IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DORENA COLEMAN, CURTIS JACKSON, and FEDERICO PEREZ*, on behalf of themselves and all other similarly situated*,	§	
Plaintiffs,	§	
v.	§	1:20-cv-847-RP
CECILE ERWIN YOUNG, *Executive Commissioner*, VICTORIA FORD, *Chief Policy and Regulatory Officer*, MAURICE MCCREARY, *Chief Operating Officer*, and MICHELLE ALLETTO, *Chief Program and Services Officer, in their official capacities* with the TEXAS HEALTH AND HUMAN SERVICES COMISSION,	§	
Defendants.	§	

ORDER

Before the Court is the parties' joint motion for preliminary approval of settlement, approval of class notice, and conditional certification of the settlement class. (Dkt. 44). While Defendants join the motion with regard to the request for preliminary approval of settlement, they do not oppose the motion with regard to approval of class notice and conditional certification of the settlement class, but do not join those portions of the motion. (*Id.* at 22 n.7). The parties also ask the Court to enter their proposed scheduling order for class notice and final settlement approval. (*Id.* at 32–33). Having considered the parties' submissions, the record in this case, and the applicable law, the court issues the following order.

I. BACKGROUND

Plaintiffs Dorena Coleman, Curtis Jackson, and Federico Perez (collectively, "Plaintiffs") bring this action on behalf of themselves and all others similarly situated in Texas based on the Texas Health and Human Services Commission's ("HHSC") allegedly unlawful denial of coverage for curative Hepatitis C treatment to Medicaid-enrolled Texans suffering from the Hepatitis C Virus ("HCV"). (Compl., Dkt. 1, at 1). Plaintiffs allege that HHSC, which operates Texas Medicaid, denied Plaintiffs coverage of direct acting antiviral ("DAA") treatment based on a fibrosis score restriction in violation of the Medicaid Act. (*Id.* at 5). Specifically, Plaintiffs allege that Texas Medicaid violated the Medicaid statute by failing to provide medically necessary DAAs to some Medicaid enrollees but not to others, and by applying a disease severity restriction on medically necessary DAAs for beneficiaries with HCV but not on treatment for other comparable chronic conditions. (Dkt. 44, at 10).

Plaintiffs filed this action on August 13, 2020 against Defendants Cecile Erwin Young, Victoria Ford, Maurice McCreary, and Michelle Alletto (collectively "Defendants"), all in their official capacities as officers of the HHSC, alleging violations of the Medicaid Act and seeking equitable relief. (*Id.* at 33–37). Plaintiffs then filed a motion to certify a class of individuals on Medicaid with HCV, who are qualified for DAA treatment but for HHSC's policy of denying such treatment based on the fibrosis score restriction. (Dkt. 10, at 19–20). Defendants then filed a motion to dismiss, (Dkt. 19), and the parties engaged in discovery. (Dkt. 44, at 11). After participating in mediation, the parties reached a settlement in principle, (Dkt. 35), and filed the instant motion for preliminary approval of their settlement. (Dkt. 44).

II. SETTLEMENT APPROVAL

The parties first ask the Court to preliminarily approve of their settlement agreement and allow notice to be sent to potential class members. Pending approval of this settlement and legislative

approval, the parties' settlement agreement releases all claims against Defendants in exchange for their agreement to not restrict access to DAA treatments based on a Medicaid recipient's Metavir Fibrosis Score.[1] (Dkt. 44, at 11). The parties have similarly agreed that class notice is appropriate to alert absent class members of their ability to seek proper treatment under the terms of the settlement. (Dkt. 44, at 12).

While Federal Rule of Civil Procedure 23, governing class actions, does not expressly provide for a preliminary fairness evaluation, "[r]eview of a proposed class action settlement generally involves two hearings," the first of which is a "preliminary fairness evaluation" made by the Court. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004). Within the Fifth Circuit, courts conduct a preliminary fairness evaluation prior to the issuance of notice. *See, e.g.*, *Piambino v. Bailey*, 610 F.2d 1306, 1327–28 (5th Cir. 1980); *see also* MANUAL FOR COMPLEX LITIGATION § 21.6 (4th ed. 2004) ("The two-step process for evaluation of proposed settlements has been widely embraced by the trial and appellate courts."). In approving a settlement agreement, "the court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement as a whole." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 311 (W.D. Tex. 2007).

