Bradley S. Shelts (Bar No. 028206)
Joshua P. Weiss (Bar No. 035073)
BRUECKNER SPITLER SHELTS PLC
8355 East Hartford Drive, Suite 200
Scottsdale, Arizona 85255
(480) 483-9600
BShelts@bss.law
JWeiss@bss.law

EPSTEIN BECKER & GREEN, P.C.
Anthony Argiropoulos (Pro Hac Vice application forthcoming)
150 College Road West, Suite 301
Princeton, New Jersey 08540
(609) 455-1540
AArgiropoulos@ebglaw.com

Kevin T. Elkins (Pro Hac Vice application forthcoming)
1222 Demonbreun St., Suite 1400
Nashville, TN 37203
(615)-564-6060
kelkins@ebglaw.com

Attorneys for Plaintiff Fortitude Surgery Center, LLC

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Fortitude Surgery Center, LLC, Plaintiff, vs. Aetna Health, Inc., and Aetna Life Insurance Company, Defendants.	Case No: **COMPLAINT AND JURY DEMAND**

This action arises out of Aetna Health Inc.'s ("Aetna Health") and Aetna Life Insurance Company's ("ALIC") (collectively, "Aetna") continuous and systematic denial of healthcare reimbursement claims for medically necessary services which were

administered to patients insured by Aetna or those for which Aetna administers self-funded ERISA plans. Aetna's conduct is another example in a pattern of retributive behavior for perceived disputes between Aetna and certain of Fortitude's owners arising out of reimbursement claims from unrelated pain management provider entities. For its Complaint, Plaintiff Fortitude Surgery Center, LLC ("Fortitude"), asserts, complains, and alleges as follows:

PARTIES

1. Fortitude is a surgery center that provides medical services to Arizona patients. It is a limited liability company organized and existing under the laws of the state of Arizona, with its principal places of business in Maricopa County, Arizona.

2. Defendant Aetna Health is a corporation organized under the laws of Pennsylvania, with its headquarters in Blue Bell, Pennsylvania. It provides insurance and administers health benefit plans, including plans funded by plan sponsors.

3. Defendant ALIC is a Connecticut corporation with its principal place of business in Connecticut, and fully insures and administers health benefit plans.

4. Fortitude is appropriately licensed and in good standing with the State of Arizona Department of Health.

5. Fortitude has standing to bring ERISA claims pursuant to valid, written assignments of benefits signed by patients prior to treatment.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, in that some of the claims asserted herein are brought under federal statutes and necessarily involve adjudication of one or more federal questions.

7. For Plaintiff's ERISA claims, jurisdiction additionally arises under § 502(e) of ERISA, 29 U.S.C. § 1132(e).

8. This Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

9. This Court has personal jurisdiction over the parties because Plaintiff operates its business in this District and Aetna systematically and continuously conducts business in Arizona and otherwise has minimum contacts with the District of Arizona sufficient to establish personal jurisdiction over each of them.

10. Venue is appropriately established in this Court under 28 U.S.C. § 1391 and 29 U.S.C. § 1132(e)(2) because Aetna conducts a substantial amount of business in the District of Arizona, including marketing, advertising, and selling insurance products, and administering health plans inside the District of Arizona. Moreover, the claims at issue in this action arise out of Aetna's misconduct which occurred in this District.

SUMMARY OF ALLEGATIONS

11. At all relevant times, Fortitude has been a licensed healthcare facility where patients ("Aetna Members") who receive their health insurance from Aetna, or from self-funded ERISA plans for whom Aetna provides administrative services, received treatment from licensed healthcare providers.

12. The basis for this action is Aetna's repeated violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002 *et seq*., and the laws of the State of Arizona by and through its improper and serial denial of benefit payment claims billed by Fortitude to Aetna for medically necessary services that Aetna preauthorized (where necessary) and that Fortitude provided to the Aetna Members, each

of whom validly and in writing assigned his or her benefits claims to Fortitude (the "Unpaid Claims").

FACTS

13. Upon information and belief, Aetna offers health insurance plans that differentiate between coverage for medical treatment provided by (i) in-network providers who have negotiated discounted rates with the insurer, and (ii) out-of-network providers who submit claims to Aetna at their billed charges.

14. Fortitude has not contracted with Aetna and, accordingly, is an out-of-network provider.

15. Fortitude has provided medical services to Aetna's subscribers.

16. Upon information and belief, the Aetna health insurance plans at issue in this action (each a "Plan" and collectively the "Plans") permit Aetna's subscribers to obtain healthcare from out-of-network providers such as Fortitude.

