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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

N.C., on her own behalf and on behalf of all similarly situated individuals, and L.J., on her own behalf and on behalf of all similarly situated individuals,

Plaintiffs,

v.

WASHINGTON STATE HEALTH CARE AUTHORITY; PUBLIC EMPLOYEES BENEFITS BOARD; and DOROTHY F. TEETER, Administrator of the Washington State Health Care Authority and Chairman of the Public Employees Benefits Board, in her official capacity,

Defendants.

NO. 16-2-08002-2 SEA

~~PROPOSED~~

SRP

ORDER GRANTING:

- (1) CLASS CERTIFICATION; AND
- (2) CLASSWIDE PRELIMINARY INJUNCTIVE RELIEF

THIS MATTER came before the Court upon Plaintiffs' Amended Motion for Class Certification and Amended Motion for Preliminary Injunction. Plaintiffs are represented by Richard E. Spoonemore and Eleanor Hamburger of Sirianni Youtz Spoonemore Hamburger. Defendants Washington State Health Care Authority, Public Employee Benefits Board and Dorothy F. Teeter in her official capacity, were represented by Angela Coates McCarthy, Nissa A. Iversen, Jennifer S. Meyer, and Katy A. Hatfield, Assistant Attorneys General, of the Office of the Attorney General.

ORDER GRANTING MOTIONS FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTIVE RELIEF- 1

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

I. MATERIAL CONSIDERED

The Court reviewed and considered the pleadings and record herein, including:

- Plaintiffs' Amended Motion for Class Certification;
- Plaintiffs' Amended Motion for Preliminary Injunction;
- Declaration of Richard E. Spoonemore and all attached exhibits;
- Declaration of Eleanor Hamburger;
- Declaration of Robert G. Gish, M.D. and all attached exhibits;
- Declaration of N.C., and all attached exhibits;
- Declaration of L.J. and all attached exhibits;
- Declaration of Richard Driscoll, M.D.,
- Declaration of Warren L. Dinges, M.D., Ph.D.;
- Defendants' Response to Plaintiffs' Motion for Preliminary Injunction;
- Defendants' Response to Plaintiffs' Motion for Class Certification;
- Any declarations and exhibits in support of Defendants' Responses;
- Plaintiffs' Reply in Support of Motion for Preliminary Injunction;
- Plaintiffs' Reply in Support of Motion for Class Certification;
- Any declarations and exhibits in support of Plaintiffs' Reply briefings; ~~and;~~
- Plaintiffs' Notice of Additional Authority; and:
- Second Declaration of Thuy Hua-Ly and plaintiffs' Response

II. ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Based upon the foregoing, the Court hereby finds that all of the requirements of Civil Rule 23 are met for certification of a class and therefore GRANTS plaintiffs' Amended Motion for class certification. The Court appoints class counsel and class representatives and directs notice as set forth below:

*hereto.
Reply
of
WHCA.*

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A. Standard

Civil Rule 23 is to be liberally interpreted because it avoids the multiplicity of litigation, saves members of the class the cost and trouble of filing individual lawsuits, and also frees the defendant from the harassment of identical future litigation. A class is always subject to later modification, or decertification and, therefore, the trial court should err in favor of certifying the class. *Moeller v. Farmers Ins.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002).

B. Class Certification under FRCP 23(a)

1. Numerosity

With respect to CR 23(a)(1), the Court finds that the class can reasonably be expected to number more than 150 individuals and is so numerous that joinder is impracticable. *See* Spoonemore Decl. (5/20/15), *Exh. J*. Numerosity under is met.

2. Commonality

CR 23 (a)(2) is also met as there are common questions of law and fact that affect all members of the class. Commonality requires a showing of the “existence of shared legal issues with divergent factual predicates” or “a common core of salient facts coupled with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality only imposes a “limited burden” upon the plaintiff given that it “only requires a single significant question of law or fact.” *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012). Plaintiffs seek adjudication of common questions, including the key questions of whether DAAs can be “medically necessary” under the Certificates of Coverage for HCV-infected individuals with fibrosis scores less than F3, and whether WHCA’s exclusionary HCV Policy violates the Certificates of Coverage and RCW 70.14.050?