At the preliminary approval phase, the Court must determine whether the settlement agreement is within the "range of reasonableness." *Duncan v. JPMorgan Chase Bank*, N.A., 2015 WL 11623393, at *3 (W.D. Tex. Oct. 21, 2015) (citations omitted). Preliminary approval is appropriate where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible judicial approval." *Duncan*, 2015 WL 11623393, at *3. Ultimately, the Court will have to determine whether the a settlement is "fair, reasonable and adequate" to issue final approval, which will require an analysis of

[1] The Metavir Fibrosis Score is a measure of liver damage, typically determined by using an ultrasound.

the following factors: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012).

Here, the Court preliminarily approves of the parties' settlement agreement as within the "range of reasonableness." *Duncan*, 2015 WL 11623393, at *3. Defendants have already produced "several hundred documents" during discovery, allowing the parties to engage in "vigorous, arms-length negotiations" before arriving at the proposed settlement. (Dkt. 44, at 18). In addition, the proposed settlement "achieves the Plaintiffs' goal in initiating this litigation." (Dkt. 44, at 16–17). Indeed, by suspending the allegedly unlawful restrictions to class members' access to DAA treatment, the settlement agreement provides Plaintiffs with "the precise outcome they would have sought to obtain through litigation." (*Id.* at 19; Settlement Agreement, Dkt. 44-21, at 5). Given the significant obstacles facing Plaintiffs in continued litigation, the proposed settlement provides Plaintiffs with their desired relief while conserving resources. (Dkt. 44, at 17–19); *see Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004). Furthermore, the parties and their respective counsel all believe the settlement is "fair, reasonable, and adequate," and the attorney's fees sought by Plaintiffs' counsel are not excessive. (Dkt. 44, at 20–21).

Lastly, the proposed notice, opportunity for objections, and fairness hearing will provide sufficient protection to absent class members. (Dkt. 44, at 21; Proposed Notice, Dkt. 44-22). Indeed, the parties' proposed notice accurately and fairly describes the terms of the settlement agreement, including the attorney's fees, will give notice of the time and place of this Court's fairness hearing, and describes how a class member may comment on, object to, or support the settlement agreement. (Proposed Notice, Dkt. 44-22).

Accordingly, the Court preliminarily approves of the parties' settlement agreement and of the proposed manner and content of the class notice. The parties shall fill in the blanks in the proposed notices prior to mailing to reflect the dates and deadlines set forth in this order.

III. CONDITIONAL CLASS CERTIFICATION

Plaintiffs ask the Court to preliminarily certify the following class pursuant to Federal Rule of Civil Procedure 23, as follows (hereinafter the "Medicaid HCV Class"):

> All individuals who are or will in the future be enrolled in the Texas Medicaid Program; who have been or will be diagnosed as having an infection of the Hepatitis C Virus; who have been or will be prescribed DAA treatment by a qualified prescriber; [ ] who have not already completed a course of DAA treatment and achieved sustained virologic response[;][. . . and who would be eligible for DAA treatment coverage but for the Texas Health and Human Services Commission] HHSC's Prior Authorization Criteria and Policy's Metavir Fibrosis Score [threshold].

(Dkt. 44, at 22; Settlement Agreement, Dkt. 44-21, at 5). For the purposes of executing the settlement, Defendants do no oppose class certification. (Dkt. 44, at 22). The parties thus propose to certify the above class, arguing that it is "adequately defined and clearly ascertainable and certification is appropriate under Rule 23(a) and (b)(2)." (*Id.*). Having reviewed the motion, the settlement agreement, and the relevant law, the Court agrees that the proposed class satisfies the Rule 23 requirements. *See* Fed. R. Civ. P. 23.

First, the proposed class is adequately defined and clearly ascertainable since there are "objective standards to determine membership" that are within Defendants' "claim and coverage records." (Dkt. 44, at 23); *DeOtte v. Azar*, 332 F.R.D. 188, 195 (N.D. Tex. 2019) (an identifiable class exists "'if its members can be ascertained by reference to objective criteria'") (cleaned up). Second, the proposed class is sufficiently numerous. Indeed, the proposed class is expected to contain "hundreds of thousands of individuals denied DAA treatment for HCV." (Dkt. 44, at 24); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624–25 (5th Cir. 1999) (stating that "any class consisting of more than forty members should raise a presumption that joinder is impracticable") (cleaned up).

Third, the class member's claims depend on common questions of law and fact, most importantly whether the HHSC's denial of DAA treatment to Texas Medicaid enrollees diagnosed with the HCV based on their fibrosis score constitutes a violation of the Medicaid Act. (Dkt. 44, at 25–26). As such, Plaintiffs' claims can "productively be litigated at once" because the class seeks to challenge the "common policy" of HHSC's denial of DAA treatment to certain individuals. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 26 (S.D. Tex. 2013).