Fortitude's Operations

17. At relevant times, Fortitude provided medical care to patients with Plans administered by Aetna.

18. Although Fortitude is not "in-network" with Aetna, it has gone through a "credentialing" process with Aetna whereby Aetna has requested and Fortitude has provided various information about Fortitude including information regarding training, licensure, tax identification number, and certifications and/or registrations in particular healthcare fields.

19. By and through its credentialing process, Aetna evaluated whether Fortitude met Aetna's criteria relating to licensing, professional competence, and conduct and

collected and stored for future reference virtually all the information necessary to understand the type of facility Fortitude operates, how that facility is licensed by state and federal government, and the services it offers to Aetna Members.

Pre-Treatment and Billing Procedures

20. With respect to each of the Unpaid Claims, the Aetna Member received medically necessary, non-surgical services (principally pain management services) from medical providers at Fortitude.

21. For each of the Unpaid Claims, Fortitude followed a substantially identical process prior to and after treatment was provided to the Aetna Member, the purpose of which was to ensure that Fortitude would be paid for the services rendered to the Aetna Member.

22. Because Fortitude is not privy to the terms and provisions of an Aetna Member's Plan, when approached by an Aetna Member seeking treatment, Fortitude requests and relies upon certain information from Aetna to determine whether it will agree to treat the Aetna Member.

23. For each of the Unpaid Claims, Fortitude contacted Aetna prior to providing medical treatment to verify that the Aetna Member was in fact covered by a plan insured or administered by Aetna and to confirm that the plan provided out-of-network benefits for the type of treatment the Aetna Member sought to obtain.

24. Aetna, either on behalf of itself or the self-funded plans, informed Fortitude that the Aetna Member was covered and had out-of-network benefits for the type of treatment the Aetna Member sought to obtain.

25. If Aetna had not confirmed the Aetna Member was insured and had out-of-

network benefits covering the treatment the Aetna Member sought, Fortitude would not have provided services in connection with any of the Unpaid Claims or, alternatively, would have required the Aetna Member to pay cash in advance for his or her treatment.

26. In addition to confirming the existence of out-of-network coverage for the treatment the Aetna Member sought, Fortitude also sought authorization from Aetna to provide such treatment during its pre-treatment communications with Aetna in connection with each of the Unpaid Claims.

27. Aetna, either on behalf of itself or the self-funded plans, either authorized Fortitude to provide treatment or informed Fortitude that no authorization was necessary.

28. Based on the pre-treatment communications with Aetna with respect to each of the Unpaid Claims, each relevant Aetna Member was associated with an insurance plan that provided for payment of out-of-network benefits with respect to each of the Unpaid Claims.

29. Fortitude would not have provided services in connection with the Unpaid Claims if Aetna had not authorized treatment or confirmed that no such authorization was required.

30. As a condition of receiving care at Fortitude Surgery Center in connection with each Unpaid Claim, the Aetna Member knowingly, willingly, validly, and in writing assigned his or her benefits to Fortitude, which states, in relevant part, that the Aetna Member conveys:

> **I hereby convey to the above named provider(s), to the full extent permissible under the laws, including but not limited to, ERISA §502(a)(1)(B) and §502(a)(3), under any applicable employee group health plan(s), insurance policies or public policies, any benefit claim, liability or tort claim, chose in action,**

> **appropriate equitable relief, surcharge remedy or other right I may have to such group health plans, health insurance issuers or tortfeasor insurer(s), with respect to any and all medical expenses legally incurred as a result of the medical services I received from the above named provider(s), and to the full extent permissible under the laws to claim or lien such medical benefits, settlement, insurance reimbursement and any applicable remedies, including, but are not limited to, (1) obtaining information about the claim to the same extent as the assignor, (2) submitting evidence; (3) making statements about facts or law; (4) making any request, or giving, or receiving any notice about appeal proceedings; and (5) any administrative and judicial actions by such provider(s) to pursue such claim, chose in action or right against any liable party or employee group health plan(s), including, if necessary, bring suit by such provider(s) against any such liable party or employee group health plan in my name with derivative standing but at such provider(s) expenses. Unless revoked, this assignment is valid for all administrative and judicial reviews under PPACA, ERISA, Medicare and applicable federal or state laws.**

31. Such assignments, which are standard in the industry, were intended to authorize and did authorize Fortitude to, among other things, obtain information from Aetna, including the information discussed above regarding coverage and authorization, and to bill Aetna, collect benefit payments originally due to the Aetna Member from Aetna for Fortitude's services, and to enforce the Aetna Member's rights in connection with his or her Plan.

