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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

BAY AREA SURGICAL  
MANAGEMENT, LLC, a California  
Limited Liability Company; BAY AREA  
SURGICAL GROUP, INC., a California  
Corporation; FOREST SURGERY  
CENTER, L.P., a California Limited  
Partnership; SOAR SURGERY CENTER,  
LLC, a California Limited Liability  
Company; KNOWLES SURGERY  
CENTER, LLC, a California Limited  
Liability Company; NATIONAL  
AMBULATORY SURGERY CENTER,  
LLC, a California Limited Liability  
Company; LOS ALTOS SURGERY  
CENTER, L.P., a California Limited  
Partnership,

Plaintiffs,

vs.

AETNA LIFE INSURANCE  
COMPANY; UNITED HEALTHCARE  
SERVICES, INC.; E3 HEALTHCARE  
MANAGEMENT, LLC.; ALPINE  
HEALTHCARE, LLC; SILICON  
VALLEY SURGERY CENTER, L.P.;  
WAVERLEY SURGERY CENTER, L.P.;  
BASCOM SURGERY CENTER, L.P.;  
CAMPUS SURGERY CENTER, L.P.; EL  
CAMINO AMBULATORY SURGERY  
CENTER, LLC,

Defendants.

Case No. 5:15-cv-01416

**CIVIL COMPLAINT FOR  
DAMAGES AND INJUNCTIVE  
RELIEF FOR VIOLATIONS OF:**

**1) SECTION ONE OF THE  
SHERMAN ACT;  
2) INTENTIONAL  
INTERFERENCE WITH  
PROSPECTIVE ECONOMIC  
ADVANTAGE;  
3) INTENTIONAL  
INTERFERENCE WITH ACTUAL  
CONTRACTUAL RELATIONS;  
4) THE CARTWRIGHT ACT; AND  
5) 17200 *et seq.* - UNFAIR  
COMPETITION**

**[DEMAND FOR JURY TRIAL]**

1 Plaintiffs file this Complaint against defendants Aetna Life Insurance  
 2 Company, United Healthcare Services, Inc., E3 Healthcare Management, LLC,  
 3 Alpine Healthcare, LLC, Silicon Valley Surgery Center, L.P., Waverley Surgery  
 4 Center, L.P., Bascom Surgery Center, L.P., Campus Surgery Center L.P., and El  
 5 Camino Ambulatory Surgery Center, LLC to secure damages and injunctive relief,  
 6 and demanding trial by jury, claim and allege as follows:

7 **I.**

8 **JURISDICTION AND VENUE**

9 1. This Complaint is filed and this action is instituted under Sections 4  
 10 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover the damages caused by,  
 11 and to secure injunctive relief against the named defendants' past and continuing  
 12 violations of Section 1 of the Sherman Act (15 U.S.C. § 1).

13 2. This Court has original and exclusive jurisdiction over the subject  
 14 matter of this civil action under 15 U.S.C. § 15 and 28 U.S.C. §§ 1331 and 1337.  
 15 This Court may exercise supplement jurisdiction over the state law claims in the  
 16 Second, Third, Fourth and Fifth Causes of Action pursuant to 28 U.S.C. § 1367.  
 17 Each defendant maintains an office and transacts business on a systematic and  
 18 continuous basis within this District, and may be found here, within the meaning of  
 19 15 U.S.C. §§ 15, 22 and 28 U.S.C. § 1391. Further, the unlawful acts alleged herein  
 20 were performed and occurred in material part within this District.

21 **II.**

22 **THE PARTIES**

23 3. Plaintiff Bay Area Surgical Management, LLC (hereinafter "BASM")  
 24 is a California limited liability company with a principal place of business located at  
 25 106 Heinz Ct., Los Gatos, California 95032. BASM manages some of the plaintiff  
 26 ambulatory surgical centers ("ASCs") at which outpatient surgeries are performed.

27 4. Plaintiff Bay Area Surgical Group, Inc. (hereinafter "BASG") is a  
 28 California corporation with a principal place of business located at 2222 Lafayette



1 Street, Suite 101, Santa Clara, California 95050. BASG owns and operates an ASC  
2 at that address at which outpatient surgeries are performed.

