contract. *Third*, the Complaint fails to state
19 any claim against Centene. *Fourth*, the unfair business practices claim under
20 Washington law cannot be maintained against Coordinated Care, and the

1 analogous claim under Texas law cannot be maintained against Superior. *Finally*,
2 this Court lacks personal jurisdiction over Centene and Superior in this matter
3 because, among other things, neither has sufficient contacts with Washington
4 arising out of or relating to Plaintiffs' claims as to be subject to personal
5 jurisdiction here.

6 **E. Constitutionality of Statute.**

7 The constitutionality of a statute is not being challenged.

8 **F. Class Action Status.**

9 Plaintiffs will seek to certify this case as a class action under Federal Rule of
10 Civil Procedure 23(a) and 23(b)(2) and 23(b)(3). Assuming Plaintiffs receive the
11 discovery they will request from Defendants, Plaintiffs anticipate they will file
12 their class certification motion within one year. The parties may involve experts in
13 class certification, and, if they decide to involve experts, the parties will seek
14 agreement among themselves regarding a joint proposal to the Court regarding
15 deadlines for expert work relating to class certification.

16 **G. Certification to State Supreme Court**

17 The parties do not anticipate requesting that any issue be certified to the
18 Washington State Supreme Court.

1 **H. Deadline for Amending Pleadings.**

2 The parties suggest that the deadline for amending the pleadings be set for
3 September 29, 2018.

4 **I. Deadline for Adding Additional Parties.**

5 The parties suggest that the deadline for adding additional parties be set for
6 September 29, 2018.

7 **J. Ownership Statements.**

8 Defendants will file the necessary ownership statements required by Fed. R.
9 Civ. Proc. 7.1 on March 8, 2018.

10 **K. Minor or Incompetent Party.**

11 This case does not involve a minor or incompetent party, and the
12 appointment of a guardian ad litem is not necessary.

13 **L. Issues for Status/Scheduling Conference**

14 1. Discovery Plan.

15 a. Subjects of Discovery.

16 Plaintiffs will seek discovery related to class certification, liability, and
17 damages. Plaintiffs will serve their First Sets of Interrogatories and Requests for
18 Production within 45 days of the ruling on Defendants' motions to dismiss. The
19 types of information sought in these requests will include: (1) Defendants policies,
20 practices, and procedures for developing, maintaining, and marketing their

1 Ambetter Health Plan; (2) Defendants policies, practices, and procedures for
2 developing, maintaining, and marketing their Ambetter Health Plan provider
3 network; (3) consumer complaints regarding the Ambetter Health Plan and
4 Defendants' provider network; (3) Defendants' knowledge about problems with
5 their provider network and efforts to monitor; and (4) audits, regulatory
6 investigations, and lawsuits relating to the Ambetter Health Plan and the
7 sufficiency of Defendants' provider network.

8 Defendants are filing motions to dismiss on March 12, 2018. Defendants
9 believe those motions should be resolved before the parties commence discovery.

10 To the extent certain Defendants are not dismissed and relevant claims remain,
11 those Defendants anticipate seeking discovery related to class certification,
12 liability, and damages. Defendants will serve their First Sets of Interrogatories and
13 Requests for Production within 45 days of the ruling on Defendants' motions to
14 dismiss. The types of information sought in these requests will include, among
15 other things: (1) materials relating to Plaintiffs' communications with Defendants;
16 (2) materials relating to Plaintiffs' communications with health care providers; (3)
17 materials relating to Plaintiffs' requests for services covered by the applicable
18 insurance policies; (4) materials relating to Plaintiffs' need for services covered by
19 the applicable insurance policies; (5) materials relating to Plaintiffs' selection of
20 insurance policies for the relevant time period; (6) materials relating to Plaintiffs'

1 damages; and (7) materials relating to Plaintiffs' communications regarding their
2 claims.

3 b. Protocol for Production of Electronic Discovery.

4 Plaintiffs' discovery requests include a request for electronically stored
5 information ("ESI"). The parties will endeavor to agree upon a protocol for the
6 exchange of discoverable ESI.

7 c. Claims of Privilege, Protection of Confidentiality, and Proposed
8 Agreements

9 At this time, the parties agree that no changes should be made to the Federal
10 and Local Civil Rules and federal and state law governing issues of privilege and
11 work-product protection.

12 2. Special Procedures.

13 The parties agree that this case is not appropriate for any special procedures.
14 The parties reserve the right to revisit this assessment as the case progresses.

15 3. Modification of Standard Pretrial Procedures.