32. Because Fortitude and not the Aetna Member himself/herself contacted Aetna to verify the Aetna Member's out-of-network benefits and to obtain authorization, Aetna knew or should have known that the Aetna Member had assigned his/her benefits to Fortitude in connection with each Unpaid Claim before Fortitude rendered treatment to the Aetna Member.

33. At no time during these pre-treatment communications did Aetna notify

Fortitude that the Aetna Member's Plan prohibited the Aetna Member from assigning his or her benefits to Fortitude or that Aetna would refuse to honor any of the Unpaid Claims on the basis that the Aetna Member had impermissibly assigned his or her benefit claims to Fortitude.

34. Had Aetna informed Fortitude that the Plans prohibited assignment, or that Aetna would refuse to honor such claims on the basis that the Aetna Member had impermissibly assigned his or her benefit claims, Fortitude would not have provided services or, alternatively, would have required the Aetna Member to pay cash in advance for his or her treatment.

35. With respect to each Unpaid Claim, the billing form submitted to Aetna as part of the claim submission process included a section which expressly indicated that the Aetna Member had assigned his or her benefits to Fortitude.

36. Thus, for each Unpaid Claim, Aetna was apprised of and knew that the Aetna Member had assigned his or her benefit claims to Fortitude when Aetna confirmed coverage and authorized treatment and when Aetna rendered a determination as to whether it would pay such claims.

37. Aetna did not object or otherwise question the Aetna Members' assignments to Fortitude, nor did Aetna inform Fortitude or the Aetna Members that Aetna would refuse to pay for the pre-authorized, necessary medical services on any other grounds.

38. For each Unpaid Claim, Fortitude provided treatment to the Aetna Member in reliance upon: (a) Aetna's confirmation that the Aetna Member was covered by a Plan with out-of-network benefits; (b) Aetna's representation that Fortitude was authorized to provide treatment if such authorization was necessary; and (c) Aetna's failure to raise any

basis, founded on the terms of the Aetna Member's Plan or otherwise, indicating that Aetna may refuse to make payment to Fortitude for such services.

39. In short, based on Aetna's conduct prior to Fortitude's treatment of an Aetna Member in connection with each of the Unpaid Claims, Fortitude reasonably understood and expected that Aetna would pay Fortitude for such services.

40. As a result, Fortitude expended valuable resources, supplies, and employee time, and incurred other expenses in connection with the services it provided to each Aetna Member.

Aetna Stops Paying

41. For each of the Unpaid Claims, Fortitude, or a billing company working on its behalf, submitted a bill to Aetna.

42. Notwithstanding Aetna's representations to Fortitude that the Aetna Members were covered, and that Fortitude was authorized to provide medical treatment (if authorization was necessary), Aetna began serially denying payment on the Fortitude bills.

43. Prior to denying these claims, Aetna did not inform Fortitude or the Aetna Members that Aetna would refuse to pay for the medical services provided by Fortitude.

44. Aetna's EOBs/denials did not inform Fortitude or the Aetna Members that Aetna was refusing (or would in the future refuse) to pay for the medical services provided by Fortitude on any other basis.

45. Further, Aetna consistently paid the other medical providers involved in the treatment that led to the Unpaid Claims, thereby demonstrating its recognition of the medical necessity of the treatment provided.

46. Upon information and belief, Aetna denied the Unpaid Claims not because

of any lack of medical necessity, but instead because Fortitude has common ownership with certain other pain management providers in the Phoenix area which had previously had disputed unpaid claims with Aetna.

47. Upon information and belief, Fortitude was "flagged" based upon certain common ownership, and because of that common ownership, Aetna decided to flatly and improperly deny the Unpaid Claims.

ERISA Claims

48. People who receive their health insurance through a private employment-based benefit plan are typically participants or beneficiaries of plans governed by ERISA, 29 U.S.C. § 1001 *et seq*. Sometimes ERISA plans are fully insured by health insurers such as Aetna. Sometimes the plan is self-funded, in which case the plan is financially responsible for the claims arising from that plan.

49. Fortitude is informed and believes that Aetna is the ERISA plan administrator and ERISA fiduciary for the ERISA claims at issue in this Complaint (the Unpaid Claims), or is otherwise a proper ERISA defendant because it "effectively controlled the decision whether to honor or to deny a claim ..." *Cyr v. Reliance Standard Life Ins. Co.,* 642 F.3d 1202, 1204 (9th Cir. 2011) and because it "improperly den[ied] or cause[d] improper denial of benefits." *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.,* 770 F.3d 1282, 1297 (9th Cir. 2014).

