   NeutralAs of: August 8, 2018 7:03 PM Z



# [***Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=)

United States District Court for the District of Colorado

July 13, 2016, Decided; July 13, 2016, Filed

Civil Action No. 12-cv-3012-WJM-NYW

**Reporter**

2016 U.S. Dist. LEXIS 185150 \*

KISSING CAMELS SURGERY CENTER, LLC, CHERRY CREEK SURGERY CENTER, LLC, ARAPAHOE SURGERY CENTER, LLC, and HAMPDEN SURGERY CENTER, LLC, Plaintiffs and Counterdefendants, v. CENTURA HEALTH CORPORATION, COLORADO AMBULATORY SURGERY CENTER ASSOCIATION, INC., ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD OF COLORADO, UNITEDHEALTHCARE OF COLORADO, INC., and AETNA, INC., Defendants and Counterclaimants.UNITEDHEALTHCARE OF COLORADO, INC., Counterclaimant v. SURGICAL CENTER DEVELOPMENT, INC., d/b/a SURGCENTER DEVELOPMENT, Counterdefendant.

**Prior History:** [*Kissing Camels Surgery Ctr., LLC v. HCA Inc., 2013 U.S. Dist. LEXIS 10997 (D. Colo., Jan. 25, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57M4-WPB1-F04C-V024-00000-00&context=)

**Core Terms**

Counterclaimants, insureds, in-network, out-of-network, motion to dismiss, providers, claim form, patient, ***antitrust***, services, practices, waive, cost sharing, allegations, tortious interference, unjust enrichment, deductibles, costs, reimbursement, conspiracy, plans, cause of action, health plan, misrepresentation, deception, parties, dismissal with prejudice, contractual, preemption, conspire

**Case Summary**

**Overview**

HOLDINGS: [1]-Health insurers and plan administrators could not pursue a counterclaim for a declaratory judgment finding that ambulatory surgery centers (ASCs) had violated [*Colo. Rev. Stat. § 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=) by waiving out-of-network insureds' deductibles and other cost sharing responsibility payments, as there was no private right of action under [*§ 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=); [2]-***Antitrust*** claims against the ASCs under the Colorado ***Antitrust*** Act and the *Sherman Act* failed because ***antitrust*** injury was not plausibly alleged. To the extent that the insurers and administrators paid an artificially inflated reimbursement, the injury was self-inflicted because they were contractually privileged not to pay anything to the ASCs; [3]-An insurer was not required at the pleading stage to identify the actual ERISA plans at issue in order to state a claim under *29 U.S.C.S. § 1132(a)(3)*.

**Outcome**

Motion to dismiss counterclaims granted in part and denied in part.

**LexisNexis® Headnotes**

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc1)[] **Pleadings, Counterclaims**



Under [*Fed. R. Civ. P. 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a party may move to dismiss a cause of action for failure to state a claim upon which relief can be granted. The [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) standard requires the court to assume the truth of the plaintiff's or counterclaimant's well-pleaded factual allegations and view them in the light most favorable to the plaintiff. In ruling on such a motion, the dispositive inquiry is whether the complaint or counterclaim contains enough facts to state a claim to relief that is plausible on its face. Granting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice. Thus, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Healthcare Law > ... > Insurance Coverage > Health Insurance > Patient Obligations

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc2)[] **Health Insurance, Patient Obligations**



Colorado has declared that a regular business practice of forgiving copays and deductibles is against public policy: (1) The general assembly hereby finds, determines, and declares that: (a) business practices that have the effect of eliminating the need for actual payment by the recipient of health care of required copayments and deductibles in health benefit plans interfere with contractual obligations entered into between the insured and the insurer relating to such payments; (b) such interference is not in the public interest when it is conducted as a regular business practice because it has the effect of increasing health care costs by removing the incentive that copayments and deductibles create in making the consumer a cost-conscious purchaser of health care; and (c) advertising of such practices may aggravate the adverse financial and other impacts upon recipients of health care. (2) Therefore, the general assembly declares that such business practices are illegal and that violation thereof or the advertising thereof shall be grounds for disciplinary actions. [*Colo. Rev. Stat. § 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=).

Governments > Legislation > Statutory Remedies & Rights

Healthcare Law > ... > Insurance Coverage > Health Insurance > Patient Obligations

Torts > ... > Commercial Interference > Contracts > Intentional Interference

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc3)[] **Legislation, Statutory Remedies & Rights**



There is no private right of action under [*Colo. Rev. Stat. § 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=). Such a private right of action would likely be duplicative of a tort claim for interference with contract, since the statute provides that the prohibited business practices interfere with contractual obligations entered into between the insured and the insurer.

***Antitrust*** & Trade Law > Sherman Act

***Antitrust*** & Trade Law > ***Regulated*** Practices > Private Actions > State ***Regulation***

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc4)[] **Antitrust & Trade Law, Sherman Act**



The Colorado ***Antitrust*** Act is the state law analogue to the *Sherman Act*, *15 U.S.C.S. § 1 et seq.* [*Colo. Rev. Stat. § 6-4-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SNV-B810-004D-11FV-00000-00&context=) provides that the courts shall use as a guide interpretations given by the federal courts to comparable federal ***antitrust*** laws. Federal ***antitrust*** law principles apply to both federal and state ***antitrust*** claims.

***Antitrust*** & Trade Law > ***Regulated*** Practices

Business & Corporate Law > Joint Ventures

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc5)[] **Antitrust & Trade Law, Regulated Practices**



The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise, and a single enterprise cannot conspire with itself to engage in anticompetitive conduct. This has been extended to other forms of joint business ventures, such as a restaurant franchisor and its franchisees.

***Antitrust*** & Trade Law > ***Regulated*** Practices

Business & Corporate Law > Joint Ventures

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc6)[] **Antitrust & Trade Law, Regulated Practices**



The key to determining whether a joint venture comprises distinct entities capable of conspiring is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a contract, combination or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition. This requires a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. Thus, it is a fact-specific inquiry.

***Antitrust*** & Trade Law > ***Regulated*** Practices

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

[***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc7)[] **Antitrust & Trade Law, Regulated Practices**



A group of franchisees which centralize only certain distinct tasks, and that otherwise do or should compete with each other, may be capable of conspiring in violation of ***antitrust*** laws.

***Antitrust*** & Trade Law > Sherman Act > Claims

***Antitrust*** & Trade Law > ... > Private Actions > Standing > Requirements

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc8)[] **Sherman Act, Claims**



***Antitrust*** injury is not enumerated as an element of any *Sherman Act*, *15 U.S.C.S. § 1 et seq.*, claims, yet it is a necessary element of any ***antitrust*** claim brought by a private party. The notion of ***antitrust*** injury recognizes that conduct in violation of the ***antitrust*** laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The ***antitrust*** injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. Thus, injury, although causally related to an ***antitrust*** violation, nevertheless will not qualify as "***antitrust*** injury" unless it is attributable to an anti-competitive aspect of the practice under scrutiny. In other words, the complained-of conduct must have a tendency, for example, to decrease the number of competitors (either through barriers to entry or practices that drive competitors out of the market) or to reduce the incentive for competitors to compete with each other.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

[***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc9)[] **Amendment of Pleadings, Leave of Court**



A district court may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint.