3 5. Plaintiff Forest Surgery Center, L.P. (hereinafter “Forest Surgery”) is a  
4 California limited partnership with a principal place of business located at 2110  
5 Forest Avenue, Suite 2, San Jose, California 95128. Forest Surgery owns and  
6 operates an ASC at that address at which outpatient surgeries are performed.

7 6. Plaintiff SOAR Surgery Center, LLC (hereinafter “SOAR”) is a  
8 California limited liability company with a principal place of business located at  
9 1849 Bayshore Highway, 3rd Floor, Burlingame, California 94010. SOAR owns  
10 and operates an ASC at that address at which outpatient surgeries are performed.

11 7. Plaintiff Knowles Surgery Center, LLC (hereinafter “Knowles  
12 Surgery”) is a California limited liability company with a principal place of business  
13 located at 555 Knowles Drive, Suite 115, Los Gatos, California 95032. Knowles  
14 Surgery owns and operates an ASC at that address at which outpatient surgeries are  
15 performed.

16 8. Plaintiff National Ambulatory Surgery Center, LLC (hereinafter  
17 “National Ambulatory”) is a California limited liability company with a principal  
18 place of business located at 15251 National Avenue, No. 207, Los Gatos, California  
19 95032. National Ambulatory owns and operates an ASC at that address at which  
20 outpatient surgeries are performed.

21 9. Plaintiff Los Altos Surgery Center, L.P. (hereinafter “Los Altos  
22 Surgery”) is a California limited partnership with a principal place of business  
23 located at 795 Altos Oaks Drive, Los Altos, California 94024. Los Altos Surgery  
24 owns and operates an ASC at that address at which outpatient surgeries are  
25 performed.

26 10. Aetna Life Insurance Company (hereinafter “Aetna”) is a Connecticut  
27 corporation with its principal place of business at 151 Farmington Avenue, Hartford,  
28



1 Connecticut 06156 and is hereby named a defendant herein. Aetna conducts its  
2 business nationwide, including in the State of California.

3 11. United Healthcare Services, Inc. (hereinafter “United”) is a Minnesota  
4 corporation with its principal place of business located at 9900 Bren Road East,  
5 Minnetonka, Minnesota 55443 and is hereby named a defendant herein. United  
6 conducts its business nationwide, including in the State of California.

7 12. E3 Healthcare Management, LLC (hereinafter “E3”) is a California  
8 limited liability company engaged in managing at least five in-network ASCs in  
9 Northern California with its principal place of business at 14601 S. Bascom Ave.,  
10 #100, Los Gatos, California 95032 and is hereby named a defendant herein.

11 13. Alpine Healthcare, LLC (hereinafter “Alpine”) is a California limited  
12 liability company in Northern California with its principal place of business at 375  
13 Forest Ave., Palo Alto, California 94301 and is hereby named a defendant herein.  
14 Alpine manages in-network ASCs in Northern California with E3.

15 14. Campus Surgery Center, L.P. (hereinafter “Campus”) is a California  
16 limited partnership with a principal place of business at 901 Campus Drive, #102,  
17 Daly City, California 94015 and is hereby named a defendant herein. Campus owns  
18 and operates an ASC at that address at which outpatient surgeries are performed.

19 15. Waverley Surgery Center, L.P. (hereinafter “Waverley”) is a California  
20 limited partnership with a principal place of business at 400 Forest Avenue, Palo  
21 Alto, California 94301 and is hereby named a defendant herein. Waverly owns and  
22 operates an ASC at that address at which outpatient surgeries are performed.

23 16. Silicon Valley Surgery Center, L.P. (hereinafter “Silicon Valley” ) is a  
24 California limited partnership with its principal place of business at 14601 S.  
25 Bascom Ave., #100, Los Gatos, California 95032 and is hereby named a defendant  
26 herein. Silicon Valley owns and operates an ASC at that address at which outpatient  
27 surgeries are performed.

28

18. El Camino Ambulatory Surgery Center, LLC (hereinafter “El Camino”) is a California limited liability company with its principal place of business at 2480 Grant Road, Mountain View, California 94040 and is hereby named a defendant herein. El Camino owns and operates an ASC at that address at which outpatient surgeries are performed.