50. Upon information and belief, with respect to the self-insured ERISA plans at issue herein, other payors enter into agreements with Aetna to perform administrative and other key responsibilities such as: (a) certifying or authorizing providers' provision of services to members; (b) receiving providers' claims; (c) pricing the claims; (d) processing

and administering the claims and appeals; (e) approving or denying the claims; (f) directing whether and how to pay the claims; (g) issuing remittance advices and explanations of benefits; (h) communicating with providers regarding the claims and services; (i) communicating with members regarding the claims and services; and (j) in many instances issuing payment. On information and belief, these agreements are structured such that Aetna has a financial incentive to keep benefit costs to the funding entity low.

51. On information and belief, Aetna functions as an ERISA plan administrator with respect to those claims upon which it has exercised delegated authority to provide plan documents to participants and beneficiaries, receive benefit claims, evaluate and process those claims, review the terms of the plan, make initial benefit determinations, make and administer benefit payments, handle appeals of benefit determinations, and serve as the primary point of contact for members and providers to communicate regarding benefits and benefit determinations.

52. In carrying out these ERISA plan administrator functions, Aetna possesses authority and fiduciary discretion to manage and administer the other payors' ERISA plans.

53. Upon information and belief, no provisions in Aetna's or the other payors' benefit plans, whether in their Summary Plan Descriptions or Evidences of Coverage, justified the failure to pay for the medical services provided by Fortitude to the Aetna Members.

54. The formal mechanism for a health plan or plan administrator to explain why a claim is denied (meaning that the allowed amount is anything less than full billed charges) is an Explanation of Benefits ("EOB"). Aetna was required to issue EOBs in conformance with 29 U.S.C. § 1133 as implemented by 29 C.F.R. § 2560.503-1. Specifically, under 29

C.F.R. § 2560.503-1(g), it was required to:

> . . . provide a claimant with written or electronic notification of any adverse benefit determination. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv). The notification shall set forth, in a manner calculated to be understood by the claimant –
>
> (i) The specific reason or reasons for the adverse determination;
>
> (ii) Reference to the specific plan provisions on which the determination is based;
>
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
>
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review;
>
> (v) In the case of an adverse benefit determination by a group health plan or a plan providing disability benefits,
>
> (A) If an internal rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination, either the specific rule, guideline, protocol, or other similar criterion; or a statement that such a rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination and that a copy of such rule, guideline, protocol, or other criterion will be provided free of charge to the claimant upon request; or
>
> (B) If the adverse benefit determination is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical judgment for the determination, applying the terms of the plan to the claimant's medical circumstances, or a statement that such explanation will be provided free of charge upon request.

55. When each of the Unpaid Claims was denied, Aetna serially failed to adequately explain the basis for its decision in a manner that could be understood. In violation of applicable ERISA regulations, Aetna's EOBs failed to state the specific and/or actual reasons for its failure to pay claims, failed to provide any of the details required by

the law (including the specific plan provisions purportedly justifying its failure to pay), and failed to request more information if needed as required by law.

56. The same is true for appeals. While Aetna's failure to comply with the ERISA regulations when issuing EOBs means that Fortitude had no duty to appeal, Fortitude did typically file and pursue appeals of denied claims to which Aetna's responses were equally deficient. Appeal response letters are subject to parallel requirements as EOBs. 29 C.F.R. § 2560.503-1(j). *See Ellis v. Met. Life Ins. Co.*, 126 F.3d 228, 237 (4th Cir. 1997) ("The notice requirement for the decision on review must be every bit as explicit as an initial denial notice in terms of providing specific reasons for the continued denial and specific references to the pertinent plan provisions."). Yet, Aetna's appeal denial letters were just as non-compliant as its EOBs.

57. To the extent there are any Unpaid Claims that were not fully appealed, in light of Aetna's grievous breach of its obligations (including, but not limited to, Aetna's insufficient EOBs and appeal responses) and systematic failures, the ERISA regulations provide that the claimants "shall be deemed to have exhausted the administrative remedies under the plan ..." 29 C.F.R. § 2560.503-1(l). Similarly, for the same reason, any appeals by Fortitude would have been futile.

CAUSES OF ACTION

CAUSE OF ACTION ONE

(Enforcement Under 29 U.S.C. § 1132(a)(1)(B)

For Failure to Pay ERISA Plan Benefits)

58. Fortitude incorporates all allegations set forth in the above paragraphs as though fully set forth herein.

59. Fortitude alleges this claim for relief in connection with claims for treatment rendered to Aetna Members covered by self-funded health benefits plans governed by ERISA. This is a claim to recover benefits, enforce rights, and clarify rights to benefits under 29 U.S.C. § 1132(a)(1)(B).