1 **3. Typicality**

2 In order to satisfy the typicality requirement of CR 23(a)(3), plaintiffs must
3 demonstrate that (1) other members of the class have the same or similar injury, (2) the
4 action is based on conduct which is not unique to the named plaintiff, and (3) other class
5 members have been injured by the same course of conduct. *Hansen v. Ticket Track, Inc.*,
6 213 F.R.D. 412, 415 (W.D. Wash. 2003). "Where an action challenges a policy or practice,
7 the named plaintiffs suffering one specific injury from the practice can represent a class
8 suffering other injuries, so long as all the injuries are shown to result from the practice."
9 *Baby Neal v. Casey*, 43 F.3d 48, 57-58 (3d Cir. 1994).

10 N.C. and L.J. are typical of the proposed class. Just like each member of the class,
11 N.C. and L.J. are enrolled in the Uniform Medical Plan (UMP), the self-funded health
12 benefit plan for public employees administered by the Washington State Health Care
13 Authority and the Public Employees Benefit Board. They both are diagnosed with HCV
14 and their medical providers recommended should be treated with Harvoni, a DAA.
15 Both sought prior authorization of coverage for the recommended treatment from the
16 UMP. Both were excluded from coverage of the treatment by operation of defendants'
17 HCV Treatment Policy solely because their fibrosis scores was less than F3. If the HCV
18 Policies' exclusions based upon fibrosis score are removed, then L.J., N.C. and other
19 proposed class members can have their need for treatment of their HCV determined on
20 an individualized basis, using the contractual definition of medical necessity.
21 Commonality is met in this case.

22 **4. Adequacy of Representation**

23 The Court finds that the named plaintiffs are adequate class representatives. The
24 claims advanced by N.C. and L.J. are not in conflict with any interests of the class, and
25 in pursuing their claims, they will necessarily advance the interests of the class. The fact
26 that post-litigation, N.C. received the DAA treatment she requested does not make her

1 an inadequate representative. She may need treatment in the future, if the current
2 treatment is ineffective. In addition, under class action law, her claim relates back to the
3 filing of her original complaint. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir.
4 2011).

5 The Court also finds that the counsel selected by plaintiffs are experienced and
6 well-qualified to represent the class. The requirements of CR 23(a)(4) are met.

7 **C. Class Certification under CR 23(b)(2)**

8 Certification under Rule 23(b)(2) is appropriate where the defendant has "acted
9 on grounds generally applicable to the class, thereby making appropriate final injunctive
10 relief or corresponding declaratory relief with respect to the class as a whole."
11 CR 23(b)(2). Certification under Rule 23(b)(2) is appropriate where, as here, "injunctive
12 or declaratory relief is requested, and when the defendant has acted or refused to act or
13 failed to perform a legal duty on grounds generally applicable to the class." *Sitton v.*
14 *State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003). Specifically,
15 since "[p]laintiffs allege a systemic problem with [state agency] procedures, and they
16 seek injunctive and declaratory relief to change [state agency]'s conduct on an agency-
17 wide basis," certification under CR 23 (b)(2) is proper. *Dunakin v. Quigley*, 99 F. Supp.
18 3d 1297, 1333 (W.D. Wash. 2015), quoting *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me.
19 2011). Plaintiffs seek an end the application of a uniform policy, the HCV Policy, that
20 excludes coverage based on fibrosis score without any individualized determination of
21 medical necessity. This type of relief fits squarely under Rule 23(b)(2). *Wal-Mart Stores,*
22 *Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2558 (2011) ("The key to the (b)(2) class is 'the
23 indivisible nature of the injunctive or declaratory remedy warranted - the notion that
24 the conduct is such that it can be enjoined or declared unlawful only as to all of the class
25 members or as to none of them.>"). The proposed class is certified pursuant to CR
26 23(b)(2).

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III. ORDER GRANTING CLASSWIDE PRELIMINARY INJUNCTIVE RELIEF

The Court hereby GRANTS Plaintiffs' Motion for Preliminary Injunctive Relief, and enters the following findings of fact and conclusions of law as required by CR 52(a)(2)(A). See *Turner v. City of Walla Walla*, 10 Wn. App. 401, 405, 517 P.2d 985 (1974).