## SUMMARY OF THE CASE

20. Defendants who together exercise substantial influence on the market for ASC services in Northern California conceived and implemented a multifaceted anticompetitive scheme to exclude plaintiffs from the growing lucrative ASC market. Within the last few years, plaintiffs have contracted with an “all star” cast of surgeons creating a great surge in demand for access to its ASCs. To thwart plaintiffs’ active and intense competition and to thwart the operation of freely functioning market forces, defendants have engaged in a concerted campaign that consists of at least the following anticompetitive and monopolistic acts: (a) inducing a group boycott of participating surgeons plaintiffs’ ASCs; (b) inducing and persuading patients not to patronize plaintiffs’ ASCs, (c) reducing the payments to

1 plaintiffs' ASCs; and (d) refusing to offer a reasonable and non-discriminatory  
2 network contract to plaintiffs.

3 21. As a consequence of this exclusionary conduct, competition in the ASC  
4 market in Northern California has been suppressed and consumers in that market  
5 have suffered a loss of choice and have been required to pay higher prices for  
6 services performed at ASCs than would otherwise be the case in a competitive  
7 market. The competitive process, plaintiffs and consumers have suffered antitrust  
8 injury by reason of this unlawful trade restraining conduct. Given the actual and  
9 demonstrable anticompetitive effects of defendants' conspiratorial conduct,  
10 plaintiffs are entitled to rely on *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447,  
11 460-61 (1986).

#### 12 IV.

#### 13 NATURE OF TRADE AND COMMERCE

14 22. Each of the named defendant insurance providers Aetna and United  
15 have the specific health benefit plan through which their insureds are provided  
16 surgical and facility services covered by the plan which are reimbursable. The plans  
17 also determine the extent to such insured bears financial responsibility, if any, for a  
18 portion of the charges through a copayment, coinsurance or deductible amount.

19 23. The amount paid by a health benefit plan for covered services is further  
20 dependent upon whether the services were provided by in-network or out-of-  
21 network providers, i.e., the surgeon and surgical facility. In-network providers  
22 accept a discounted rate in exchange for participation in the insured's network.  
23 Insureds who choose an in-network provider are assured that, for covered services,  
24 their responsibility for payment is limited to any applicable copayment, coinsurance  
25 and deductible amounts provided in their plan. Out-of-network services, however,  
26 do not include this assurance. Different benefit plans include different provisions  
27 for the rate at which out-of-network services will be reimbursed by the carrier. In  
28 addition to any applicable copayment, coinsurance and deductible amounts,



1 members are ultimately responsible for the difference between the amount billed by  
2 an out-of-network provider and the amount allowed by the plan for out-of-network  
3 services. The amount allowed for out-of-network services is often referred to as the  
4 “allowed amount” or “recognized amount.”

5       24. Unlike in-network providers, out-of-network providers do not have the  
6 right, as service providers, to seek payment for their services from the carrier based  
7 on pre-negotiated fixed rates. Instead, out-of-network providers submit bills for  
8 their services to the carrier on behalf of the insured (through an assignment of  
9 benefits), and the carrier then determines the amount it will pay based on the  
10 allowed or recognized amount in its policy with the insured.

11       25. The American Medical Association (“AMA”) publishes and licenses an  
12 annual compendium of CPT Codes, which has become the standard source for  
13 coding procedures for billing purposes in the health care industry. The CPT Code  
14 is, therefore, the standard means for describing the health care services rendered by  
15 providers when submitting claims for payment to health plans and the federal  
16 government.

17       26. Payment of benefits is made after a review of the services provided as  
18 represented on a reasonably standard claim form. A claim for benefits must include  
19 a description of the services provided to the insured. Providers describe the services  
20 by assigning a CPT Code and/or revenue code to each service rendered. The claim  
21 form also includes a representation from the provider of the amount the provider  
22 charged to the member for the described services.

23                                   **V.**

24                                   **INTERSTATE COMMERCE**

25       27. The actions complained of herein will continue to restrain and  
26 adversely affect interstate commerce in that the defendant insurance carriers sell  
27 their policies and services across state lines. Defendant E3 and each plaintiff  
28 purchase goods and supplies in interstate commerce.