The claims and defenses relevant to the proposed class representatives are also "typical of the class," as named plaintiffs Dorena Coleman, Curtis Jackson, and Federico Perez are enrollees in Texas Medicaid who have been diagnosed with the HCV and have not received DAA treatment despite being prescribed such treatment by a qualified prescriber. (Dkt. 44, at 26–27). Accordingly, the named plaintiffs share the "same interests and suffer the same injury" as the proposed class members. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (citations omitted), *aff'd sub nom., Falcon v. Gen. Tel. Co.*, 815 F.2d 317 (5th Cir. 1987). Lastly, because named plaintiffs have no interests antagonistic to those of the class and have demonstrated themselves to be "committed to and passionate about the case," they will fairly and adequately represent the interests of the proposed class. (Dkt. 44, at 28); *see Regmund v. Talisman Energy USA, Inc.*, 2019 WL 2863926, at *4 (S.D. Tex. July 2, 2019). Plaintiffs' counsel, as attorneys with "extensive experience with civil rights and healthcare-related litigation," are "generally able to conduct the proposed litigation," and as such will similarly represent the proposed class in an adequate manner as required under Rule 23(a). (Dkt. 44, at 29); *N. Am. Acceptance Corp. Sec. Cases v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 (5th Cir. 1979).

Plaintiffs further satisfy Rule 23(b)(2)'s requirement that class members were harmed by a common behavior by Defendants and Plaintiffs propose injunctive relief that specifically addresses

that harm. Fed. R. Civ. P. 23(b)(2)); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007); *Haley v. Merial, Ltd.*, 292 F.R.D. 339, 350 (N.D. Miss. 2013). The proposed class has been harmed in the same way by the common HHSC policy that affects all class members, and Plaintiffs' proposed relief asks this Court for a permanent injunction to prevent Defendants from denying coverage for DAAs to class members. This request is "specific in its terms" and "describe[s] in reasonable detail the act or acts" that are to be enjoined. *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 387–88 (5th Cir. 1980) (citation omitted).

Lastly, Plaintiffs ask this Court to appoint Jeff Edwards, Mike Singley, Scott Medlock, and David James of Edwards Law, Kevin Costello of the Center for Health Law & Policy Innovation of Harvard Law School, and David Tolley, Amanda Barnett, and Avery Borreliz of Latham & Watkins LLP as class counsel. Given proposed counsel's extensive civil litigation experience, including in healthcare-related litigation, this Court finds that proposed class counsel will fairly and adequately represent the interests of the class. (Dkt. 44, at 31); Fed. R. Civ. P. 23(g).

Accordingly, Plaintiffs' unopposed motion to conditionally certify class and appoint class counsel is granted.

III. CONCLUSION

IT IS ORDERED that the parties' joint motion for preliminary approval of settlement, approval of class notice, and conditional certification of the settlement class, (Dkt. 44), is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' motion to certify class, (Dkt 10), and Defendants' motion to dismiss, (Dkt 19), are **MOOT**.

IT IS FURTHER ORDERED that the following scheduling order is entered in this case:

Class Notice – on or before August 1, 2021, HHSC shall mail Class Notice to class members, and class counsel shall set up the settlement website;

• Any Comments or Objections to Settlement Agreement – on or before October 15, 2021, class members must submit to the Court any written comments or objections to the Settlement Agreement or indicate a desire to appear at the fairness hearing;

• Motion for Attorneys' Fees and Costs– Class Counsel shall file its Motion for Attorneys' Fees, and Costs within 30 days from the Class Member Comments/Objections deadline;

• Motion for Final Approval of the Settlement Agreement – the Parties shall file a Motion for Final Approval of the Settlement Agreement within 30 days from the Class Member Comments/Objections deadline; and

• Fairness Hearing – the Parties request that the Court set a Fairness Hearing to consider the Parties' Motion within 90 days from the filing of the Motion for Final Approval of the Settlement Agreement.

IT IS FINALLY ORDERED that this Court retains jurisdiction only for the purpose of enforcing the terms of the Settlement Agreement. Either party may contest the other party's compliance with the Settlement Agreement by filing a motion to reopen the action to seek enforcement of the Settlement Agreement terms, as long as the action is commenced on or before August 31, 2023.

SIGNED on March 25, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE