IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00904-KLM

MICHAEL RYAN,
SHARON MOLINA,
EARBY MOXON, and
HEATHER MEYERS,
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SUSAN E. BIRCH, in her official capacity only, as Executive Director of the Colorado State Department of Health Care Policy and Financing,

Defendant.

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on Plaintiffs' **Motion for Certification of Class, Approval of Class Representatives, and Approval and Appointment of Class Counsel** [#18][1] (the "Motion"). Defendants filed a Response [#29] in opposition to the Motion, and Plaintiffs filed a Reply [#33]. The Court has reviewed the Motion, the Response, the Reply, the entire case file, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the Motion [#18] is **GRANTED.**[2]

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[1] "[#18]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Order.

[2] Pursuant to 28 U.S.C. § 636(c) and D.C.COLO.LCivR 72.2(d), the parties in this civil action consented to have the undersigned conduct all proceedings. *See* [#36, 37].

I. Background

Plaintiffs initiated this putative class action lawsuit against Defendant Susan E. Birch, the Executive Director of the Colorado State Department of Health Care Policy and Financing ("HCPF"), for denying them coverage for direct-acting antiviral ("DAA") treatment in violation of the Medicaid Act. *Am. Compl.* [#14] ¶ 7; 42 U.S.C. §§ 1396-1396v. Plaintiffs are Medicaid enrollees who suffer from the Hepatitis C Virus ("HCV") and have been denied coverage by HCPF for DAA treatment. *Am. Compl.* [#14] ¶¶ 1-4. Plaintiffs' Amended Complaint [#14] contains three claims for relief: (1) a 42 U.S.C. § 1983 claim for HCPF's failure to provide necessary medical assistance in violation of 42 U.S.C. § 1396a(a)(10)(A); (2) a § 1983 claim for denial of access to treatment comparable to similarly situated Medicaid enrollees in violation of 42 U.S.C. § 1396a(a)(10)(B); and (3) a § 1983 claim for failure to provide necessary medical assistance with reasonable promptness in violation of 42 U.S.C. § 1396a(a)(8). *Id.* ¶¶ 5, 105-06, 110-12, 114-15.

Colorado participates in the federal Medicaid program and has chosen to provide prescribed drugs in its state Medicaid plan, a non-mandatory service under the Medicaid Act. COLO. REV. STAT. § 25.5–5–202. HCPF is the state agency that administers the Medicaid program in Colorado. COLO. REV. STAT. § 25.5–4–104(1). Under HCPF policy, enrollees diagnosed with HCV must satisfy certain criteria in order to be approved for DAA treatment, a breakthrough therapy for HCV, which results in "a *de facto* cure for more than 90% of patients." *Am. Compl.* [#14] ¶ 35. The criterion at issue in the present case is that in order for enrollees with HCV to receive coverage for DAA treatment, they must have a Metavir Fibrosis Score ("MFS" or "fibrosis score") of F2 or higher. *Am. Compl.* [#14] ¶ 70. MFS grades the severity of liver damage caused by HCV: scores of F0 and F1 indicate no

or minimal scarring of the liver, a score of F2 indicates intermediate scarring, a score of F3 indicates severe fibrosis, and a score of F4 indicates cirrhosis. *Id.* ¶ 25. Plaintiffs challenge HCPF's MFS policy and argue that by denying them DAA treatment on account of their MFS scores or because of inadequate proof of such scores, HCPF fails to provide medically-necessary prescription drugs in violation of § 1396a(a)(10)(A). Further, Plaintiffs allege that the policy denies them access to treatment, which similarly situated enrollees have access to, in violation of the Medicaid Act's "comparability" requirement under § 1396a(a)(10)(B). *Id.* ¶¶ 48, 70, 105-06, 110. Plaintiffs seek to certify this case as a class action pursuant to Fed. R. Civ. P. 23. *Motion* [#18] at 1.