A. Civil Rule 52(a)(2)(A) Findings of Fact

1. N.C. and L.J. are both enrollees in the Uniform Medical Plan, the self-funded health benefit plan administered by defendants for public employees. N.C. Decl., ¶2; L.J. Decl., ¶1. Both pay premiums towards the cost of the health coverage. Spoonemore Decl., *Exh. L*, pp. 95-96 ("They pay premiums").

2. Both N.C. and L.J. are monoinfected with HCV. Driscoll Decl., ¶2; Dinges Decl., ¶2. N.C. has a fibrosis score of F1. Driscoll Decl., ¶2; N.C. Decl., ¶2; Spoonemore Decl., *Exh. K*. L.J. has a fibrosis score of F2. Dinges Decl., ¶2.

3. Both received written prescriptions for Harvoni, a DAA, to treat their HCV. *Id.*, ¶3; Driscoll Decl. ¶4. Both sought prior authorization from WHCA for the medication, and both were denied based upon the defendants' standard HCV Treatment Policy. L.J. Decl., ¶2, *Exhs. A, B*; N.C. Decl., *Exh. A*. An expedited administrative appeal under the UMP policy was also pursued on behalf of N.C. which was also denied. Spoonemore Decl., *Exh. L*, p. 58, lns. 12-25; *Exh. M*.

4. After this lawsuit was filed, N.C.'s request for prior authorization was reviewed by Dr. Daniel Lessler, WHCA's Chief Medical Officer. He immediately approved N.C. for treatment despite the fact that both her biopsy and fibroscan show that she is F1. Spoonemore Decl., *Exh. L*, p. 57, lns. 2-24.; Driscoll Decl., ¶2. Dr. Lessler admitted that the lawsuit prompted his review and approval, and that it was the only instance in which he reversed a denial under the HCV Policy. Spoonemore Decl., *Exh. L*, p. 63.

1 5. N.C. is currently undergoing treatment. If N.C.'s current treatment is not
2 successful, the standard of care is to retreat with another DAA. Gish Decl., ¶7.

3 **B. Civil Rule 52 (a)(2)(A) Conclusions of Law**

4 1. “A plaintiff is entitled to a preliminary injunction when “(1) [s]he has a
5 clear legal or equitable right, (2) [s]he has a well-grounded fear of immediate invasion of
6 that right, and (3) that the acts he is complaining of have or will result in actual and
7 substantial injury.” *DeLong v. Parmelee*, 157 Wn. App. 119, 150-51, 236 P.3d 936, 951-52
8 (2010).

9 2. Based upon the evidence presented, the Court concludes that Plaintiffs and
10 the Plaintiffs’ Class have a “clear legal or equitable right” to coverage of medically
11 necessary treatment for their HCV conditions, consistent with the terms and conditions
12 of the UMP Certificates of Coverage.

13 3. To reach this conclusion the Court considered whether the Plaintiffs and
14 the Class are likely to prevail on their claim that defendants breached their contract with
15 Plaintiffs and the Class when they applied the HCV Treatment Policy.

16 4. The Court concludes that the Plaintiffs and the Class will likely prevail on
17 their position that all the UMP requirements for coverage of DAAs to treat HCV are met
18 and none of the “limitations” on coverage of prescription drugs applies, such that the
19 exclusions imposed in the HCV Policy based upon fibrosis score are a breach of contract.
20 Specifically, DAAs to treat HCV have been approved for coverage by the Washington
21 State Pharmacy and Therapeutics Committee (P&T Committee). Spoonemore Decl., *Exh.*
22 *J*, p. 85. They are listed for coverage by the UMP. *Id.*, *Exh. C*. The P & T Committee
23 determined that the medications are safe and effective for the treatment of HCV. *Id.*,
24 *Exh. L*, p. 41, 69-70. None of the contractual limitations on prescription drugs under the
25 UMP contract apply. *See id.*, *Exh. H*, p. 98. Of the ten limitations, WHCA claims that
26 only one limitation, “a sound medical reason” applies. *Id.*, *Exh. L*, p. 74, lns. 7-13. This

1 term is not defined in the coverage contract, and WHCA's Chief Medical Director
2 admitted, however, that its "medical reason" was driven by concerns about cost. *Id.*, pp.
3 71-72.