**FIRST CAUSE OF ACTION**

**(Violation of Section One of the Sherman Act)**

**(15 U.S.C. § 1)**

28. Plaintiffs hereby allege and incorporate by reference each allegation set forth in Paragraphs 1 through 27, as if set forth in full herein.

29. Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits, inter alia, agreements or arrangements that unreasonably restrain competition in interstate commerce.

30. The relevant product market for antitrust purposes in this case is defined as the provision of surgical services through ambulatory surgical centers. Ambulatory surgical centers do not effectively compete with regular hospitals which in most cases provide longer term care for surgical patients where ASCs are not permitted to have patients overnight at their facilities. Moreover, ASCs generally do not provide emergency services. Finally, ASCs specifically have both lower prices and costs. Aetna and United comprised approximately 25% of plaintiffs' cases prior to Aetna and United's initiation of litigation in February 2012 when doctors stopped referring their cases to plaintiffs and were intimidated and scared off by insurance company threats. Following the initiation of the lawsuits, BASM's Aetna/United cases declined to about half or less of what they were while the amount that they actually paid on the remaining cases also took a steep decline, if anything was paid at all. At best there would be some modest overlap but, in the main, hospitals and ASCs provide care to two entirely distinct sets of patients. The relevant geographic market for antitrust purposes is Northern California.

31. Plaintiffs have the requisite standing to assert antitrust claims against defendants because they are participants and competitors in the relevant market and have suffered injury by reason of the restraints.

32. The anticompetitive scheme and plan of the defendants to unreasonably restrain trade in the above-described trade and commerce has been done with the



1 intent to specifically eliminate plaintiffs as viable competitors and as a threat to E3's  
2 business operation, and to reduce competition in general. Beginning in early 2010  
3 and continuing thereafter, E3, Aetna and United engaged in a continuous stream of  
4 communications about plaintiffs with the objective of eliminating, restraining or  
5 substantially reducing plaintiffs' ability to compete in the ASC market in Northern  
6 California. There have been numerous writings, conversations and meetings among  
7 these three entities to accomplish this objective. These agreements and  
8 combinations constitute unreasonable restraints of trade. The overall  
9 anticompetitive scheme consists of at least the following acts/conduct to be viewed  
10 as a whole:

11 (a) E3 has importuned the insurance company defendants to confine  
12 and restrain the activities of plaintiffs, its singular main ASC competitor;

13 (b) successfully threatening, intimidating and coercing actual and  
14 potential surgeons not to deal with plaintiffs;

15 (c) inducing, organizing and implementing a group boycott of or  
16 concerted refusal to deal among surgeons not to deal with plaintiffs;

17 (d) inducing, organizing and implementing a group boycott among  
18 plaintiffs' patients not to patronize plaintiffs' ASCs;

19 (e) refusing to enter into a reasonable and non-discriminatory  
20 network facilities fee contract with plaintiffs that would assure their ability to  
21 compete on a level playing field; and

22 (f) consistently refusing to pay, or underpaying, plaintiffs' claims  
23 submitted to the carrier defendants for facility fees.

24 33. As a direct result of the foregoing anticompetitive conduct and  
25 restrictions on competition, ambulatory surgical centers, and surgeons have been  
26 restricted from functioning in a competitive and open market, output has been  
27 limited and the quality and choice of facilities and surgeons among patients has been  
28 reduced and diminished in this market. Because of the combinations and



1 conspiracy, the ability of plaintiff to attract surgeries has been severely impacted  
2 and the number of surgeries performed by plaintiffs has diminished seriously.  
3 Moreover, patients have been required to pay coinsurance so that costs to consumers  
4 have increased. There are no business, technological or efficiency reasons or  
5 justifications that require defendants to impose these anticompetitive conditions and  
6 restrictions.

7 34. Defendants' restrictions, threats and arrangements have created a  
8 barrier that precludes effective entry by other competitors into the relevant market  
9 and the quality and variety of offerings in that market have been reduced and  
10 constrained.