Business & Corporate Compliance > ... > Pensions & Benefits Law > ERISA > Fiduciaries

Pensions & Benefits Law > ERISA > Civil Litigation > Causes of Action

Pensions & Benefits Law > ... > Remedies > Equitable Relief > Injunctions

[***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc10)[] **Employee Retirement Income Security Act (ERISA), Fiduciaries**



The Employee Retirement Income Security Act (ERISA), [*29 U.S.C.S. § 1001 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJT1-NRF4-4454-00000-00&context=), permits an ERISA plan fiduciary to bring an action (A) to enjoin any act or practice which violates any provision of the subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan. *29 U.S.C.S. § 1132(a)(3)*.

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims

[***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc11)[] **Pleadings, Counterclaims**



There are often sound litigation reasons to plead a mirror-image counterclaim (e.g., the plaintiff alleges patent infringement while the defendant counterclaims for declaratory judgment of non-infringement). A plaintiff could decide to withdraw the original claim but the defendant might nonetheless want declaratory judgment of non-liability, to remove any uncertainty going forward regarding the parties' rights and duties.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

[***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc12)[] **Defenses, Demurrers & Objections, Motions to Dismiss**



A court may consider an exhibit attached to a motion to dismiss if it is mentioned in the complaint, it is central to the claims being challenged, and its authenticity is not disputed.

Pensions & Benefits Law > ERISA > Federal Preemption

[***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc13)[] **ERISA, Federal Preemption**



ERISA, [*29 U.S.C.S. § 1001 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJT1-NRF4-4454-00000-00&context=), includes expansive preemption provisions to ensure that employee benefit plan ***regulation*** would be exclusively a federal concern. There are two aspects of ERISA preemption: (1) conflict preemption and (2) remedial or complete preemption.

Pensions & Benefits Law > ERISA > Federal Preemption

[***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc14)[] **ERISA, Federal Preemption**



If a party could have brought its claim under [*ERISA § 502(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJP1-NRF4-42X4-00000-00&context=), *29 U.S.C.S. § 1132(a)*, and where there is no other independent legal duty that is implicated by a defendant's actions, then the party's cause of action is completely preempted by [*ERISA § 502(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJP1-NRF4-42X4-00000-00&context=).

Pensions & Benefits Law > ERISA > Federal Preemption

[***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc15)[] **ERISA, Federal Preemption**



ERISA, [*29 U.S.C.S. § 1001 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJT1-NRF4-4454-00000-00&context=), preemption does not apply to non-ERISA health plans.

Torts > ... > Contracts > Intentional Interference > Elements

[***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc16)[] **Intentional Interference, Elements**



Colorado recognizes the tort of intentional interference with contractual relations. One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Healthcare Law > ... > Insurance Coverage > Health Insurance > Patient Obligations

Torts > ... > Contracts > Intentional Interference > Elements

[***HN17***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc17)[] **Health Insurance, Patient Obligations**



In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties. Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an interference improper. Colorado has declared that a regular business practice of forgiving copays and deductibles is against public policy and an abuse of health insurance.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > Remedies > Damages > Types of Damages

[***HN18***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc18)[] **Civil Conspiracy, Elements**



To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result. Civil conspiracy is not a traditional cause of action, but is a means for establishing vicarious liability for an underlying tort. Recovery of damages in a civil action for conspiracy is not based on the conspiracy itself, but on damages resulting from an overt act or acts of one or more of the defendants, resulting from the conspiracy.

***Antitrust*** & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State ***Regulation***

[***HN19***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=LNHNREFclscc19)[] **Deceptive & Unfair Trade Practices, State Regulation**



To prove a private cause of action under the Colorado Consumer Protection Act, [*Colo. Rev. Stat. § 6-1-101 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SNV-B810-004D-1185-00000-00&context=), a plaintiff must show: (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury.

**Counsel:** **[\*1]**For Kissing Camels Surgery Center LLC, Arapahoe Surgery Center LLC, Hampden Surgery Center LLC, Cherry Creek Surgery Center LLC Plaintiffs, Counter Defendants: Joe Ramon Whatley, Jr., LEAD ATTORNEY, Patrick Joseph Sheehan, Whatley Kallas, LLP-Aspen, Aspen, CO; Alan McQuarrie Mansfield, Whatley Kallas, LLC-San Diego, San Diego, CA; D. Jamie Carruth, William Tucker Brown, Whatley Kallas, LLC-Birmingham, Birmingham, AL; Deborah Jane Winegard, Whatley Kallas, LLC-Atlanta, Atlanta, GA; Edith M. Kallas, Ilze C. Thielmann, Michael Scott Lyons, Whatley Kallas, LLC-New York, New York, NY; Henry C. Quillen, Whatley Kallas, LLC-Portsmouth, Portsmouth, NH.

For Centura Health Corporation, Defendant: Melvin B. Sabey, LEAD ATTORNEY, Hall Render Killian Heath & Lyman, P.C., Denver, CO; Brett William Bell, Robert E. Haffke, Thomas Demitrack, Jones Day-Cleveland, Cleveland, OH; Laura M. Sturges, Gibson Dunn & Crutcher, LLP-Denver, Denver, CO; Paula Wilson Render, Jones Day-Chicago, Chicago, IL; Toby Gale Singer, Jones Day-DC, Washington, DC.

For Colorado Ambulatory Surgery Center Association, Inc., Defendant: Kathryn A. Reilly, LEAD ATTORNEY, Grace Anne Fox, Wheeler Trigg O'Donnell, LLP, Denver, CO; Laura**[\*2]** M. Sturges, Gibson Dunn & Crutcher, LLP-Denver, Denver, CO.

For Aetna, Inc., Defendant, Counter Claimant: Laura M. Sturges, LEAD ATTORNEY, Matthew Richard Harvey, Gibson Dunn & Crutcher, LLP-Denver, Denver, CO; Joseph Phillip Vardner, Joshua Lipton, Gibson Dunn & Crutcher, LLP-DC, Washington, DC.

For Humana Health Plan, Inc., Interested Party: Daniel Furman, LEAD ATTORNEY, Andrew David Ringel, Hall & Evans, LLC-Denver, Denver, CO.

For UnitedHealthCare of Colorado, Inc, Counter Claimant: Richard B. Benenson, LEAD ATTORNEY, Emily Renwick Garnett, Justin L. Cohen, Lawrence W. Treece, Brownstein Hyatt Farber Schreck, LLP-Denver, Denver, CO.

For SurgCenter Development, Counter Defendant: William Tucker Brown, Whatley Kallas, LLC-Birmingham, Birmingham, AL.

For United HealthCare Services, Inc., Counter Claimant: Emily Renwick Garnett, Justin L. Cohen, Lawrence W. Treece, Hannah Misner Caplan, Richard B. Benenson, Brownstein Hyatt Farber Schreck, LLP-Denver, Denver, CO.