II. Standard

A district court possesses broad discretion in determining whether a suit should proceed as a class action. *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 960 (D.C. Cir. 1985). A district court is required to engage in its own "rigorous analysis" regarding whether the requirements of Rule 23(a) have been satisfied. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Plaintiffs bear the burden of proof on all requirements for class action certification. *DG ex. rel. Stricklen v. Deveughn*, 594 F.3d 1188, 1194 (10th Cir. 2010).

III. Analysis

A party seeking to certify a class bears the "strict" burden of proving that the requirements of Rule 23 have been met. *See Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988); *see also Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 381 (D. Colo. 1993). Specifically, Plaintiffs must establish each of the four requirements set forth in Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable; (2) there are

questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Cook*, 151 F.R.D. at 381.

In addition, a party seeking class certification must establish that the case falls within one of the subcategories provided in Rule 23(b). *Id.* These subcategories are: (1) that separate actions would create a risk of inconsistent adjudications resulting in conflicting consequences for Defendant or other putative class members; (2) that Defendant has acted on grounds that generally apply to the class; and (3) that common questions of law or fact predominate over individualized questions. *DG*, 594 F.3d at 1194.

A. Rule 23(a) Requirements

The Court first examines whether Plaintiffs have met the requirements of Rule 23(a).

1. Numerosity

To establish the numerosity element of Rule 23(a)(1), "[t]he burden is upon plaintiffs seeking to represent a class to establish that the class is so numerous as to make joinder impracticable." *Folks v. State Farm Mut. Auto. Ins. Co.*, 281 F.R.D. 608, 616 (D. Colo. 2012) (quoting *Peterson v. Okla. City Hous. Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976)). Determining whether the plaintiffs have met this element is not subject to a "set formula;" it is a "fact-specific inquiry." *Folks*, 281 F.R.D. at 616 (quoting *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006)).

Defendant does not dispute that Plaintiffs meet the numerosity element of Rule 23(a). *Response* [#29] at 6 n.3. Plaintiffs contend that there are approximately 14,400 Colorado Medicaid recipients with HCV who have not received treatment and

approximately 4,320 Colorado Medicaid enrollees living with HCV who have a MFS score below F2. *Motion* [#18] at 16. Based on the information Plaintiffs have provided, the Court agrees that the numerosity factor of Rule 23(a) is satisfied. *See, e.g.*, *Clay v. Pelle*, No. 10-cv-01840-WYD-BNB, 2011 WL 843920, at *2-3 (finding that a class of 400 prisoners, all subject to the challenged prison policy, satisfied the numerosity element).

2. Common Questions of Law or Fact

The Court next turns to the common-question requirement of Rule 23(a)(2). For class members to share a least one common question of law or fact, they must "possess the same interest and suffer the same injury." *DG*, 594 F.3d at 1195; *Trevizo*, 455 F.3d at 1163 (citing *Gen. Tel. Co. of the Sw.*, 457 U.S. at 156)). Class members do not need to share both common questions of law *and* common questions of fact. *See J.B. ex rel Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999). Further, the common question must be able to be resolved classwide, meaning that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Plaintiffs provide a clear, specific question of law that is common to all putative class members: "whether the Policy's restrictions on access to coverage for DAA treatments based on fibrosis score is [sic] illegal under the Federal Medicaid Act." *Motion* [#18] at 17. Plaintiffs provide three additional common factual and legal questions that arise: (1) whether HCPF has violated federal law by failing to provide medically necessary DAAs; (2) whether HCPF has violated the "reasonable promptness" requirement of 42 U.S.C. § 1396(a)(8); and (3) whether HCPF has violated the "comparable treatment" requirements of 42 U.S.C. § 1396(a)(10)(B)(i) and (ii). *Motion* [#18] at 17-18.

Defendant, however, argues that Plaintiffs' contention that the Policy categorically restricts access to DAAs based on MFS is based on "a false premise" because an individual's MFS is one of multiple factors that affect whether an individual will receive authorization for coverage. *Response* [#29] at 19. Defendant contends that this makes Plaintiffs' common question incapable of a common answer because the authorization process requires each individual class member to "articulate his or her own unique set of medical and personal circumstances . . . ." *Id.* at 20.