11 35. Defendants' arrangements are unlawful under the antitrust laws when  
12 assessed under the "Rule of Reason." The anticompetitive consequences of  
13 defendants' conduct outweigh any procompetitive effects thereof.

14 36. The aforesaid conduct of defendants has produced antitrust injury, and  
15 unless enjoined by this Court, will continue to produce at least the following  
16 anticompetitive, exclusionary and injurious effects upon competition in interstate  
17 commerce:

18 (a) competition in the provision of surgical services in Northern  
19 California has been substantially and unreasonably restricted, lessened, foreclosed  
20 and eliminated;

21 (b) barriers to entry into the market have been raised;

22 (c) consumers choice has been, and will continue to be, significantly  
23 limited and constrained as to selection, price and quality of ambulatory surgical  
24 services in Northern California; and

25 (d) consumer access to plaintiffs' competitive surgical centers will  
26 be artificially restricted and reduced and its products will continue to be excluded  
27 from the market.  
28

1 37. Defendants' restrictions and arrangements affect a substantial volume  
2 of interstate commerce in the relevant market.

3 38. Defendants' predatory and exclusionary conduct has caused antitrust  
4 injury to plaintiffs, competition and consumers.

5 39. By reason of, and as a direct and proximate result of defendants'  
6 practices and conduct, plaintiffs have suffered, and will continue to suffer, financial  
7 injury to their business and property. As a result, plaintiffs have been deprived of  
8 revenues and profits they would have otherwise made, suffered diminished market  
9 growth and sustained a loss of goodwill. Plaintiffs have not yet calculated the  
10 precise extent of its past damages and cannot now estimate with precision the future  
11 damages that continue to accrue, but when they do so, they will seek leave of the  
12 Court to insert the amount of the damages sustained herein

### 13 **SECOND CAUSE OF ACTION**

#### 14 **(Intentional Interference With Prospective Economic Advantage)**

15 40. Plaintiffs hereby allege and incorporate by reference each allegation set  
16 forth in Paragraphs 1 through 39, as if set forth in full herein.

17 41. This Court has jurisdiction over this Second Cause of Action based on  
18 the doctrine of supplemental jurisdiction (28 U.S.C. § 1367) because this Second  
19 Cause of Action arises from the same transactions and from a common nucleus of  
20 operative facts as alleged in the first federal based cause of actions.

21 42. Each named plaintiff has existing and valuable business relationships,  
22 as well as reasonable expectations of further and future relationships, with surgeons  
23 and their actual and prospective surgical patients.

24 43. Defendants were each aware of these prospective business contractual  
25 relationships and engaged in intentional and wrongful conduct designed or  
26 calculated to disrupt and interfere with those relationships. Defendants knew  
27 disruptions or interferences were substantially certain to occur as a result of their  
28 conduct.



1           44. Defendants' conduct in interfering with such prospective business  
2 contractual relations is intentional, malicious and without justification and such  
3 conduct and overall scheme was undertaken solely to hinder, if not eliminate,  
4 competition. Defendants' anticompetitive conduct was not privileged or excused  
5 and was without any legitimate business justification. Defendants have knowingly  
6 engaged in such wrongful conduct for the purpose of excluding competition and to  
7 deprive consumers of the benefits of free and open competition. In doing so,  
8 defendants have wrongfully interfered with the relationship of one or more plaintiffs  
9 and the following physicians, among others: Dr. Andy Yu, Dr. Peter Yuan, Dr. Julia  
10 Kahan, Dr. Norman Kahan, Dr. Samir Sharma, Dr. Jeff Gutman, and Dr. Shahram  
11 Gholami.

12           45. By actions, including but not limited to the unfair, anticompetitive  
13 and/or predatory acts set herein, defendants intended induce plaintiffs' physicians  
14 and patients to end or disrupt their prospective economic relationships with  
15 plaintiffs. Defendants' conduct was a substantial factor in causing financial injury  
16 to each plaintiff and has rendered it more difficult for each plaintiff to remain and  
17 survive as a viable competitor

18           46. Plaintiffs' business and goodwill has been, and will continue to be,  
19 substantially injured by defendants' wrongful and unjustified conduct. Additionally,  
20 prospective customers of each plaintiff will continue to be injured and harmed by  
21 defendants' acts and practices. Although each plaintiff has incurred substantial  
22 losses as a proximate result of the foregoing acts, and will continue to incur  
23 substantial losses in the future as well as its growth being negatively impacted, all  
24 such losses may be difficult to calculate with precision. Therefore, in addition to  
25 any recoverable damages proximately caused by the alleged wrongful conduct, each  
26 plaintiff will also seek a permanent injunction preventing defendants from continued  
27 wrongful interference in the future.