**Judges:** William J. Martínez, United States District Judge.

**Opinion by:** William J. Martínez

**Opinion**

**ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS COUNTERCLAIMS**

Plaintiffs Kissing Camels Surgery Center, LLC, Cherry Creek Surgery Center, LLC, Arapahoe**[\*3]** Surgery Center, LLC, and Hampden Surgery Center, LLC, are all ambulatory surgery centers, and will be referred to collectively as "the ASCs." They bring this ***antitrust*** action alleging violations of the *Sherman Act*, *15 U.S.C. §§ 1 et seq.*, and the Colorado ***Antitrust*** Act, [*Colo. Rev. Stat. §§ 6-4-101 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SNV-B810-004D-11F6-00000-00&context=) (ECF No. 213.) The defendants are certain health insurers and a trade association that allegedly conspired to destroy Plaintiffs' business. Defendants Rocky Mountain Hospital and Medical Service, Inc., d/b/a Anthem Blue Cross and Blue Shield of Colorado ("Anthem"), UnitedHealthcare of Colorado, Inc. ("United"), and Aetna, Inc. ("Aetna") have brought various counterclaims against Plaintiffs. (*See* ECF Nos. 317 (Anthem), 318 (United), 320 (Aetna).)[[1]](#footnote-0)1 For purposes of this order, the Court will refer to Anthem, United, and Aetna collectively as "Counterclaimants." United (but no other Counterclaimant) has joined, as a counterclaim defendant, a common minority owner of all of the Plaintiffs, Surgical Center Development, Inc. ("SurgCenter"). (*See* ECF No. 375.)

Currently before the Court is Plaintiffs' Motion to Dismiss Counterclaims (ECF No. 346) and SurgCenter's Motion to Dismiss United's Counterclaims (ECF No. 379). These motions are functionally**[\*4]** indistinguishable and will therefore be discussed below as a singular "Motion to Dismiss." In addition, although SurgCenter is not a plaintiff, it is aligned with the actual plaintiffs (the ASCs), and so the Court will refer to SurgCenter and the ASCs collectively as "Plaintiffs," for simplicity.

For the reasons stated below, the Motion to Dismiss is granted in part and denied in part. Specifically, the Motion is granted as to any counterclaim grounded in ***antitrust***, fraud, negligent misrepresentation, the Colorado Consumer Protection Act, civil theft, or declaratory relief under [*Colorado Revised Statutes § 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=). The Motion is denied as to counterclaims for tortious interference with contract, unjust enrichment, civil conspiracy, and ERISA relief.

**I. LEGAL STANDARD**

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc1)[] Under [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a party may move to dismiss a cause of action for "failure to state a claim upon which relief can be granted." The 12(b)(6) standard requires the Court to "assume the truth of the plaintiff's [or counterclaimant's] well-pleaded factual allegations and view them in the light most favorable to the plaintiff." [*Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P58-8YX0-TXFX-F29C-00000-00&context=). In ruling on such a motion, the dispositive inquiry is "whether the complaint [or counterclaim] contains 'enough facts to state a claim to relief**[\*5]** that is plausible on its face.'" *Id.* (quoting [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." [*Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WD1-JY30-TXFX-F2SX-00000-00&context=) (internal quotation marks omitted). "Thus, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting [*Twombly, 550 U.S. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)).



**II. BACKGROUND**

In prior orders, the Court has extensively discussed the genesis of this case from Plaintiffs' perspective. *See* [*Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., 111 F. Supp. 3d 1180, 1182-85 (D. Colo. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G7F-SX71-F04C-V02K-00000-00&context=); [*Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., 2015 U.S. Dist. LEXIS 11460, 2015 WL 5081608 (D. Colo. Aug. 28, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F67-M691-F04C-R01Y-00000-00&context=). The Counterclaimants' perspective, not surprisingly, is somewhat different.

Counterclaimants are health insurers and health plan administrators. (ECF No. 318 ¶¶ 1, 23.)[[2]](#footnote-1)2 Counterclaimants reimburse insureds for "Covered Services," *i.e.*, medical services for which Counterclaimants have agreed to pay some amount under the insured's health plan. (*Id.* ¶ 24.) Insureds often bear a "Cost Sharing Responsibility" such as a copay, deductible, or coinsurance. (*Id.* ¶ 25.)

Counterclaimants' health plans usually offer insureds the choice between obtaining medical services from in-network providers or out-of-network**[\*6]** providers. (*Id.* ¶ 26.) In-network providers have contracted with United to accept a fixed compensation for their services. (*Id.* ¶ 29.) This helps to hold down the overall cost of care, and also provides certainty to insureds because in-network providers have agreed to collect from insured patients no more than the specified Cost Sharing Responsibility payments provided in the insured's health plan document. (*Id.* ¶¶ 28, 30.)

There is less certainty when an insured visits and out-of-network provider. An "out-of-network provider may charge any amount it chooses for its services—which is usually notably higher than [in-network] contracted rates." (*Id.* ¶ 31.) Moreover, insureds must pay a higher Cost Sharing Responsibility and must pay the out-of-network provider any difference between the amount charged and the amount that Counterclaimants agree to reimburse. (*Id.* ¶¶ 31-32.)

Although Cost Sharing Responsibility payments are made by the insured to the medical service provider (not to Counterclaimants), Counterclaimants still consider these payments to be a critical part of a health insurance plan, particularly when insureds visit out-of-network providers:

The increased Cost Sharing Responsibility**[\*7]** applicable to out-of-network benefits sensitizes insureds to the true costs of out-of-network services and ensures that insureds who choose to utilize their out-of-network benefits are willing to pay a greater portion of the expense. If insureds did not share in these costs, then they would have no financial incentive to consider the higher costs of any particular out-of-network provider, leading to increased costs for the Health Plans, the employers, and eventually the insureds themselves.

(*Id.* ¶ 33.)

The precise mechanism by which costs would increase is never specified. Counterclaimants never allege that the amount they agree to reimburse for out-of-network charges is higher than the contracted rate for in-network services, but this appears to be the assumption underlying Counterclaimants' allegations. As relevant to the fear of rising costs, however, that assumption clashes with Counterclaimants' allegations elsewhere that they retain discretion to set reimbursement rates. (*Id.* ¶ 24; *see also* ECF No. 320 ¶ 24.) Absent some allegation that Counterclaimants' reimbursement discretion is limited in out-of-network situations, the causal connection between overutilization of out-of-network**[\*8]** services and rising healthcare costs is not obvious.

In any event, Counterclaimants' health plans have mechanisms to ensure that insureds continue to bear their Cost Sharing Responsibility in out-of-network situations. In particular, the health plans state that Counterclaimants will not cover any charge if the out-of-network provider "does not bill that amount to the insured and does not require the insured to pay the full amount of the insured's Cost Sharing Responsibility." (*Id.* ¶ 36.)

Plaintiffs are four ambulatory surgery centers performing outpatient surgical procedures and treatments in a non-hospital environment. (ECF No. 318 ¶¶ 73, 105, 120, 140.) They are all located in the Denver metropolitan area, except for Kissing Camels, which is located in Colorado Springs. (*Id.*) SurgCenter is a Nevada corporation headquartered in California. (*Id.* ¶ 17.) "SurgCenter partners with and assists physicians in forming a limited liability company and in the design and construction of . . . ambulatory surgical centers," and did so for the ASCs. (*Id.* ¶ 43.) SurgCenter then becomes a 38% owner of those surgical centers, as it is with the ASCs here. (*Id.* ¶ 44.) SurgCenter "provides management and**[\*9]** consulting services . . . at no charge" to the ASCs. (*Id.* ¶ 45.)