60. When a Plan is insured by, funded by, or administered by Aetna, Aetna must pay benefits to Aetna Members or their assignees pursuant to the Plan's terms, including payments for out-of-network services pursuant to the methodology set forth in the Aetna Member's Plan.

61. For each of the Unpaid Claims involving an Aetna Member with a Plan governed by ERISA, Fortitude is entitled assert a claim to recover benefits, enforce rights and clarify rights to benefits under the terms of the Aetna Member's ERISA Plan pursuant to 29 U.S.C. § 1132(a)(1)(B).

62. Fortitude has standing to assert such claims as the Aetna Members' authorized assignee in connection with the services provided such Members.

63. Fortitude is informed and believes that each of the ERISA Plans at issue in connection with the Unpaid Claims required Aetna and the ERISA plans to pay for the medical services that Fortitude provided to the Aetna Member.

64. Aetna has breached these ERISA plan provisions by failing to provide the Aetna Members or their assignees the benefits due to them under the terms of their Plans and by arbitrarily denying payment to Fortitude for the services rendered to the Aetna Members, without justification and in derogation of the Plans' express terms.

65. As a result of Aetna's nonpayment of benefits, it is liable to Fortitude for the difference between what should have been paid and the amounts that were actually paid, if

any, plus applicable interest and attorneys' fees, pursuant to 29 U.S.C. § 1132(g)(1) and any other applicable law, rule, or regulation.

CAUSE OF ACTION TWO

(Breach of Contract)

66. Fortitude incorporates all allegations set forth in the above paragraphs as though fully set forth herein.

67. This Cause of Action applies to claims governed by state law and does not apply to any Unpaid Claims associated with health insurance plans governed by ERISA.

68. Each of the Aetna Members with Non-ERISA Plans (the "Non-ERISA Aetna Members") is party to a valid and enforceable health insurance contract with Aetna which requires Aetna to pay for authorized and medically necessary services rendered by a licensed healthcare professional.

69. By paying premiums, among other things, each of the Non-ERISA Aetna Members provided good and valuable consideration to Aetna in exchange for Aetna's delivery of the benefits set forth in his or her health insurance contract with Aetna, including benefits covering out-of-network services at facilities such as Fortitude Surgery Center.

70. Fortitude is the authorized assignee of each Non-ERISA Aetna Member's rights and benefits under his or her health insurance contract with Aetna and is therefore entitled to assert a claim for Aetna's breach of those assigned contract rights.

71. The Non-ERISA Aetna Members sought and received medically necessary services from Fortitude, and Fortitude sought and received (where necessary) prior authorization from Aetna for such services.

72. Both the Non-ERISA Aetna Members and Fortitude fully performed all their obligations under the health insurance contracts with Aetna, or, to the extent they failed to perform any such obligation, such failure is excused by Aetna's own failure to perform or was waived by Aetna.

73. In material breach of its obligations under the Non-ERISA Aetna Members' health insurance contracts' terms regarding payment of out-of-network healthcare costs, Aetna has categorically and serially failed and refused to pay for the services rendered by Fortitude to the Non-ERISA Aetna Members in connection with the Unpaid Claims.

74. Fortitude has been damaged by Aetna's material breaches in that Fortitude, as the Non-ERISA Aetna Member's assignee, received none of the benefits or payments Aetna contracted to provide in connection with services rendered to the Non-ERISA Aetna Members.

75. Accordingly, Fortitude is entitled to and seeks damages in an amount to be determined at trial, together with attorneys' fees, costs, expenses, and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

CAUSE OF ACTION THREE

(For Breach of the Implied Covenant of Good Faith and Fair Dealing)

76. Fortitude incorporates all allegations set forth in the above paragraphs as though fully set forth herein.

77. This Cause of Action applies to claims governed by state law and does not apply to any Unpaid Claims associated with health insurance plans governed by ERISA.

78. Each of the Non-ERISA Aetna Members is party to a valid and enforceable health insurance contract with Aetna, each of which contains an implied covenant of good

faith and fair dealing.

79. Each such Non-ERISA Aetna Member has validly assigned his or her rights and benefits to Fortitude as a condition of receiving treatment at Fortitude Surgery Center.