Although there may be individualized disparities among Plaintiffs' medical circumstances, this has no effect on the common question of law that is applicable to all putative class members. *See Pliego v. Los Arcos Mexican Rests., Inc.*, 313 F.R.D. 117, 126 (D. Colo. 2016) ("Commonality still exists if class members differ factually but challenge the application of a commonly-applied policy."). The common questions of law articulated by Plaintiffs refer to HCPF's uniform policy of including fibrosis score, and verification of that score, as a criterion of approval for DCC treatment. *Reply* [#33] at 17; *see J.B.*, 186 F.3d at 1289 ("For a common question of law to exist, the putative class must share a discrete legal question of some kind."). The members of the class identified by Plaintiffs have all been affected by the policy because they are all: (1) Medicaid recipients, (2) who have been or will be diagnosed with chronic HCV, (3) who were prescribed DAA by a specialist, and (4) who have been denied coverage because they do not have the required MFS, or have not provided adequate verification of the required score. *Am. Compl.* [#18] at 1-2; *Reply* [#33] at 17. Because the central issue in determining commonality is whether "a classwide proceeding will be efficacious in generating common answers apt to drive the resolution of litigation," the Court finds that the commonality requirement of Rule 23(a)(2)

is met. *See Reed*, 849 F.2d at 1309.

3. Typicality

In order to establish the third element of Rule 23(a), Plaintiffs must demonstrate that their individual claims are typical of the class members they seek to represent. *Folks*, 281 F.R.D. at 617. Rule 23(a)(3) states that typicality is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." In other words, "[a] prerequisite for certification is that the class representatives be part of the class and possess the same interest and suffer the same injury as class members." *Folks*, 281 F.R.D. at 617-18 (quoting *Rector v. City & Cty. of Denver*, 348 F.3d 935, 949 (10th Cir. 2003)).

Defendant argues that Plaintiffs are atypical of the putative class because the information provided in their requests for coverage was limited to fibrosis score. *Response* [#29] at 21. Defendant argues that the policy provides many other avenues for Plaintiffs to demonstrate that DAA treatment is medically necessary. *Id.* Further, Defendant contends that three out of the four named Plaintiffs have a MFS high enough to qualify them for coverage under the policy and that these Plaintiffs were denied not because of their score, but because "they failed to provide adequate support for their fibrosis score." *Id.* at 22. Defendant further maintains that Plaintiffs are not typical of the putative class because some of the named Plaintiffs failed to demonstrate that their HCV was "chronic" at the time they were denied coverage and that "only chronic infections of more than six months are eligible for DAA treatment." *Id.* at 26.

However, Defendant's contentions that the named Plaintiffs were denied coverage for reasons atypical of the class are not supported by the treatment authorization requests,

and corresponding denials by HCPF.[3] *See Response* [#29] at 22-26. Plaintiff Meyers's request states on the cover page: "Epclusa denied: Fibrotest 0.10=F0=denial; nothing was sent in to show F2 or greater." *Response* [#29] at 26; *Exhibit P* [#29-11] at 1. Similarly, Plaintiff Ryan's multiple requests, and subsequent denials, for coverage reference either fibrosis score or a discord between APRI and FIB4 calculations, which are required by the policy to verify the fibrosis score, as the reason for denial. *See Exhibit F* [#29-1] at 1 ("Does not meet criteria for coverage. No evidence presented of minimum required Metavir F2 or extrahepatic manifestations of HCV."); *Exhibit G* [#29-2] at 1 ("Fibrosis score 0.39=F1-F2; APRI 0.306; FIB4 1.22=nonconcordance. APRI and FIB4 do not support F2."); *Exhibit H* [#29-3] at 1 ("No new information presented to overturn denial. No evidence of minimum Metavir F2."); *Exhibit I* [#29-4] at 1 ("Denial stands; Fibrosis score 0.39 (not >0.48)=denial."); *Exhibit J* [#29-5] ("Denial upheld. No new info presented."). Plaintiff Molina and Moxons' denials similarly note a discord between their fibrosis scores and the APRI and FIB4 calculations they provided to verify those scores. *Exhibit M* [#29-9] at 1 ("discordance Fibrotest F3 and APRI 0.236 (required > 0.7) and FIB4 0.83 (required > 1.50)"); *Exhibit N* [#29-9] at 1 ("fibrotest is not supported by either APRI or FIB4"); *Exhibit O* [#29-10] (stating that denial was based on a discord between the fibrosis score and the APRI and FIB4 calculations).