Counterclaimants allege that the ASCs and SurgCenter have engaged in a conspiracy to take advantage of the out-of-network system and thereby reap significant profits. As coordinated by SurgCenter, the ASCs:

• choose not to become in-network with any health insurer, but nonetheless recruit physician partners who are in-network elsewhere so that they can refer high-revenue procedures to the ASCs (*id.* ¶¶ 46-52);

• advertise or otherwise represent to potential patients that they will be treated and billed as if in-network (*id.* ¶¶ 53, 58(a), 66, 241);

• waive the patient's in-network deductible, and sometimes waive all other Cost Sharing Responsibility payments—or, at most, charge the in-network coinsurance amount (a percentage of the insurance company's in-network allowed amount, which the ASCs do not know and therefore estimate to be 150% of the Medicare allowance for the procedure at issue) (*id.* ¶¶ 55-58); and

• bill a much larger amount to the insurance company, usually 800% of the Medicare allowance for the procedure at issue (*id.* ¶¶ 54, 58(d), 61).

The ASCs' complaint in this case revolves around Counterclaimants' and other**[\*10]** entities' alleged anti-competitive efforts to destroy this business model. Counterclaimants, however, allege that the business model is itself illegal, thus prompting the counterclaims that Plaintiffs now challenge through their Motion to Dismiss.

**III. ANALYSIS**

**A. Declaratory Judgment of Violation of** [***Colo. Rev. Stat. § 18-13-119***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=)

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc2)[] Colorado has declared that a regular business practice of forgiving copays and deductibles is against public policy:



(1) The general assembly hereby finds, determines, and declares that:

(a) Business practices that have the effect of eliminating the need for actual payment by the recipient of health care of required copayments and deductibles in health benefit plans interfere with contractual obligations entered into between the insured and the insurer relating to such payments;

(b) Such interference is not in the public interest when it is conducted as a regular business practice because it has the effect of increasing health care costs by removing the incentive that copayments and deductibles create in making the consumer a cost-conscious purchaser of health care; and

(c) Advertising of such practices may aggravate the adverse financial and other impacts upon recipients of health care.

(2)**[\*11]** Therefore, the general assembly declares that such business practices are illegal and that violation thereof or the advertising thereof shall be grounds for disciplinary actions. . . .

[*Colo. Rev. Stat. § 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=). Under this statute,

if the effect is to eliminate the need for payment by the patient of any required deductible or copayment applicable in the patient's health benefit plan, a person who provides health care commits abuse of health insurance [a class 1 petty offense] if the person knowingly:

(a) Accepts from any third-party payor, as payment in full for services rendered, the amount the third-party payor covers; or

(b) Submits a fee to a third-party payor which is higher than the fee he has agreed to accept from the insured patient with the understanding of waiving the required deductible or copayment.

*Id.* [*§ 18-13-119(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=).

Counterclaimants seek a declaration that Plaintiffs have violated the statute. (ECF No. 317 ¶¶ 20-29 (Anthem's Count I); ECF No. 318 ¶¶ 287-95 (United's Count XII); ECF No. 320 ¶¶ 120-30 (Aetna's Count I).) However, in a closely related case between some of the ASCs and a different health insurer, Cigna Healthcare ("Cigna"), the Court recently ruled that declaratory judgment was inappropriate because**[\*12]** [***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc3)[] there is no private right of action under [*§ 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=). *See* [*Arapahoe Surgery Ctr., LLC v. Cigna Healthcare, Inc., 171 F. Supp. 3d 1092, 2016 W L 1089697, at \*13-15 (D. Colo. Mar. 21, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FBP-TMW1-F04C-V08F-00000-00&context=). The Court noted that such a private right of action "would likely be duplicative of a tort claim for interference with contract, since the statute provides that the prohibited business practices 'interfere with contractual obligations entered into between the insured and the insurer.'" [*Id. at \*14*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JBY-P6X1-F04C-V2C7-00000-00&context=).



Counterclaimants' claims for declaratory judgment under [*§ 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=) are materially indistinguishable from CIGNA's counterclaim for declaratory judgment under the same statute. Accordingly, Anthem's Count I, United's Count XII, and Aetna's Count I fail as a matter of law and are therefore dismissed with prejudice.

Anthem's Count I is its sole counterclaim. Anthem's counterclaims are therefore dismissed in their entirety. For the remainder of this order, "Counterclaimants" refers solely to Aetna and United.

**B. *Antitrust* Claims**[[3]](#footnote-2)3

Counterclaimants assert causes of action for violation of federal and Colorado ***antitrust*** laws, claiming that Plaintiffs' agreement to bill insurers at 800% of Medicare reimbursement rates is an illegal price-fixing conspiracy, and that the ASCs' refusal to negotiate to become in-network providers is an illegal boycott. (ECF No. 318 ¶¶ 256-86**[\*13]** (United's Counts X & XI); ECF No. 320 ¶¶ 224-37 (Aetna's Counts IX & X).)

1. Single-Entity Rule

Plaintiffs dispute that they can engage in any conspiracy or boycott, arguing that they should be treated as a single entity that cannot conspire with itself. (ECF No. 346 at 8-14.)[[4]](#footnote-3)4 Plaintiffs' theory is based on the Supreme Court's holding in [*Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3C80-003B-S323-00000-00&context=), that [***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc5)[] "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise," and a single enterprise cannot conspire with itself to engage in anticompetitive conduct. [*Id. at 771-74*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3C80-003B-S323-00000-00&context=). Lower courts have since extended *Copperweld* to other forms of joint business ventures, such as a restaurant franchisor and its franchisees. *See* [*Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026, 1030-32 (D. Nev. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-NPS0-008H-F3N1-00000-00&context=).



The Supreme Court counsels that

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc6)[] [t]he key [to determining whether a joint venture comprises distinct entities capable of conspiring] is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a contract, combination or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers**[\*14]** of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.



[*Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=) (internal quotation marks omitted; alterations incorporated). This requires "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." [*Id. at 191*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=). Thus, it is a "fact-specific" inquiry. [*Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:483T-TCP0-0038-X49T-00000-00&context=).

Counterclaimants' allegations do not resolve this inquiry one way or another. On the one hand, SurgCenter might be seen as a franchisor setting up franchisees that were never meant to be competitors, and therefore could not conspire in restraint of trade. *See* [*United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 119-20, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BGW0-003B-S21P-00000-00&context=). On the other hand, the Supreme Court has found that[***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc7)[] a group of franchisees which centralize only certain distinct tasks, and that otherwise do or should compete with each other, may be capable of conspiring in violation of ***antitrust*** laws. [*Am. Needle, 560 U.S. at 197-202*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=); *see also* [*Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 936-44 (6th Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JC2-19G1-F04K-P117-00000-00&context=) (hospitals formed a centralized entity to "handle[] much of the financial business of the hospitals . . ., including negotiating managed-care contracts with insurance carriers"; summary judgment for hospitals on single-entity theory reversed because "a reasonable juror might conclude that, aside from [centralizing financial and similar**[\*15]** decisions], defendant hospitals maintained separate identities and acted more like competitors than one unit"). The latter is a plausible inference from Counterclaimants' allegations, subject to discovery regarding "how the parties involved in the alleged anticompetitive conduct actually operate." [*Am. Needle, 560 U.S. at 191*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=). Accordingly, the Court rejects the single-entity theory as a basis to dismiss the ***antitrust*** counterclaims at this pleading phase.



2. Price-Fixing/***Antitrust*** Injury

Although the single-entity theory does not require dismissal at this time, the Court agrees with Plaintiffs that Counterclaimants fail to state an ***antitrust*** claim because they have not plausibly alleged "***antitrust*** injury." (ECF No. 346 at 14-16.)