80. Prior to treating each of the Non-ERISA Aetna Members, Aetna confirmed the Non-ERISA Aetna Member was covered by a plan with Aetna and either authorized service or indicated no authorization was necessary.

81. As a result, each Non-ERISA Aetna Member (and Fortitude, as their assignee) reasonably expected and anticipated that Aetna would pay claims submitted by Fortitude for such medical treatment pursuant to the terms of the Non-ERISA Aetna Member's contract with Aetna.

82. Aetna's decision not to pay any the Unpaid Claims involving Non-ERISA Aetna Members has been based not on terms excluding coverage in the Non-ERISA Aetna Members' contracts with Aetna, but rather on Aetna's unjustified and undisclosed application of Aetna's own alleged internal policies.

83. Aetna has systematically and arbitrarily applied its alleged policies to all Unpaid Claims involving Non-ERISA Aetna Members who received medical services at Fortitude Surgery Center.

84. Aetna knew or should have known there was no basis for denying the claims submitted by Fortitude as the assignee of Non-ERISA Aetna Members' benefits and rights.

85. Through its intentional conduct described herein, Aetna has failed to act in good faith and has deliberately and unfairly deprived Non-ERISA Aetna Members (and Fortitude, as their assignee) of their expected benefits and reasonable expectations under each of their contracts with Aetna.

86. Through its intentional conduct described herein, Aetna has breached the implied covenant of good faith and fair dealing.

87. As a direct and proximate result of Aetna's breach of the implied covenant of good faith and fair dealing, Non-ERISA Aetna Members (and Fortitude, as their assignee) have been damaged in an amount to be proven at trial.

88. Accordingly, Fortitude is entitled to and seeks damages in an amount to be determined at trial, together with attorneys' fees, costs, expenses, and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

CAUSE OF ACTION FOUR

(For Unjust Enrichment)

89. Fortitude incorporates all allegations set forth in the above paragraphs as though fully set forth herein.

90. This Cause of Action applies to claims governed by state law and as an alternative to Fortitude's other causes of action and does not apply to any Unpaid Claims associated with health insurance plans governed by ERISA.

91. For Unpaid Claims submitted under Non-ERISA Plans, Aetna has been unjustly enriched by failing and refusing to pay the amounts due and owing to Fortitude for services they provided to Non-ERISA Aetna Members.

92. Aetna received a benefit by receiving premiums and other consideration from the Non-ERISA Aetna Members, which in turn allowed the Non-ERISA Aetna Members to receive valuable medical care from Fortitude with the expectation, by both the Non-ERISA Aetna Members and Fortitude, that Aetna would pay the benefits it agreed to pay in exchange for the premiums and consideration provided.

93. Fortitude has been impoverished by providing valuable treatment to the Non-ERISA Aetna Members with the expectation of payment, only to be systematically and arbitrarily denied such payment by Aetna. In providing such care, Fortitude incurred costs associated with the use and consumption of materials and supplies, expenditure of employee time and effort, and the cost of capital—all without receiving any payment for its efforts, services, and investments.

94. There is no justification for Aetna's refusal to pay for the medical treatment provided to Non-ERISA Aetna Members, and it would be inequitable for Aetna to retain the benefits it has received under these circumstances.

95. Should Fortitude's other causes of action fail for any reason, Fortitude will not have been afforded an adequate remedy under law for Aetna's unjust enrichment and Fortitude's resulting impoverishment.

96. Fortitude seeks and is entitled to an award of damages in an amount equal to the value of the services Fortitude provided, in an amount to be proven at trial, together with attorneys' fees, costs, expenses, and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

CAUSE OF ACTION FIVE

(For Promissory Estoppel)

97. Fortitude incorporates all allegations in the above paragraphs as though fully set forth herein.

98. This Cause of Action applies to claims governed by state law and does not apply to any Unpaid Claims associated with health insurance plans governed by ERISA.

99. Although Fortitude did not have a contract with Aetna, Aetna should

nonetheless be estopped to deny its promise to Fortitude in relation to the services the Non-ERISA Aetna Members received at Fortitude Surgery Center.

100. As set forth herein, prior to providing services to any of the Non-ERISA Aetna Members with Unpaid Claims, Aetna confirmed to Fortitude that the Non-ERISA Aetna Member was covered by a plan insured and/or administered by Aetna, that such plan provided the Non-ERISA Aetna Member with out-of-network benefits for the services, and that Fortitude was authorized to provide such services if authorization was required.

101. Aetna did not notify Fortitude, prior to Fortitude providing services to the Non-ERISA Aetna Members with Unpaid Claims, that Aetna would not honor its obligation to pay for a portion of the cost associated with such services.