4 5. Based upon the plain language of the UMP contract, the Court concludes
5 that no reasonable enrollee in the UMP's health coverage would understand the term
6 "sound medical reason" to include the UMP's concerns about cost. *See, e.g., Dailey v.*
7 *Allstate Ins. Co.*, 135 Wn.2d 777, 783, 958 P.2d 990 (1998) ("Courts interpret insurance
8 contacts as an average insurance purchaser would understand them. . . ."). As a result,
9 the Court finds that none of the limitations listed in the UMP Certificate of Coverage
10 limit coverage of medically necessary DAAs.

11 6. The Court then considered whether DAAs may be medically necessary
12 under the terms of the UMP certificate of coverage for individuals with F0-F2 fibrosis
13 score, such that the blanket exclusion of treatment for class members resulting from the
14 application of the HCV policy is improper. The definition of "medical necessity" under
15 the UMP Certificate of Coverage requires that four conditions are met:

- 16 1. The purpose of the service, supply, intervention, or drug is to
17 treat or diagnose a medical conditions.
- 18 2. It is the appropriate level of service, supply, or intervention, or
19 drug dose considering the potential benefits and harm to the
20 patient.
- 21 3. The level of service, supply, intervention, or drug dose is known
22 to be effective in improving health outcomes.
- 23 4. The level of service, supply, intervention, or drug recommended
for this condition is cost-effective compared to alternative
interventions, including no intervention.

24 Spoonemore Decl., *Exh. H*, pp. 212-214. Based upon the evidence in the record, the Court
25 concludes that Plaintiffs and the Class will likely prevail in showing that all of these
26 conditions are met. Defendants admit that the treatment of choice for HCV is treatment

1 with a DAA, regardless of fibrosis score. *Id.*, *Exh. L*, pp. 26-27. There is no other equally
2 effective, less costly alternative treatment. *Id.*, *Exh. A*, p.2, 4; Gish Decl. ¶¶6, 9-10,15-18.
3 Under the terms of the UMP coverage contract, treatment with DAAs may be medically
4 necessary for enrollees with fibrosis scores of F0-F2, such that the blanket exclusions of
5 coverage in the HCV treatment policy are a breach of contract.

6 7. The Court further concludes that Plaintiffs and the Class will likely prevail
7 in their claim for declaratory relief that defendants violated RCW 70.14.050 when they
8 applied restrictions to coverage of medically necessary medications that were not
9 "evidence-based" and resulted in reduced quality of care. The undisputed evidence
10 shows that WHCA imposed restrictions on coverage of medically necessary DAAs to
11 treat HCV solely because of cost, and despite its knowledge that the rationing policy
12 would potentially result in greater mortality and morbidity for Plaintiffs and the Class.
13 *See Spoonemore Decl.*, *Exh. A*, p. 4, *Exh. L*, p. 89.

14 8. The Court further concludes that Plaintiffs and the Class have a well-
15 grounded fear of an immediate invasion of their rights. Defendants have applied HCV
16 Policy consistently on all requests from class members who have requested DAA
17 treatment, without exceptions (apart from HCA's post-litigation attempt to moot N.C.'s
18 claim). *Spoonemore Decl. Exh. E, Exh. L*, pp. 46-48; 65. Defendant WHCA also admits
19 that it will not change the policy unless and until more money is provided to it by the
20 State. *Id.*, *Exh. L*, pp. 104-105.

21 9. Defendants' HCV Treatment Policy will cause actual and substantial harm
22 to Plaintiffs and the Class unless enjoined. The denial of medically necessary coverage
23 required under a certificate of coverage is sufficient proof of "actual or substantial
24 injury." *Washington Fed'n of State Employees (WSFE), Council 28, AFL-CIO v. State*, 99
25 Wn.2d 878, 891, 665 P.2d 1337 (1983) (it is "well nigh irrefutable" that a cancellation of
26 health insurance is an injury that has no remedy at law). It is undisputed that Class

1 members will potentially experience serious health conditions or even die if WHCA
2 continues to apply the current HCV Policy. Spoonemore Decl., *Exh. L*, pp. 88-89; *Exh. A*,
3 p. 4; Gish Decl., ¶¶8, 15-17 That is a sufficient showing of "actual or substantial injury."