28

47. The intentional and disruptive conduct of each defendant was willful, malicious and oppressive. Consequently, an award of exemplary or punitive damages in an amount sufficient to punish and deter such conduct is justified.

### **THIRD CAUSE OF ACTION**

#### **(Intentional Interference With Actual Contractual Relations)**

48. Plaintiffs hereby allege and incorporate by reference each allegation set forth in Paragraphs 1 through 47, as if set forth in full herein.

49. This Court has jurisdiction over this Third Cause of Action based on the doctrine of supplemental jurisdiction (28 U.S.C. § 1367) because this Third Cause of Action arises from the same transactions and from a common nucleus of operative facts as alleged in the first federal based cause of actions.

50. Each named plaintiff has existing and valuable contracts with surgeons and their actual and prospective surgical patients.

51. Defendants were each aware of these contractual relationships, as well as the identity of plaintiffs' surgeons and their patients, and engaged in intentional and wrongful conduct designed or calculated to disrupt the performance of those contracts.

52. Defendants' conduct in interfering with such contractual relations is intentional, malicious and without justification and such conduct and overall scheme was undertaken solely to hinder, if not eliminate, competition. Defendants' anticompetitive conduct was not privileged or excused and was without any legitimate business justification. Defendants have knowingly engaged in such wrongful conduct for the purpose of excluding competition and to deprive consumers of the benefits of free and open competition. In doing so, defendants have wrongfully interfered with the relationship of one or more plaintiffs and the following physicians, among others: Dr. Andy Yu, Dr. Peter Yuan, Dr. Julia Kahan, Dr. Norman Kahan, Dr. Samir Sharma, Dr. Jeff Gutman, and Dr. Shahram Gholami.

53. By actions, including but not limited to the unfair, anticompetitive and/or predatory acts set herein, defendants intended to and did in fact, induce or cause plaintiffs' physicians and patients to breach, end or restrict their contractual relationships with plaintiffs. As a result, defendants' conduct has prevented the performance, maintenance or completion of plaintiffs' existing and valuable contracts, or has made performance more difficult.

54. Defendants' conduct was a substantial factor in causing financial injury to each plaintiff. Plaintiffs' business and goodwill has been, and will continue to be, substantially injured by defendants' wrongful and unjustified conduct. Additionally, actual and prospective customers of each plaintiff will continue to be injured and harmed by defendants' acts and practices. Although each plaintiff has incurred substantial losses as a proximate result of the foregoing acts, and will continue to incur substantial losses in the future as well as its growth being negatively impacted, all such losses may be difficult to calculate with precision. Therefore, in addition to any recoverable damages proximately caused by the alleged wrongful conduct, each plaintiff will also seek a permanent injunction preventing defendants from continued interference in the future.

55. The intentional and disruptive conduct of each defendant was willful, malicious and oppressive. Consequently, an award of exemplary or punitive damages in an amount sufficient to punish and deter such conduct is justified.

#### **FOURTH CAUSE OF ACTION**

##### **(Violation Of The Cartwright Act)**

##### **(Cal. Bus. & Prof. Code §§ 16720 *et seq.*)**

56. Plaintiffs hereby allege and incorporate by reference each allegation set forth in Paragraphs 1 through 55, as if set forth in full herein.

57. This Court has jurisdiction over this Fourth Cause of Action based on the doctrine of supplemental jurisdiction (28 U.S.C. § 1367) because this Fourth



1 Cause of Action arises from the same transactions and from a common nucleus of  
2 operative facts as alleged in the first federal based cause of actions.

3 58. During all relevant periods, plaintiffs conducted a substantial volume of  
4 business in California. California is plaintiffs' place of incorporation and principal  
5 place of business. As a result of plaintiffs' business operations and substantial  
6 contacts in California, plaintiffs are entitled to the protection of the laws of  
7 California.

8 59. Defendants conduct a substantial volume of business in California,  
9 including but not limited to entering into contracts with ASC facilities, physicians,  
10 and patients in California.

11 60. Defendants entered into and engaged in an unlawful trust in restraint of  
12 the trade and commerce and prohibited by and contrary to the public policy of  
13 California under California Business and Professions Code section 16720 *et seq.*

14 61. Plaintiffs have the requisite standing to assert claims under California  
15 Business and Professions Code section 16720 *et seq.* because they are participants  
16 and competitors in the market for the provision of surgical services in Northern  
17 California ASCs and have suffered injury by reason of defendant's unlawful  
18 restraints, including but not limited to the unreasonable and substantial restriction of  
19 competition for the provision of surgical services in Northern California,  
20 significantly limited consumer choice for ambulatory surgical services in Northern  
21 California, and consumers' reduced access to plaintiffs' competitive surgical  
22 centers.

23 62. The actions of the defendants have the purpose and effect of  
24 eliminating or substantially restricting competition between plaintiffs and ASC  
25 competitors, and inducing or coercing a group boycott of or concerted refusal to deal  
26 among surgeons and patients not to deal with plaintiffs. Defendants have also  
27 combined to restrain competition by consistently refusing to pay, or underpaying,  
28



1 plaintiffs' claims for facility fees, and refusing to enter into a reasonable and non-  
2 discriminatory facilities fee contract with plaintiffs.

3 63. The anticompetitive effect of these restraints outweighs any beneficial  
4 effect of competition.

5 64. As a direct and proximate result of defendants' combinations and  
6 contracts to restrain trade and eliminate competition, plaintiffs have suffered injury  
7 and have been deprived of the benefits of free and fair competition on the merits.  
8 Defendants' anticompetitive conduct, unless restrained, will continue to  
9 unreasonably limit, reduce or suppress actual and potential competition and  
10 intrastate commerce in the Northern California market for surgical services through  
11 ambulatory surgical centers; raise substantial barriers to entry into the market for  
12 ambulatory surgical centers in Northern California; significantly restrict or eliminate  
13 consumer choice as to selection, price and quality of facilities and surgeons in  
14 Northern California; and artificially restrain consumer access to plaintiffs'  
15 competitive surgical centers.

16 65. Because of defendants' actions, plaintiffs have suffered the loss of  
17 reasonably anticipated sales and profits, an increase in expenses, and other damages  
18 to be proven at trial. Pursuant to California Business and Professions Code section  
19 16750, plaintiffs are entitled to recover compensatory and treble damages, injunctive  
20 relief, and reasonable attorneys' fees and costs of suit.

## 21 **FIFTH CAUSE OF ACTION**

### 22 **(Unfair Competition in Violation of**

### 23 **Cal. Bus. & Prof. Code §§ 17200 *et seq.*)**

24 66. Plaintiffs hereby reallege and incorporate by reference each allegation  
25 set forth in Paragraphs 1 through 65, as if set forth in full herein.

26 67. This Court has jurisdiction over this Fifth Cause of Action based on the  
27 doctrine of supplemental jurisdiction (28 U.S.C. § 1367) because this Fifth Cause of  
28



1 Action arises from the same transactions and from a common nucleus of operative  
2 facts as alleged in the first federal based cause of action.

3 68. Section 17200 *et seq.* of the California Business & Professions Code is  
4 written in the disjunctive and broadly covers three varieties of unfair competition –  
5 acts that are unlawful or unfair or fraudulent. The statute’s intent and purpose is to  
6 protect both consumers and competitors by promoting fair competition in  
7 commercial markets for goods and services. The coverage of Section 17200 *et seq.*  
8 is broad and intended to “enjoin on-going wrongful business conduct in whatever  
9 context such activity might occur.” *Cel-Tech Communications, Inc. v. Los Angeles*  
10 *Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181.

11 69. Each plaintiff is a “person” within the meaning of California Business  
12 & Professions Code § 17201.