16 This case is a proposed class action. Therefore, the parties agree that the
17 deadlines set forth in the Court's Notice Setting Court's Scheduling Conference
18 (ECF No. 28) should be modified to include a briefing schedule for class
19 certification. If Defendants' motion to dismiss is denied, then the parties propose
20 that the Court set a schedule through class certification. After the Court rules on
class certification, the parties propose that they propose a schedule that sets

1 deadlines to (1) send notice of the class action to the class if the class is certified,
2 (2) opt out of the class if the class is certified, (3) complete fact discovery, (4)
3 exchange expert disclosure, (5) complete expert discovery, (6) complete pre-trial
4 deadlines and (7) a trial date.

5 4. Bifurcation.

6 a. Plaintiffs' Position

7 Plaintiffs believe that this case should be bifurcated between liability and
8 damages.

9 b. Defendants' Position

10 Defendants believe that discovery regarding Plaintiffs' damages will be
11 necessary to resolve issues that will present themselves early in the case, and
12 therefore oppose bifurcation.

13 5. Modification to Standard Discovery Procedures.

14 The parties agree to make reasonable efforts to work cooperatively and
15 litigate efficiently. The parties have stipulated to the electronic service of all
16 documents, including discovery requests and responses. The parties suggest that
17 the Court permit the parties to bring any discovery disputes that they cannot
18 resolve through the meet and confer process to the Court's attention through
19 informal letter briefs or telephonic hearings.

1 6. Suggested Expert Disclosures.

2 The parties propose that the deadline for expert discovery be set after the
3 Court rules on Plaintiffs' motion for class certification. As noted above, the parties
4 may involve experts in class certification, and, if they decide to involve experts,
5 the parties will seek agreement among themselves regarding a joint proposal to the
6 Court regarding deadlines for expert work relating to class certification.

7 7. Suggested Discovery Cut-Off.

8 The parties propose that the deadline to complete discovery be set after the
9 Court rules on Plaintiffs' motion for class certification.

10 8. Anticipated Fed. R. Evid. 502 Agreements.

11 The parties propose an agreed protective order/confidentiality agreement
12 that addresses inadvertent disclosures under FRE 502. *See* Exhibit A to this report.

13 **M. Proposed Protective Order.**

14 A proposed protective order is attached as Exhibit A to this report.

15 **N. Anticipated Motions and Suggested Dispositive Motion Filing Deadline.**

16 Plaintiffs anticipate filing a class certification motion. Plaintiffs have
17 proposed a briefing schedule in the table below. Plaintiffs suggest that the Court
18 set a deadline to hear dispositive motions after the Court has ruled on the class
19 certification motion and, if a class is certified, class members have been given an
20 opportunity to opt out.

1 Defendants will file motions to dismiss on March 12, 2018.

2 **O. Trial.**

3 The parties propose that the Court set a trial date after it rules on class
4 certification. The parties propose that within five business days after the class
5 certification ruling, the parties meet and confer and jointly propose a schedule for
6 completing fact and expert discovery, briefing dispositive motions, and completing
7 other pre-trial deadlines.

8 **P. Dispute Resolution.**

9 The parties agree that this case may benefit from private mediation after a
10 sufficient period of discovery has occurred.

11 **Q. Proposed Schedule.**

EVENT	DEADLINE
Deadline to Add Parties	September 29, 2018
Deadline to Amend	September 29, 2018
Motion for Class Certification	December 17, 2018
Response to Class Certification	February 14, 2019
Class Certification Reply	March 28, 2019
Hearing on Class Certification	To be set by the Court
Expert Witness Disclosures	To be set after the Court rules on class certification

EVENT	DEADLINE
Rebuttal Expert Witness Disclosures	To be set after the Court rules on class certification
Discovery Cut off	To be set after the Court rules on class certification
Dispositive Motions	To be set after the Court rules on class certification
Exhibit Lists/Witnesses	To be set after the Court rules on class certification
Final Status Conference	To be set after the Court rules on class certification
Objections to Exhibits/witness lists	To be set after the Court rules on class certification
Motions in Limine	To be set after the Court rules on class certification
Pretrial Order	To be set after the Court rules on class certification
Trial Briefs	To be set after the Court rules on class certification
Jury Instructions/Voir Dire	To be set after the Court rules on class certification
Pretrial Conference	To be set after the Court rules on class certification
Trial	To be set after the Court rules on class certification

1 **N. Trial Counsel Contact Information.**

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RESPECTFULLY SUBMITTED AND DATED this 8th day of March,

2018.

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1 CERTIFICATE OF SERVICE

2 I, Beth E. Terrell, hereby certify that on March 8, 2018, I electronically filed
3 the foregoing with the Clerk of the Court using the CM/ECF system which will
4 send notification of such filing to the following:

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DATED this 8th day of March, 2018.

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