4 10. Any bond requirement is waived under RCW 7.490.080 because "a
5 person's health...would be jeopardized" without this preliminary injunction.

6 IV. CONCLUSION

7 It is therefore ORDERED that Plaintiffs' Motion for Class Certification and Motion
8 for Preliminary Injunctive Relief are GRANTED in full. It is further ORDERED that:

9 A. Class Definition

10 The Court certifies the following class:

11 All individuals

12 (i) covered under HCA's self-funded health benefits plan(s) administered
13 by PEBB, HCA and/or Teeter (or her predecessor or successor) that have
14 been or will be offered, established, renewed or otherwise effective on or
15 after October 10, 2014;

16 (ii) who have received, require, or are expected to require treatment for
17 Hepatitis C with Harvoni/ledipasvir-sofosbuvir or other similar FDA
18 approved direct acting antivirals under the current guidelines adopted by
19 the American Association for the Study of Liver Diseases and the Infectious
20 Diseases Society of America (*see* <http://www.hcvguidelines.org/full-report/when-and-whom-initiate-hcv-therapy>); and

21 (iv) do not meet the coverage criteria for HCV medication applied by
22 defendants, as described in *Appendix 1* to Plaintiffs' Amended Complaint.

23 The Court further appoints N.C. and L.J. as class representatives and appoints
24 Richard E. Spoonemore and Eleanor Hamburger of Sirianni Youtz Spoonemore
25 Hamburger as class counsel.

26 B. Preliminary Injunctive Relief

Defendants are hereby enjoined from applying any exclusions of coverage of
DAAs to treat HCV based upon fibrosis score while this action is pending. Defendants

1 are further enjoined from making medical necessity decisions about DAA treatment for
2 HCV based on cost or budgetary concerns while this action is pending.

3 Defendants are ordered to undertake an individualized determination of medical
4 necessity based upon the terms and conditions of the UMP Certificate of Coverage and
5 prevailing medical standards, without regard to cost, of each request for treatment of
6 HCV with DAAs by Class members while this action is pending.

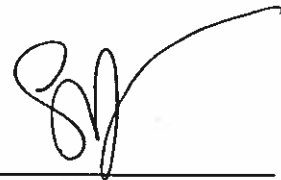
7 **C. Notice**

8 Class counsel shall draft and submit for Court approval a form of Notice within
9 seven (7) days after entry of this Court's Order. The parties shall meet and confer on the
10 form of the Order. The proposed Notice shall inform class members of the Court's Order
11 certifying a class and ordering preliminary injunctive relief.

12 After the form of the Notice is approved by the Court, Defendants shall immediately
13 and prominently post the Notice on WHCA's website. Within 21 days of approval of the
14 Notice by the Court, Defendants shall also mail, via first class mail, the Notice to all
15 current Class members who had a prior authorization request for coverage of treatment
16 of HCV with a DAA denied by WHCA, in addition to all enrollees in UMP who can be
17 identified by defendants or its agents as having a HCV diagnosis.

18 DATED: this 17th day of ~~April~~, 2016.

19 August



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21 Suzanne R. Parisien
22 King County Superior Court Judge
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1 Presented by:

2 SIRIANNI YOUTZ
3 SPOONEMORE HAMBURGER

4 /s/ Richard E. Spoonemore
Richard E. Spoonemore (WSBA #21833)
5 Eleanor Hamburger (WSBA #26478)

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on May 20, 2016, I served a copy of this document on counsel of record as indicated below:

Angela Coats McCarthy	<input type="checkbox"/>	By United States Mail
Nissa A. Iversen	<input type="checkbox"/>	By FedEx/UPS
Katy A. Hatfield	<input type="checkbox"/>	By Legal Messenger
Jennifer S. Meyer	<input checked="" type="checkbox"/>	By E-Service/Email
Office of the Attorney		Tel. (360) 586-6565
General		Fax (360) 586-6657
7141 Cleanwater Drive SW		angelac3@atg.wa.gov
PO Box 40124		nissai@atg.wa.gov
Olympia, WA 98504-0124		katyjl@atg.wa.gov
<i>Attorneys for Defendants</i>		jennisl@atg.wa.gov

DATED: May 20, 2016, at Seattle, Washington.

Richard E. Spoonemore (WSBA #21833)