13 70. As alleged herein, defendants’ conduct constitutes “unfair” business  
14 practices. A practice may be deemed unfair even if not specifically proscribed by  
15 some other law. Conduct that significantly threatens or harms competition, or  
16 threatens an incipient violation of an antitrust law, may be deemed to be “unfair.”

17 71. As alleged herein, defendants’ anticompetitive conduct is also  
18 “unlawful.” Within the meaning of section 17200, virtually any violation of any  
19 civil or criminal federal, state or municipal, statutory, regulatory, court-made or  
20 local law can serve as a predicate for an “unlawful” claim. *Law Offices of Mathew*  
21 *Higbee v. Expungement Assistance Services* (2013) 214 Cal.App.4th 544, 553. The  
22 violations of the federal antitrust laws as alleged herein, satisfy the “unlawful”  
23 prong of section 17200.

24 72. By reason of, and as a direct and proximate result of defendants’ unfair  
25 and unlawful practices and conduct, each plaintiff has suffered and will continue to  
26 suffer, financial injury to its business and property.

27 73. Defendants’ unfair and unlawful conduct has caused harm to each  
28 plaintiff, competition and consumers. Nonetheless, the UCL is a strict liability

1 statute and it is not necessary to show that defendants intended to injure or harm  
2 plaintiffs.

3 74. Pursuant to Business & Professions Code section 17203, the entry of  
4 permanent and mandatory injunctive relief against each defendant is necessary to  
5 enjoin defendants' ongoing unfair and/or unlawful business conduct. Plaintiffs can  
6 seek an injunction whether or not restitution is also available. An injunction is  
7 needed to enable and restore competition in the market for surgical services  
8 rendered through ambulatory surgical centers.

### 9 **PRAYER FOR RELIEF**

10 WHEREFORE each plaintiff prays that this Court adjudges and decrees and  
11 follows:

12 1. The conduct alleged in the First Cause of Action herein be adjudged to  
13 be an unreasonable restraint of trade in violation of Section 1 of the Sherman Act  
14 (15 U.S.C. § 1);

15 2. The conduct alleged in the Second Cause of Action herein be adjudged  
16 to constitute intentional interference with prospective economic advantage;

17 3. The conduct alleged in the Third Cause of Action herein be adjudged to  
18 constitute intentional interference with actual contractual relationships;

19 4. The conduct alleged in the Fourth Cause of Action herein be adjudged  
20 to constitute a violation of the Cartwright Act;

21 5. The conduct alleged in the Fifth Cause of Action herein be adjudged to  
22 be unfair and/or unlawful in violation of Section 17200 *et seq.* of the California  
23 Business & Professions Code;

24 6. Pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15), plaintiff  
25 recover treble the actual amount of its damages sustained by reason of those federal  
26 antitrust violations;

27 7. Pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15), plaintiff be  
28 awarded a reasonable attorneys' fee and costs of litigation;

1           8. Pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26), the  
2 anticompetitive, predatory and/or exclusionary conduct be permanently enjoined;

3           9. Plaintiffs be awarded punitive or exemplary damages on its tort claim  
4 under the Second Cause of Action;

5           10. Pursuant to Section 17203 of the California Business & Professions  
6 Code, the unfair and/or unlawful business practices of defendants be permanently  
7 enjoined;

8           11. Pursuant to Section 1021.5 of the California Code of Civil Procedure,  
9 each plaintiff be awarded reasonable attorneys' fees; and

10          12. For such other and further relief as the Court deems just and proper.  
11

12  
13 Dated: March 26, 2015

BLECHER COLLINS PEPPERMAN & JOYE  
MAXWELL M. BLECHER  
DONALD R. PEPPERMAN  
TAYLOR C. WAGNIERE

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17  
18 By: \_\_\_\_\_

Maxwell M. Blecher  
Attorneys for Plaintiffs

**DEMAND FOR JURY TRIAL**

Each named plaintiff hereby demands trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: March 27, 2015

BLECHER COLLINS PEPPERMAN & JOYE  
MAXWELL M. BLECHER  
DONALD R. PEPPERMAN  
TAYLOR C. WAGNIERE

By: /s/ Maxwell M. Blecher

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