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc8)[] ***Antitrust*** injury is not enumerated as an element of any of *Sherman Act* claims, yet it is a necessary element of any ***antitrust*** claim brought by a private party. *See* [*NYNEX Corp. v. Discon, 525 U.S. 128, 135 (1998), 119 S. Ct. 493, 142 L. Ed. 2d 510*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V9V-W320-004B-Y00G-00000-00&context=); [*Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 750 (10th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WV4-Y0M0-0038-X40M-00000-00&context=); [*Rural Tele. Serv. Co., Inc. v. Feist, 957 F.2d 765, 768 (10th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5PT0-008H-V1CT-00000-00&context=). The notion of ***antitrust*** injury recognizes that



[c]onduct in violation of the ***antitrust*** laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The ***antitrust*** injury requirement**[\*16]** ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.

[*Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 343-44, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=) (emphasis in original). Thus, "injury, although causally related to an ***antitrust*** violation, nevertheless will not qualify as '***antitrust*** injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny." [*Id. at 334*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6WP0-003B-452G-00000-00&context=). In other words, the complained-of conduct must have a tendency, for example, to decrease the number of competitors (either through barriers to entry or practices that drive competitors out of the market) or to reduce the incentive for competitors to compete with each other.

Counterclaimants assert that Plaintiffs' alleged agreement amongst themselves to charge 800% of Medicare rates is horizontal price-fixing, and that the ASCs would otherwise have competed with each other on price but for this arrangement. The manifestation of that injury, Counterclaimants say, is overpayment and increased costs. (ECF No. 318 ¶¶ 272(a)—(b); ECF No. 320 ¶¶ 117-19.)

There are many dubious aspects of this theory, but the Court need only discuss one of them. Even assuming that Counterclaimants' overpayment resulted from harm to competition,**[\*17]** Counterclaimants do not *pay* what the ASCs *charge*. Counterclaimants instead pay what they believe to be a reasonable amount for the service rendered. (ECF No. 318 ¶ 24; ECF No. 320 ¶ 24.) In these circumstances, moreover, Counterclaimants were contractually privileged not to pay anything to the ASCs given the ASCs' alleged waiver of Cost Sharing Responsibility payments. (ECF No. 318 ¶ 36; ECF No. 320 ¶ 34.) Thus, to the extent Counterclaimants paid a reimbursement that was artificially inflated by a price-fixing conspiracy, the injury was self-inflicted.[[5]](#footnote-4)5 The Court is unwilling to hold that paying an illegally inflated price constitutes ***antitrust*** injury when the paying party disregards its right to pay less or nothing at all.

Counterclaimants also assert that Plaintiffs' practices will eventually cause healthcare premiums to increase. (*See, e.g.*, ECF No. 318 ¶ 33; ECF No. 320 ¶ 10.) Although increase in consumer costs looks more like a typical ***antitrust*** injury, Counterclaimants' arguments in this regard have two important flaws. First, again, Counterclaimants have discretion to reduce or refuse payment to the ASCs, thus preventing the need to increase premiums. Second, increasing premiums**[\*18]** is not an injury to Counterclaimants, but rather to Counterclaimants' insureds.

Referring to the ASCs' alleged boycott of in-network insurance arrangements, United additionally claims that it "lost the economic benefit of having the ASCs as in-network providers." (ECF No. 318 ¶ 272(c).) United has not coherently explained how this alleged harm to itself is also a harm to competition generally.

For all of these reasons, Counterclaimants' federal and Colorado ***antitrust*** claims (United's Counts X & XI; Aetna's Counts IX & X) fail as a matter of law. In light of proceedings thus far in this case and the thorough vetting that these claims received through the briefing on the Motion to Dismiss, the Court further concludes that amendment would be futile. These claims are accordingly dismissed with prejudice. [*Brereton v. Bountiful City Corp., 434 F.3d 1213, 1219 (10th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J4F-JV60-0038-X2M3-00000-00&context=) ([***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc9)[] district court "may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint").



**C. ERISA**

[***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc10)[] The Employee Retirement Income Security Act ("ERISA"), [*29 U.S.C. §§ 1001 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJT1-NRF4-4454-00000-00&context=), permits an ERISA plan fiduciary to bring an action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain**[\*19]** other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." *29 U.S.C. § 1132(a)(3)*. United claims that "[s]ome of [its] insureds who were provided services by the ASCs and for which United made overpayments are covered under ERISA Plans." (ECF No. 318 ¶ 224.) United therefore asserts a cause of action under *29 U.S.C. § 1132(a)(3)*, relying particularly on various plans' language denying benefits where providers waive patient responsibility payments. ([*Id. ¶¶ 220-38 (Count VIII)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J4F-JV60-0038-X2M3-00000-00&context=).)



Plaintiffs argue that United has only alleged that it is a fiduciary over "some" of the plans at issue here, and therefore United's ERISA counterclaim is "inadequately pled." (ECF No. 346 at 16.) According to Plaintiffs, United was required "to identify the actual ERISA plans at issue." (*Id.* at 17.)

The Court disagrees that United had such a pleading duty under these circumstances. Although United could have listed in its counterclaims all of the ERISA-governed plans in question, its allegation that "some" of the plans it administers are ERISA plans is entirely plausible. Indeed, for a large health insurer like United, it would be surprising if the case were otherwise. Thus, the precise**[\*20]** plans at issue is a matter appropriately explored in discovery, such as through an interrogatory, and not a matter that must be resolved at the pleading phase.

Plaintiffs also attack United's ERISA counterclaim to the extent it seeks declaratory relief "because any controversy that exists between the parties will be determined with regard to [Plaintiffs'] original claims, thereby making United's [ERISA] counterclaim redundant and mooting United's claim for declaratory relief." (*Id.*) Plaintiffs do not explain how United's ERISA claim is entirely redundant of Plaintiffs' own affirmative claims (all of which sound in ***antitrust***, *see* ECF No. 213). In addition, [***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc11)[] there are often sound litigation reasons to plead a mirror-image counterclaim (*e.g.*, the plaintiff alleges patent infringement while the defendant counterclaims for declaratory judgment of non-infringement). A plaintiff could decide to withdraw the original claim but the defendant might nonetheless want declaratory judgment of non-liability, to remove any uncertainty going forward regarding the parties' rights and duties. Thus, even if United's ERISA claim is redundant of Plaintiffs' claims, the Court sees no reason at this stage to**[\*21]** dismiss it.



Plaintiffs assert no other basis to dismiss United's ERISA counterclaim. Plaintiffs' Motion to Dismiss is therefore denied as to this counterclaim.

**D. Fraud & Negligent Misrepresentation**

In the related case between most of the same plaintiffs here and Cigna, this Court found that Cigna could not plead a claim for misrepresentation (fraudulent or negligent) because the ASCs disclosed through their claim forms to Cigna that they reduced patients' charges to approximate in-network rates. Thus, the Court found it implausible that Cigna had been misled as to the amounts charged or the ASCs' practices. [*Arapahoe Surgery Ctr., 2015 U.S. Dist. LEXIS 28375, 2015 WL 1041515, at \*5-6, \*8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FGB-C9K1-F04C-V0NF-00000-00&context=). Plaintiffs request the same result with respect to Counterclaimants' respective fraudulent and negligent misrepresentation counterclaims, which are based on the idea that the ASCs misrepresented their billing practices to Counterclaimants (*e.g.*, charging patients one amount but billing insurers for another). (ECF No. 346 at 17-20.)

