

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

~~REVISED PROPOSED~~ SRP

ORDER GRANTING:

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

– AND –

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS

THIS MATTER came before the Court upon Plaintiffs' Amended Motion for Class Certification and Amended Motion for Preliminary Injunction, in addition to Defendants' Amended Motion to Dismiss. 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 CLASS CERTIFICATION AND CLASSWIDE
PRELIMINARY INJUNCTIVE RELIEF, AND DENYING MOTION
TO DISMISS - 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;
- Defendants' Amended Motion to Dismiss;
- 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.;
- Declaration of Daniel Lessler, M.D.;
- Declaration of Grady Williamson;
- Second Declaration of Grady Williamson;
- Declaration of Angela Coats McCarthy and all attached exhibits;
- Declaration of Sital Patel;
- Declaration of Cynthia Lacro;
- Defendants' Response to Plaintiffs' Amended Motion for Preliminary Injunction;
- Defendants' Response to Plaintiffs' Amended Motion for Class Certification;
- Declaration of Thuy Hua-Ly;
- Second Declaration of Daniel Lessler, M.D.;
- Plaintiffs' Reply in Support of Motion for Preliminary Injunction;
- Plaintiffs' Reply in Support of Motion for Class Certification;

- 1 • Supplemental Declaration of Richard E. Spoonemore and all attached
- 2 exhibits;
- 3 • Supplemental Declaration of L.J.;
- 4 • Defendants' Reply in Support of Motion to Dismiss;
- 5 • Second Declaration of Angela Coats McCarthy and all attached exhibits;
- 6 • Plaintiffs' Notice of Additional Authority;
- 7 • Second Declaration of Thuy Hua-Ly;
- 8 • Plaintiff Response to Second Declaration of Thuy Hua-Ly; and
- 9 • Reply of WHCA.

10 II. ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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

15 A. Standard

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

22 B. Class Certification under FRCP 23(a)

23 1. Numerosity

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

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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?

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3. Typicality

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

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N.C. and L.J. are typical of the proposed class. Just like each member of the class, N.C. and L.J. are enrolled in the Uniform Medical Plan (UMP), the self-funded health benefit plan for public employees administered by the Washington State Health Care Authority and the Public Employees Benefit Board. They both are diagnosed with HCV and their medical providers recommended should be treated with Harvoni, a DAA.

1 Both sought prior authorization of coverage for the recommended treatment from the
2 UMP. Both were excluded from coverage of the treatment by operation of defendants'
3 HCV Treatment Policy solely because their fibrosis scores was less than F3. If the HCV
4 Policies' exclusions based upon fibrosis score are removed, then L.J., N.C. and other
5 proposed class members can have their need for treatment of their HCV determined on
6 an individualized basis, using the contractual definition of medical necessity.
7 Commonality is met in this case.

8 4. Adequacy of Representation

9 The Court finds that the named plaintiffs are adequate class representatives. The
10 claims advanced by N.C. and L.J. are not in conflict with any interests of the class, and
11 in pursuing their claims, they will necessarily advance the interests of the class. The fact
12 that post-litigation, N.C. received the DAA treatment she requested does not make her
13 an inadequate representative. She may need treatment in the future, if the current
14 treatment is ineffective. In addition, under class action law, her claim relates back to the
15 filing of her original complaint. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir.
16 2011).

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

19 C. Class Certification under CR 23(b)(2)

20 Certification under Rule 23(b)(2) is appropriate where the defendant has "acted
21 on grounds generally applicable to the class, thereby making appropriate final injunctive
22 relief or corresponding declaratory relief with respect to the class as a whole."
23 CR 23(b)(2). Certification under Rule 23(b)(2) is appropriate where, as here, "injunctive
24 or declaratory relief is requested, and when the defendant has acted or refused to act or
25 failed to perform a legal duty on grounds generally applicable to the class." *Sitton v.*
26 *State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003). Specifically,

1 since “[p]laintiffs allege a systemic problem with [state agency] procedures, and they
2 seek injunctive and declaratory relief to change [state agency]’s conduct on an agency-
3 wide basis,” certification under CR 23 (b)(2) is proper. *Dunakin v. Quigley*, 99 F. Supp.
4 3d 1297, 1333 (W.D. Wash. 2015), quoting *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me.
5 2011). Plaintiffs seek an end the application of a uniform policy, the HCV Policy, that
6 excludes coverage based on fibrosis score without any individualized determination of
7 medical necessity. This type of relief fits squarely under Rule 23(b)(2). *Wal-Mart Stores,*
8 *Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2558 (2011) (“The key to the (b)(2) class is ‘the
9 indivisible nature of the injunctive or declaratory remedy warranted – the notion that
10 the conduct is such that it can be enjoined or declared unlawful only as to all of the class
11 members or as to none of them.”). The proposed class is certified pursuant to CR 23(b)(2)
12 for purposes of injunctive and declaratory relief.