102. To the contrary, through its representations to Fortitude and by omitting any basis for which Aetna might refuse to pay for such services, Aetna made a promise that if Fortitude provided such services for the benefit of Aetna's Members, Aetna would pay for such services in accordance with its obligations under the Non-ERISA Aetna Member's Plan.

103. Aetna's promises made in connection with services Fortitude provided to the Non-ERISA Aetna Members was further reinforced by Aetna's payment of substantially similar claims Fortitude submitted to Aetna for services rendered to Aetna Members.

104. Aetna unequivocally knew that Fortitude would rely upon Aetna's representations and promises in agreeing to provide services to the Non-ERISA Aetna Members.

105. Indeed, the purpose of each pre-treatment communication Fortitude had with Aetna was to confirm that Aetna would pay Fortitude for the services Fortitude rendered

to the Non-ERISA Aetna Member.

106. Fortitude actually relied on Aetna's promises to its detriment, by providing services to the Non-ERISA Aetna Members in connection with the Unpaid Claims for which it has received no compensation.

107. Furthermore, as alleged herein, Fortitude would not have provided such services or would have required the Non-ERISA Aetna Member to pay cash in advance for his or her services but for Aetna's promise to pay Fortitude.

108. Fortitude's reliance on Aetna's promises was reasonable because, among other things, Fortitude sought authorization and confirmation of coverage and payment prior to providing services to Non-ERISA Aetna Members for the specific purpose of obtaining confirmation that Aetna would pay Fortitude in exchange for the services requested by the Non-ERISA Aetna Members, and in light of Aetna's previous practice of paying such claims submitted by Fortitude.

109. Fortitude seeks and is entitled to an award of damages in an amount equal to the value of the services Fortitude provided, in an amount to be proven at trial, together with attorneys' fees, costs, expenses, and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

CAUSE OF ACTION SIX

(For Negligent Misrepresentation)

110. Fortitude incorporates all allegations in the above paragraphs as though fully set forth herein.

111. This Cause of Action applies to claims governed by state law and does not apply to any Unpaid Claims associated with health insurance plans governed by ERISA.

112. Aetna provided Fortitude with false or incorrect information or omitted or failed to disclose material information to Fortitude relating to Aetna's intention to pay for the services Fortitude provided to the Non-ERISA Aetna Members with Unpaid Claims.

113. As set forth herein, prior to providing treatment to the Non-ERISA Aetna Members with Unpaid Claims, Aetna confirmed to Fortitude that the Non-ERISA Aetna Member was covered by a plan insured and/or administered by Aetna, that such plan provided the Non-ERISA Aetna Member with out-of-network benefits for the treatment, and that Fortitude was authorized to provide such treatment if authorization was required.

114. Aetna did not notify Fortitude, prior to Fortitude providing services to the Non-ERISA Aetna Members with Unpaid Claims, that Aetna would not honor its obligation to pay for a portion of the cost associated with such treatment.

115. To the contrary, through its representations to Fortitude and by omitting any basis for which Aetna might refuse to pay for such treatment, Aetna represented that it would pay for such services in accordance with its obligations under the Non-ERISA Aetna Member's Plan.

116. Aetna intended that Fortitude rely on its false or incorrect information and material omissions by, among other things, providing services to the Non-ERISA Aetna Members, and Aetna provided such false or incorrect information and material omissions for that purpose.

117. Aetna, as the insurer and/or administrator of the Non-ERISA Aetna Member's Plans, failed to exercise reasonable care in communicating information to Fortitude by withholding material information from Fortitude, misleading Fortitude, and falsely informing Fortitude of information in order to induce Fortitude to provide treatment

to the Non-ERISA Aetna Members under the assumption that Aetna would pay Fortitude for such treatment.

118. Fortitude reasonably and justifiably relied on Aetna's false or incorrect information and material omissions to its detriment, which information Fortitude sought in order to confirm Aetna would pay for services rendered to the Non-ERISA Aetna Members.

119. Fortitude's reliance was particularly reasonable and justified in light of Aetna's payment of substantially similar claims Fortitude submitted to Aetna for services rendered to other Aetna Members.

120. As a direct and proximate result of Aetna's material negligent misrepresentations and omissions, Fortitude has been damaged in an amount to be proven at trial, together with attorneys' fees, costs, expenses, and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

CAUSE OF ACTION SEVEN

(Violation of Arizona's Prompt Pay Statute)

121. Fortitude incorporates the allegations made in each of the foregoing paragraphs as though those allegations are set forth fully herein.