As Plaintiffs contend, and the Court agrees, each named Plaintiff's fibrosis score, and verification of that score in the form of APRI and FIB4 calculations, appears at this juncture to have formed the basis for his or her denial of DCC treatment. *Reply* [#33] at 20-

[3] *See Gen Tel. Co. of Sw.*, 457 U.S. at 160 (stating that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question").

21. Thus, Plaintiffs' claims all arise from the same alleged course of conduct by Defendant, denying coverage based on Plaintiffs' "failure to demonstrate a verified fibrosis score of F2 or greater." *Reply* [#33] at 19; *see DG*, 594 F.3d at 1199 (stating that "typicality exists where . . . all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances"). Accordingly, the Court finds that Plaintiffs meet the typicality element of Rule 23(a). *See Pliego*, 313 F.R.D. at 126 (finding that the plaintiffs satisfied the typicality standard because their claims "challenge[d] the same conduct under the same legal and remedial theories as d[id] the claims of the absent class").

4. Fair Representation

Finally, the Court determines whether the fair-representation requirement of Rule 23(a) has been satisfied. In order to do so, Plaintiffs must show that the class representatives will fairly and adequately protect the class interests. *Folks*, 281 F.R.D. at 618 (citing Fed. R. Civ. P. 23(a)(4)). The Tenth Circuit has mandated that two questions must be asked in making this determination: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Folks*, 281 F.R.D. at 618 (quoting *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002)).

Defendant does not dispute that Plaintiffs meet the fair and adequate representation element of Rule 23(a)(4). *Response* [#29] at 6 n.3. In response to the first question, Plaintiffs assert that none of the named Plaintiffs have any conflicts of interest with absent class members. *Motion* [#18] at 19. In response to the second question, Plaintiffs maintain

that they are represented by experienced counsel. *Id.* at 20. The Court agrees and finds that, based on the information Plaintiffs have provided, the fair and adequate representation element of Rule 23(a) is satisfied. *See Pliego*, 313 F.R.D. at 127 ("Absent evidence to the contrary, a presumption of adequate representation is invoked.") (quoting *Schwartz v. Celestial Seasonings*, 178 F.R.D. 545, 552 (D. Colo. 1998).

B. Rule 23(b) Requirements

In order for a class to be certified, Plaintiffs must satisfy not only the requirements of Rule 23(a), but also one of the requirements of Rule 23(b). Plaintiffs seek certification only pursuant to Rule 23(b)(2). *Motion* [#18] at 20. Rule 23(b)(2) states, in part, that class treatment is allowed when defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." To satisfy Rule 23(b)(2), Plaintiffs must establish that the class members are "sufficiently cohesive that any classwide injunctive relief satisfies Rule 65(d)'s requirement that every injunction state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required." *DG*, 594 F.3d at 1199-1200 (internal quotation marks omitted).