United argues that its case differs from Cigna's because, unlike Cigna, United has not affirmatively alleged that it received the claim form disclosures that put Cigna on notice of the ASCs' billing practices. (ECF No. 362 at 6.) United claims that it**[\*22]** has, by contrast, "affirmatively allege[d] that the ASCs failed to disclose that they waived or reduced patients' responsibility." (*Id.* (citing ECF No. 318 ¶¶ 58, 67-68).) The cited counterclaim paragraphs do not match that description, however. The closest they come is to allege that "[t]he ASCs failed to disclose the true nature, extent, and scope of their fraudulent . . . billing scheme." (ECF No. 318 ¶ 67.) This is not the same as alleging that the ASCs concealed their practice of waiving or reducing patient responsibility payments.

Plaintiffs' Motion to Dismiss attaches what Plaintiffs represent to be the sort of claim forms routinely sent to United. (ECF No. 346-1.) Each form, in varying words, discloses that the patient's responsibility has been reduced to approximate in-network rates. United argues that this material is outside the pleadings and should not be considered. (ECF No. 362 at 6.) Under the circumstances, the Court agrees with Plaintiffs that the outside-the-pleadings nature of these documents results from a pleading ploy by United, not from a true factual dispute.

The Court issued its order with respect to Cigna in March 2015, almost six months before United filed its counterclaims.**[\*23]** Thus, United knew what doomed Cigna's misrepresentation claims and had an incentive to employ a tactical approach to avoid that same fate, even though the mechanics of the alleged fraud were identical. [***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc12)[] The Court further notes that it may consider an exhibit attached to a motion to dismiss if "it is mentioned in the complaint, it is central to [the] claims [being challenged], and its authenticity is not disputed." [*Toone v. Wells Fargo Bank, N.A., 716 F.3d 516, 521 (10th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57XB-TMM1-F04K-W0CS-00000-00&context=). Here, United does not mention any claim forms in its counterclaims, but the Court finds that they should be deemed "mentioned" by their conspicuous *absence* in these particular circumstances. Moreover, the claim forms are central to United's misrepresentation claims, and United has not disputed the authenticity of the examples attached to the Motion to Dismiss. The Court therefore chooses not to exalt form over substance and finds that the attachments should be considered. "If the rule were otherwise, a plaintiff [or counterclaimant] with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff [or counterclaimant] relied." [*GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RG4-33X0-0038-X159-00000-00&context=); *see also* [*Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 923 (N.D. Ill. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y39-G7K0-0038-Y037-00000-00&context=) ("it would be totally wasteful to uphold a claim on the false premise created**[\*24]** by less than complete documentation when the delayed consideration of the remaining documents would lead to dismissal of that claim").



Aetna, for its part, admits it received claim forms such as those attached to the Motion to Dismiss. (ECF No. 320 ¶ 102.) But Aetna argues (as does United, in the alternative to its outside-the-pleadings argument) that "the ASCs' fraud is not the waiving of copays and deductibles, but rather that the price represented to Aetna on the claim form is not the ASCs' actual charge for their services." (ECF No. 364 at 12 (emphasis removed).) The Court already rejected this theory with respect to Cigna, finding that the language on the claim forms should have alerted Cigna that there was a difference between the amount charged the patient and the amount billed to the insurance company: "Given this disclosure, which appeared in the ASCs' claim forms, the Court finds it implausible that Cigna was misled into believing that the patient was charged the same amount that the ASCs billed to Cigna, because Cigna was aware that the ASCs' claims were higher than in-network rates." [*Arapahoe Surgery Ctr., 2015 U.S. Dist. LEXIS 28375, 2015 WL 1041515, at \*6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FGB-C9K1-F04C-V0NF-00000-00&context=). Neither Aetna nor United explains why the analysis should be any different here.

Aetna**[\*25]** further contends, however, that "the ASCs' claim forms misrepresent to Aetna that the ASC has charged the Aetna member something, which is false in instances where the ASC charged the Aetna member nothing." (ECF No. 364 at 12 (emphasis removed).) Although this is a somewhat different allegation than what Cigna presented, it nonetheless fails here because Aetna admits its "general awareness that the ASCs sometimes waive or otherwise eliminate Required Member Responsibilities." (ECF No. 320 ¶ 97.) Aetna goes on to say that this awareness "does not allow Aetna to know whether or to what extent the ASC has done so in connection with any single claim for reimbursement at the time Aetna pays the claim" (*id.*), but this is irrelevant. Aetna well knew that the ASCs were submitting allegedly fraudulent claims. As a matter of law, Aetna could not at that point reasonably rely on any particular claim singled out as truthful. Indeed, serial interaction with a known (alleged) fraudster makes reliance all the more unreasonable, even though the fraudster on occasion engages in transactions that might look legitimate.

Aetna additionally claims that, although the claim forms disclosed unusual practices**[\*26]** with respect to deductibles and copays, "the ASCs' claim forms say nothing about reducing or waiving coinsurance or other forms of member responsibilities." (ECF No. 364 at 12.) This is also beside the point. The claim forms make clear that the ASCs are treating these patients as if they were in-network; or, at a minimum, that the ASCs are not following normal out-of-network practices. It strains credulity to suppose that Aetna reasonably relied on the lack of any mention specifically of coinsurance to conclude that the ASCs were submitting typical out-of-network claims.

For all of these reasons, Aetna's and United's counterclaims for fraud and negligent misrepresentation, and for aiding and abetting the same (Aetna's Counts VI & VII; United's Counts I, II, III, & IV), fail as a matter of law. The Court further concludes that any amendment would be futile, and dismisses these counterclaims with prejudice.

**E. ERISA Preemption**

Plaintiffs argue that ERISA preempts Counterclaimants' claims for unjust enrichment and tortious interference with contract. (ECF No. 346 at 21 n.7, 22-23.) [***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc13)[] "ERISA includes expansive pre-emption provisions . . . to ensure that employee benefit plan ***regulation*** would**[\*27]** be exclusively a federal concern." [*Aetna Health Inc. v. Davila, 542 U.S. 200, 208, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CNS-7CJ0-004C-1006-00000-00&context=) (citing [*29 U.S.C. § 1144*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GV61-NRF4-44J6-00000-00&context=)) (internal quotation marks omitted). "There are two aspects of ERISA preemption: (1) 'conflict preemption' and (2) remedial or 'complete preemption.'" [*David P. Coldesina, D.D.S. v. Estate of Simper, 407 F.3d 1126, 1135-36 (10th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G6M-HX60-0038-X0YK-00000-00&context=). Here, the ASCs argue only for complete preemption.