13 III. ORDER GRANTING CLASSWIDE PRELIMINARY INJUNCTIVE RELIEF

14 The Court hereby GRANTS Plaintiffs’ Motion for Preliminary Injunctive Relief,
15 and enters the following findings of fact and conclusions of law as required by
16 CR 52(a)(2)(A). See *Turner v. City of Walla Walla*, 10 Wn. App. 401, 405, 517 P.2d 985
17 (1974).

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

19 1. N.C. and L.J. are both enrollees in the Uniform Medical Plan, the self-
20 funded health benefit plan administered by defendants for public employees. N.C. Decl.,
21 ¶2; L.J. Decl., ¶1. Both pay premiums towards the cost of the health coverage.
22 Spoonemore Decl., *Exh. L*, pp. 95-96 (“They pay premiums”).

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

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

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

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

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

17 1. "A plaintiff is entitled to a preliminary injunction when "(1) [s]he has a
18 clear legal or equitable right, (2) [s]he has a well-grounded fear of immediate invasion of
19 that right, and (3) that the acts he is complaining of have or will result in actual and
20 substantial injury." *DeLong v. Parmelee*, 157 Wn. App. 119, 150-51, 236 P.3d 936, 951-52
21 (2010).

22 2. Based upon the evidence presented, the Court concludes that Plaintiffs and
23 the Plaintiffs' Class have a "clear legal or equitable right" to coverage of medically
24 necessary treatment for their HCV conditions, consistent with the terms and conditions
25 of the UMP Certificates of Coverage.
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1 3. To reach this conclusion the Court considered whether the Plaintiffs and
2 the Class are likely to prevail on their claim that defendants breached their contract with
3 Plaintiffs and the Class when they applied the HCV Treatment Policy.

4 4. The Court concludes that the Plaintiffs and the Class will likely prevail on
5 their position that all the UMP requirements for coverage of DAAs to treat HCV are met
6 and none of the "limitations" on coverage of prescription drugs applies, such that the
7 exclusions imposed in the HCV Policy based upon fibrosis score are a breach of contract.
8 Specifically, DAAs to treat HCV have been approved for coverage by the Washington
9 State Pharmacy and Therapeutics Committee (P&T Committee). Spoonemore Decl., *Exh.*
10 *J*, p. 85. They are listed for coverage by the UMP. *Id.*, *Exh. C*. The P & T Committee
11 determined that the medications are safe and effective for the treatment of HCV. *Id.*,
12 *Exh. L*, p. 41, 69-70. None of the contractual limitations on prescription drugs under the
13 UMP contract apply. *See id.*, *Exh. H*, p. 98. Of the ten limitations, WHCA claims that
14 only one limitation, "a sound medical reason" applies. *Id.*, *Exh. L*, p. 74, lns. 7-13. This
15 term is not defined in the coverage contract, and WHCA's Chief Medical Director
16 admitted, however, that its "medical reason" was driven by concerns about cost. *Id.*, pp.
17 71-72.

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

25 6. The Court then considered whether DAAs may be medically necessary
26 under the terms of the UMP certificate of coverage for individuals with F0-F2 fibrosis

1 score, such that the blanket exclusion of treatment for class members resulting from the
2 application of the HCV policy is improper. The definition of "medical necessity" under
3 the UMP Certificate of Coverage requires that four conditions are met:

- 4 1. The purpose of the service, supply, intervention, or drug is to
5 treat or diagnose a medical conditions.
- 6 2. It is the appropriate level of service, supply, or intervention, or
7 drug dose considering the potential benefits and harm to the
8 patient.
- 9 3. The level of service, supply, intervention, or drug dose is known
10 to be effective in improving health outcomes.
- 11 4. The level of service, supply, intervention, or drug recommended
for this condition is cost-effective compared to alternative
interventions, including no intervention.