Defendant first argues that Plaintiffs fail to satisfy Rule 23(b)(2) because class certification is unnecessary. *Response* [#29] at 11. Defendant argues that if Plaintiffs prevail and obtain the injunctive relief they seek as individuals, the injunction "would apply to any Medicaid recipient going forward, including those individuals within the proposed class" and thus class certification is inappropriate and inefficient. *Id.* at 14. Defendant relies on *Kansas Health Care Association v. Kansas Department of Social and Rehabilitative Services* as the basis for this necessity argument. 31 F.3d 1536, 1548 (10th

Cir. 1994) (affirming the district court's finding that class certification was unnecessary because all class members would benefit from the injunction issued on behalf of the named plaintiffs).

However, as Plaintiffs argue, and the Court agrees, "a class action may be maintained" so long as the conditions of Rule 23(a) and (b) are met. *Reply* [#33] at 7. "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes." *Shady Grove Orhthopedic Ass'n v. Allstate Ins. Co.*, 559 U.S. 393, 399-400 (2010). Thus, the question of whether class certification is "necessary" turns on whether Plaintiffs satisfy the requirements set forth in Rule 23(a) and (b) and whether Plaintiffs decide to proceed as a class. *See Maez v. Springs Auto. Grp., LLC*, 268 F.R.D. 391, 393 (D. Colo. 2010) (stating that "doubts about the propriety of entertaining a class action should be resolved in favor of proceeding on granting certification").

Defendant also argues that Rule 23(b)(2) is not satisfied because the injunctive relief Plaintiffs seek violates Rule 65(d). *Response* [#29] at 15. Specifically, Defendant contends that the class is not cohesive, that the requested injunction is not specific, and that it would require relief to be individually tailored to each Plaintiff. *Id.* at 15-17.

Defendant's arguments are unavailing. "At the class certification stage, the injunctive relief sought must be described in reasonably particular detail such that the court can at least conceive of an injunction that would satisfy Rule 65(d)'s requirements." *Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 605 (10th Cir. 2008). The injunctive relief Plaintiffs seek is "that HCPF refrain from the use of fibrosis score as a barrier to coverage in its DAA policy." *Reply* [#33] at 13. This request, at this early stage

in the litigation, provides an adequate description such that "both the defendant and the court can determine if the former is complying." *Shook*, 543 F.3d at 597.

Further, the injunctive relief sought by Plaintiffs uniformly applies to all of the class members, who were all prescribed DAAs by a physician and denied coverage due to their fibrosis scores or failure to verify such scores. *See DG*, 594 F.3d at 1201 (affirming the district court's finding that the plaintiffs had satisfied Rule 23(b)(2) because the proposed injunction "applie[d] to the proposed class as a whole without requiring differentiation between class members"). Thus, the Court finds that the injunctive relief sought by Plaintiffs satisfies Rule 65(d)'s requirement at this stage in the litigation, and therefore Plaintiffs have met the requirements of Rule 23(b)(2). *See Shook*, 543 F.3d at 614.

Accordingly, the Court finds that Plaintiffs have satisfied Rule 23(a) and (b), the necessary elements for class certification. *See DG*, 594 F.3d at 1194.

IV. Conclusion

Accordingly, for the reasons stated above,

IT IS HEREBY **ORDERED** that the Motion [#18] is **GRANTED**.

IT IS FURTHER **ORDERED** that the following class is certified in this case:

> All individuals who are or will be enrolled in the Colorado Medicaid Program; who have been or will be diagnosed with HCV; who are prescribed DAA medication by an infectious disease specialist, gastroenterologist, or hepatologist or by a primary care provider in consultation with one of these specialists; and who would be eligible for coverage of DAA medication but for the fibrosis score threshold included in HCPF's policy.

IT IS FURTHER **ORDERED** that Plaintiffs Ryan, Molina, Moxon and Myers are **APPOINTED** as the class representatives.

IT IS FURTHER **ORDERED** that Plaintiffs' counsel of record are **APPOINTED** as

counsel for the class.

IT IS FURTHER **ORDERED** that this action shall proceed as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2). *See Motion* [#18] at 1-2.

Dated: September 21, 2017

BY THE COURT:

Kristen L. Mix
United States Magistrate Judge