[***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc14)[] If a party could have brought its claim under *ERISA § 502(a)*, "and where there is no other independent legal duty that is implicated by a defendant's actions, then the [party]'s cause of action is completely pre-empted by *ERISA § 502(a)*[]." [*Aetna Health, 542 U.S. at 210*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CNS-7CJ0-004C-1006-00000-00&context=). The ASCs' Motion does not establish that Aetna or United's unjust enrichment or tortious interference claims are based solely on duties created by ERISA or an ERISA plan. As for tortious interference, Aetna and United have plausibly alleged that the ASCs are acting contrary to public policy as expressed in the "abuse of health insurance" statute, [*Colo. Rev. Stat. § 18-13-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-83B0-004D-10MM-00000-00&context=), discussed above in Part III.A.[[6]](#footnote-5)6 As for unjust enrichment, this same statute could also conceivably support the requirement that the ASCs have been enriched under circumstances that would make it unjust for the defendant to retain the benefit. *See* [*Lewis v. Lewis, 189 P.3d 1134, 1141 (Colo. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SWG-CSW0-TX4N-G135-00000-00&context=). Thus, the Court finds that these claims are not completely preempted.[[7]](#footnote-6)7



**F. Unjust Enrichment**

Plaintiffs argue that Counterclaimants' unjust enrichment**[\*28]** counterclaims cannot stand in light of a contract that controls the question of compensation and reimbursement (*i.e.*, each insured's health benefit plan). (ECF No. 346 at 21.) Counterclaimants respond that the rule invoked by Plaintiffs is a rule that applies to contracting parties, whereas the ASCs are out-of-network and therefore, by definition, non-contracting parties. (ECF No. 362 at 15 (citing *Greenway Nutrients, Inc. v. Blackburn, 33 F. Supp. 3d 1224, 1261-62 (D. Colo. 2014))*; ECF No. 364 14-15 (same).) In their reply brief, Plaintiffs do not respond to this argument. (*See* ECF No. 377 at 26-27.) The Court therefore deems Plaintiffs to have admitted that Counterclaimants' position is correct. The Court therefore rejects Plaintiffs' challenge to Counterclaimants' unjust enrichment counterclaims.[[8]](#footnote-7)8

**G. Tortious Interference**

The ASCs assert that Aetna's and United's various theories of tortious interference with contract fail as a matter of law. (ECF No. 346 at 23-25.)

[***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc16)[] "Colorado recognizes the tort of intentional interference with contractual relations," and has adopted the definition provided in the Restatement (Second) of Torts. [*Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14N0-003D-90H2-00000-00&context=). That definition is as follows:



One who intentionally and improperly interferes with the performance of a contract (except a contract to marry)**[\*29]** between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

[*Restatement (Second) of Torts § 766*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12M-00000-00&context=) (1979).

As for determining "improper" interference, Colorado has likewise approved the Restatement approach:

[***HN17***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc17)[] In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:



(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

*Id.* [*§ 767*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12S-00000-00&context=); *see also* [*Westfield Dev. Co. v. Rifle Inv. Assocs., 786 P.2d 1112, 1118 (Colo. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0T50-003D-93NH-00000-00&context=) (endorsing [*§ 767*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12S-00000-00&context=) factors). Importantly, "[c]onduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an interference improper." [*Restatement (Second) of Torts § 767 cmt. c*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42JH-HPR0-00YF-T12S-00000-00&context=). As discussed**[\*30]** in Part III.A, above, Colorado has declared that a regular business practice of forgiving copays and deductibles is against public policy and an "abuse of health insurance."

Counterclaimants allege that Plaintiffs tortiously interfered with Counterclaimants' contracts with insureds by inducing insureds to obtain services in a way that permits them to shirk their out-of-network Cost Sharing Responsibility payments. (ECF No. 318 ¶¶ 209-14; ECF No. 320 ¶¶ 142-56.) Counterclaimants ground these claims both in the Colorado abuse of health insurance statute, and in the ASCs' alleged misrepresentation to insureds that they could use their in-network benefits at the ASCs. (*See id.*) The Court already concluded in the Cigna case that this adequately states a claim for tortious interference with contract. *See* [*Arapahoe Surgery Ctr., 2015 U.S. Dist. LEXIS 28375, 2015 WL 1041515, at \*8-9*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FGB-C9K1-F04C-V0NF-00000-00&context=). The Court finds that the same result applies here.

Aetna additionally alleges that Plaintiffs tortiously interfered with Aetna's contracts with in-network physicians by inducing them to refer patients to the ASCs. (ECF No. 320 ¶¶ 160-67.) Plaintiffs respond that Aetna fails to plead any plausible connection between the alleged interference and the alleged damages (overpayment) because "Aetna's**[\*31]** reimbursement rates have no connection to the referrals." (ECF No. 346 at 25.) Rather, Aetna sets its own reimbursement rate based on a self-determined "reasonable amount." (*Id.*)[[9]](#footnote-8)9 Aetna does not directly respond, but instead reiterates its claim that in-network referrals to the ASCs are "causing Aetna to pay more than it would have paid but-for the ASCs' unlawful conduct." (ECF No. 364 at 11.)

The Court understands Aetna to be saying that its in-network physicians are violating some unspecified contractual provision regarding out-of-network referrals, and thereby causing Aetna to pay more in out-of-network reimbursements than it normally would. The Court finds it telling, however, that Aetna fails to respond to the specific claim that causation fails because it retains discretion to set its out-of-network reimbursement rates. Nonetheless, Aetna pleads an alternative theory of interference, namely, that Plaintiffs' inducements have "hinder[ed] Aetna's ability to negotiate favorable rates with its In-Network facilities." (ECF No. 364 at 11; *see also* ECF No. 320 ¶ 37.) Aetna explains this theory as follows:

The improper referrals to the ASCs by the Network Physicians caused Aetna's Network Facilities**[\*32]** to receive fewer referrals than they otherwise would have, when those Network Facilities had agreed to accept lower In-Network rates from Aetna for their services in exchange, at least in part, for an increased opportunity for referrals by Network Physicians, thereby harming the relationship between Aetna and its Network Facilities and in turn undermining and frustrating the purpose and effect of the coinsurance framework which the Network Agreements are intended to promote—making healthcare both accessible and affordable for Aetna's members—and thereby causing economic harm to Aetna.

(*Id.* ¶ 166.) This theory is rather attenuated, but the ASCs do not specif ically challenge it. Given at least one unchallenged theory by which the ASCs may be held liable for interference with the insurer-provider relationship, the Court will not dismiss this cause of action. Plaintiffs' Motion to Dismiss is therefore denied with respect to Counterclaimants' tortious interference counterclaims.

**H. Civil Conspiracy**

Plaintiffs claim that United's civil conspiracy counterclaim fails on its elements. (ECF No. 346 at 25-26.) [***HN18***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc18)[] "To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more**[\*33]** persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result." [*Nelson v. Elway, 908 P.2d 102, 106 (Colo. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YY90-003D-91WK-00000-00&context=). Civil conspiracy is not a traditional cause of action, but "is a means for establishing vicarious liability for [an] underlying tort." [*Halberstam v. Welch, 705 F.2d 472, 479, 227 U.S. App. D.C. 167 (D.C. Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0CM0-003B-G0WD-00000-00&context=); *see also* [*Lockwood Grader Corp. v. Bockhaus, 129 Colo. 339, 270 P.2d 193, 196 (Colo. 1954)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XF20-0040-03B6-00000-00&context=) ("Recovery of damages in a civil action for conspiracy . . . is not based on the conspiracy itself, but on damages resulting from an overt act or acts of one or more of the defendants, resulting from the conspiracy.").



The Court agrees with United that it has satisfied these elements. United has plausibly alleged that the ASCs are separate entities capable of conspiring. (*See* Part III.B.1, [*supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XF20-0040-03B6-00000-00&context=).) United has also plausibly alleged an agreement between SurgCenter and the ASCs to engage in a course of conduct that might have been illegal under Colorado's abuse of health insurance statute, and also might have been a tortious interference with contract. The fact that Plaintiffs carried on with this business model satisfies the overt act requirement, and United has alleged damages in the form of overpayment.[[10]](#footnote-9)10 Accordingly, Plaintiffs' Motion to Dismiss is denied as to United's**[\*34]** civil conspiracy counterclaim.