12 Spoonemore Decl., *Exh. H*, pp. 212-214. Based upon the evidence in the record, the Court
13 concludes that Plaintiffs and the Class will likely prevail in showing that all of these
14 conditions are met. Defendants admit that the treatment of choice for HCV is treatment
15 with a DAA, regardless of fibrosis score. *Id.*, *Exh. L*, pp. 26-27. There is no other equally
16 effective, less costly alternative treatment. *Id.*, *Exh. A*, p.2, 4; Gish Decl. ¶¶6, 9-10,15-18.
17 Under the terms of the UMP coverage contract, treatment with DAAs may be medically
18 necessary for enrollees with fibrosis scores of F0-F2, such that the blanket exclusions of
19 coverage in the HCV treatment policy are a breach of contract. In short, based on the
20 evidence presented, DAAs are "medically necessary" under the UMP contract because
21 (1) the purpose of DAAs is to treat a medical condition, (2) DAAs are the appropriate
22 level of intervention considering the potential benefits and harm to the patient, (3) DAAs
23 are known to be effective in improving health outcomes, and (4) DAAs for HCV is cost-
24 effective compared to alternative interventions, including no intervention.

25 7. The Court further concludes that Plaintiffs and the Class will likely prevail
26 in their claim for declaratory relief that defendants violated RCW 70.14.050 when they

1 applied restrictions to coverage of medically necessary medications that were not
2 "evidence-based" and resulted in reduced quality of care. The undisputed evidence
3 shows that WHCA imposed restrictions on coverage of medically necessary DAAs to
4 treat HCV solely because of cost, and despite its knowledge that the rationing policy
5 would potentially result in greater mortality and morbidity for Plaintiffs and the Class.
6 See Spoonemore Decl., *Exh. A*, p. 4, *Exh. L*, p. 89.

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

14 9. Defendants' HCV Treatment Policy will cause actual and substantial harm
15 to Plaintiffs and the Class unless enjoined. The denial of medically necessary coverage
16 required under a certificate of coverage is sufficient proof of "actual or substantial
17 injury." *Washington Fed'n of State Employees (WSFE), Council 28, AFL-CIO v. State*, 99
18 Wn.2d 878, 891, 665 P.2d 1337 (1983) (it is "well nigh irrefutable" that a cancellation of
19 health insurance is an injury that has no remedy at law). It is undisputed that Class
20 members will potentially experience serious health conditions or even die if WHCA
21 continues to apply the current HCV Policy. Spoonemore Decl., *Exh. L*, pp. 88-89; *Exh. A*,
22 p. 4; Gish Decl., ¶¶8, 15-17. That is a sufficient showing of "actual or substantial injury."

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

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IV. ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss under CR 12(b)(1) and/or CR 12(b)(6) is DENIED in its entirety.

V. CONCLUSION

It is therefore ORDERED that Plaintiffs' Amended Motion for Class Certification and Amended Motion for Preliminary Injunctive Relief are GRANTED in full, and Defendants' Amended Motion to dismiss is DENIED in full. It is further ORDERED that:

A. Class Definition

The Court certifies the following class under CR 23(b)(2) for the purposes of injunctive and declaratory relief:

All individuals

(i) covered or who will become covered under WHCA's self-funded health benefits plan(s) administered by PEBB, HCA and/or Teeter (or her predecessor or successor);

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

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

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

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.

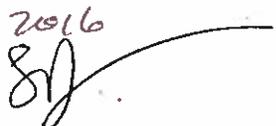
7 **C. Notice**

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 This Order, which shall be effective *nuc pro tunc* August 17, 2016, replaces and
19 supersedes the "Order Granting: (1) Class Certification; and (2) Classwide Preliminary
20 Injunctive Relief" dated August 17, 2016.

21 DATED: this 13th day of September, 2016.

22 *Nunc pro tunc August 17, 2016*
23 

24 _____
25 SUZANNE R. PARI SIEN
26 King County Superior Court Judge

1 Presented by:

2 SIRIANNI YOUTZ
3 SPOONEMORE HAMBURGER

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

7 Presentation waived, Approved as to form:

8 ROBERT W. FERGUSON
9 Attorney General

10 /s/ Jennifer S. Meyer
11 Angela Coats McCarthy (WSBA #35547)
12 Nissa A. Iversen (WSBA #46708)
13 Katy A. Hatfield (WSBA #39906)
Jennifer S. Meyer (WSBA #27057)
14 Attorneys for Defendants