122. A.R.S. § 20-3102 requires prompt payment of properly submitted claims and provides for interest on late payments.

123. Fortitude provides services to patients insured by Aetna (as applicable) and in doing so have been damaged by the withholding of payments beyond the statutory time limit on properly submitted claims.

124. Accordingly, Fortitude seeks damages as permitted by Arizona's prompt pay

statute in an amount to be determined at trial, together with costs and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

CAUSE OF ACTION EIGHT

(Breach of Implied Contract)

125. Fortitude incorporates the allegations made in each of the foregoing paragraphs as though those allegations are set forth fully herein.

126. This Cause of Action applies to claims governed by state law and does not apply to any Unpaid Claims associated with health insurance plans governed by ERISA.

127. At all material times, Aetna knew that Fortitude provided services to patients including Aetna's Non-ERISA Members.

128. As a result of being an out-of-network provider, there was a meeting of the minds between Aetna and Fortitude that Fortitude would submit claims, and Aetna would reimburse claims, in accordance with Aetna's policies and procedures applicable to all other out-of-network providers.

129. As a result, an implied-in-fact contract was created that Fortitude would be reimbursed at the applicable out-of-network rate for the provision of care to Aetna's Non-ERISA Members.

130. The Non-ERISA Aetna Members sought and received medically necessary services from Fortitude, and Fortitude sought and received (where necessary) prior authorization from Aetna for such services.

131. Through the parties' conduct and respective undertaking of obligations concerning services provided by Fortitude, the parties implicitly agreed, and Fortitude had a reasonable expectation and understanding, that Aetna would reimburse Fortitude for out-

of-network claims at rates in accordance with the standards acceptable under Arizona law and in accordance with rates Aetna pays for other substantially identical claims submitted by other providers.

132. Under Arizona common law, Aetna, by undertaking responsibility for payment to Fortitude for the services rendered to Non-ERISA Aetna Members, impliedly agreed to reimburse Fortitude at rates, at a minimum, equivalent to the reasonable value of the professional services provided.

133. Aetna, by undertaking responsibility for payment to Fortitude for the services rendered to Non-ERISA Aetna Members, impliedly agreed to reimburse Fortitude at rates, at a minimum, equivalent to the usual and customary rate or alternatively for the reasonable value of the professional services provided by Fortitude.

134. In material breach of its obligations under the implied-in-fact contract between Fortitude and Aetna related to the payment of out-of-network healthcare costs, Aetna has categorically and serially failed and refused to pay for the services rendered by Fortitude provided to the Non-ERISA Aetna Members in connection with the Unpaid Claims.

135. At all material times, all conditions precedent had occurred that were necessary for Aetna to perform its obligations under its implied contract to pay Fortitude for the out-of-network claims, at a minimum, based upon the "usual and customary fees in that locality" or the reasonable value of Fortitude's services.

136. Fortitude has been damaged by Aetna's material breaches of the implied-in-fact contract between Fortitude and Aetna.

137. Fortitude did not agree to provide services to Non-ERISA Aetna Members

without reimbursement.

138. Accordingly, Fortitude is entitled to and seeks damages in an amount to be determined at trial, together with attorneys' fees, costs, expenses, and pre- and post-judgment interest on all amounts awarded at the maximum rate permitted by law.

DEMAND FOR JURY TRIAL

Fortitude demands trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Fortitude requests that this Court enter judgment in its favor and against Aetna (as applicable), and provide the following relief:

1. For compensatory damages in an amount to be proven at trial, plus applicable pre- and post-judgment interest at the maximum rate permitted by law;

2. For restitution in an amount to be proven at trial, plus applicable interest at the maximum rate permitted by law;

3. For punitive damages;

4. For attorneys' fees, costs, and expenses permitted by law; and

5. For such other relief as the Court deems just and appropriate.

Respectfully submitted this 1st day of October 2024.

BRUECKNER SPITLER SHELTS PLC

/s/ Joshua P. Weiss
Bradley S. Shelts
Joshua P. Weiss

EPSTEIN BECKER & GREEN, P.C.
Anthony Argiropoulos (Pro Hac Vice Forthcoming)
150 College Road West, Suite 301
Princeton, New Jersey 08540
(609) 455-1540
AArgiropoulos@ebglaw.com

Kevin T. Elkins (Pro Hac Vice Forthcoming)
1222 Demonbreun St., Suite 1400
Nashville, TN 37203
(615)-564-6060
kelkins@ebglaw.com

Attorneys for Plaintiff Fortitude Surgery Center