**I. Civil Theft (**[***Colo. Rev. Stat. § 18-4-405***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5PC1-8370-004D-102T-00000-00&context=)**)**

Plaintiffs argue that Counterclaimants' counterclaims for civil theft should be dismissed for the same reason that Cigna's civil theft counterclaim was dismissed, *i.e.*, lack of deception regarding the ASCs' billing practices. (ECF No. 346 at 26.) *See also* [*Arapahoe Surgery Ctr., 2015 U.S. Dist. LEXIS 28375, 2015 WL 1041515, at \*9-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FGB-C9K1-F04C-V0NF-00000-00&context=). The Court agrees. The ASCs' claim forms disclosed that they calculated patients' financial obligations as if in-network. Counterclaimants therefore cannot satisfy the deception element of a civil theft claim. *See id.* Aetna's and United's civil theft counterclaims (Aetna's Count VIII and United's Count IX) are dismissed with prejudice.

**J. Colorado Consumer Protection Act**

Finally, the ASCs challenge Aetna's and United's claims for violation of the Colorado Consumer Protection Act ("CCPA"), [*Colo. Rev. Stat. §§ 6-1-101 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SNV-B810-004D-1185-00000-00&context=) (ECF No. 346 at 27-30.)

[***HN19***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc19)[] To prove a private cause of action under the CCPA, a plaintiff must show:



(1) that the defendant engaged in an unfair or deceptive trade practice;

(2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation;

(3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property;

(4)**[\*35]** that the plaintiff suffered injury in fact to a legally protected interest; and

(5) that the challenged practice caused the plaintiff's injury.

[*Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 146-47 (Colo. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47P2-HN80-0039-42MP-00000-00&context=).

As to the element of an unfair or deceptive trade practice, United alleges that the practices at issue are: (1) waiving or reducing an insured's cost sharing responsibility; (2) advertising a willingness to waive an insured's cost sharing responsibility; and (3) making false or misleading statements on the ASCs' claim forms submitted to Aetna and United. (ECF No. 318 ¶ 241.) Aetna joins United as to the third theory of deception (*i.e.*, the claim forms). (ECF No. 320 ¶¶ 172-75.)

The Court has already concluded that Plaintiffs did not engage in deception when submitting their claim forms, but instead disclosed their practices to Counterclaimants. Accordingly, that theory fails to satisfy the first element of a CCPA claim.

United's two other theories also fail to satisfy the first element of the CCPA claim. Waiving or reducing an insured's cost sharing responsibility may or may not be lawful, but it is not deceptive. Moreover, advertising a willingness to waive an insured's cost sharing responsibility is only deceptive if it is untrue. In this case,**[\*36]** it was not.

Counterclaimants' CCPA counterclaims (Aetna's Count V; United's Count VIII) are dismissed with prejudice.

**IV. CONCLUSION**

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiffs' Motion to Dismiss Counterclaims (ECF No. 346) and SurgCenter's Motion to Dismiss United's Counterclaims (ECF No. 379) are both GRANTED IN PART and DENIED IN PART;

2. Anthem's Count I is DISMISSED WITH PREJUDICE;

3. Aetna's Counts I, V, VI, VII, VIII, IX, and X are DISMISSED WITH PREJUDICE;

4. United's Counts I, II, III, IV, VIII, X, XI, XII, and XIII are DISMISSED WITH PREJUDICE; and

5. Plaintiffs' and SurgCenter's Motions to Dismiss are otherwise DENIED.

Dated this 13th day of July, 2016.

BY THE COURT:

/s/ William J. Martínez

William J. Martínez

United States District Judge

**End of Document**

1. 1Each of these documents includes both an answer and counterclaims. In each document, the paragraph numbering starts over at 1 in the counterclaim portion. Throughout this Order, paragraph-only citations to ECF Nos. 317, 318, and 320 (*e.g.*, ECF No. 320 ¶ 1), refer to the paragraph numbers in the counterclaim portion of those documents. [↑](#footnote-ref-0)
2. 2ECF No. 318 is United's counterclaims. As between Aetna, Anthem, and United, United's counterclaim allegations are the most detailed, but they are also largely representative of Aetna's and Anthem's allegations. Accordingly, for purposes of stating the Counterclaimants' allegations in this Part II, the Court will cite only to ECF No. 318. [↑](#footnote-ref-1)
3. 3[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc4)[] The Colorado ***Antitrust*** Act is the state law analogue to the ***Sherman Act***. *See* [*Colo. Rev. Stat. § 6-4-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SNV-B810-004D-11FV-00000-00&context=) ("the courts shall use as a guide interpretations given by the federal courts to comparable federal ***antitrust*** laws"). Because federal ***antitrust*** law principles apply to both the federal and state ***antitrust*** claims, the Court will analyze both claims together. *See* [*Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1220 n.1 (10th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XBH-PX80-TXFX-F25Y-00000-00&context=).

   

   [↑](#footnote-ref-2)
4. 4All ECF page citations are to the page number in the ECF header, which does not always match the document's internal pagination, particularly in briefs with prefatory material (such as a table of contents) and in exhibits. [↑](#footnote-ref-3)
5. 5Plaintiffs' Motion to Dismiss prominently asserts this disconnect in Counterclaimants' injury theory. (*See* ECF No. 346 at 14-15.) Surprisingly, neither Aetna's nor United's respective response briefs offer any rebuttal. [↑](#footnote-ref-4)
6. 6As explained in Parts III.A & G, herein, this statute does not provide a private cause of action, but it nonetheless may be considered when determining whether the ASCs' alleged interference with contract satisfies the element of "improper" interference. [↑](#footnote-ref-5)
7. 7In any event, [***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N3Y-X6C1-F04C-V068-00000-00&context=&link=clscc15)[] ERISA preemption does not apply to non-ERISA health plans. Thus, Aetna's and United's tortious interference and unjust enrichment claims would survive at least as to these plans.

   

   [↑](#footnote-ref-6)
8. 8Rather than responding to Counterclaimants' position, Plaintiffs asserted for the first time in their reply brief that there can be no unjust enrichment because Counterclaimants do not pay the amount billed by the ASCs, but instead something less than that based on Counterclaimants' decisions regarding a reasonable reimbursement rate. "It can hardly be contended," say Plaintiffs, "that Aetna and United's payments to the ASCs were 'unjust' in light of Aetna and United's unilateral roles in determining the amount of the payments." (ECF No. 377 at 27.) Plaintiffs had ample opportunity to raise this argument in their opening brief, and did so in their challenges to other counterclaims. The Court therefore must consider the argument's absence in the opening brief's discussion of unjust enrichment to be a deliberate decision, and Plaintiffs have therefore waived the argument in this phase of the case. [↑](#footnote-ref-7)
9. 9Plaintiffs do not direct this same attack at Counterclaimants' theories of tortious interference based on the insurer-insured relationship. The Court therefore has no occasion to examine it in that context. [↑](#footnote-ref-8)
10. 10Plaintiffs do not argue that this claim fails due to United's discretion over reimbursement amounts. [↑](#footnote-ref-9)