

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RACHEL CONDRY, JANCE HOY, CHRISTINE
ENDICOTT, LAURA BISHOP, FELICITY BARBER,
RACHEL CARROLL on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

UnitedHealth Group Inc.; UnitedHealthcare, Inc.;
UnitedHealthcare Insurance Company; UnitedHealthcar
Services, Inc.; and UMR, Inc.,

Defendants.

Case No.: 3:17-cv-00183-VC

**STIPULATED ~~PROPOSED~~ FINAL
JUDGMENT AND ORDER**

Honorable Vince Chhabria

1 Plaintiff, Rachel Condry (“Condry”), who was later joined by Plaintiffs, Jance Hoy (“Hoy”),
2 Christine Endicott (“Endicott”), Laura Bishop (“Bishop”), Felicity Barber (“Barber”), and Rachel
3 Carroll (“Carroll”) (collectively with Condry, “Plaintiffs”), first commenced this class action on
4 January 13, 2017, against their respective health benefit plans and/or claims administrators,
5 UnitedHealthcare Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United
6 Healthcare Services, Inc., and UMR, Inc. (collectively, “Defendants”), alleging they violated the
7 Affordable Care Act (“ACA”) when they denied coverage for, or imposed cost-shares on, Plaintiffs’
8 out-of-network claims for lactation services. In addition, Plaintiffs (except Carroll) alleged that
9 Defendants failed to provide a “full and fair review” as required by ERISA claiming that the reasons
10 Defendants provided to Plaintiffs (except Carroll), about how their claims processed, were not
11 understandable. Based on these allegations, Plaintiffs asserted: breach of fiduciary duty claims under
12 the Employee Retirement Income Security Act of 1974 (“ERISA”) for failing to provide adequate
13 notice when denying their benefit claims (Counts I); breach of fiduciary and co-fiduciary duty claims
14 under ERISA for failing to provide ACA-mandated lactation counseling coverage (Counts II and III);
15 sex discrimination in violation of Section 1557(a) of the ACA (Count IV); and violation of the ACA’s
16 preventive care provisions which were incorporated by reference in non-ERISA health benefit plans
17 (Count V); and, unjust enrichment (Count VI). [Dkt. No. 78.] Defendants denied all of these
18 allegations, asserting that that they cover network lactation services without cost-sharing as required
19 by the ACA and provided a “meaningful dialogue” to Plaintiffs in processing their lactation claims as
20 required by ERISA. [Dkt. Nos. 82 and 104.]

21 Plaintiffs and Defendants (collectively, “Parties”), by and through their counsel, stipulate as
22 follows:

23 WHEREAS, on June 27, 2018, the Court entered summary judgment: (1) in favor of all
24 Plaintiffs on Count I (except for Carroll)¹; (2) in favor of Bishop and Hoy for Count II; (3) in favor of
25 Defendants for Count II with respect to Barber and Condry; and (4) in favor of Defendants for Counts

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27 ¹ Unlike the other Plaintiffs, Carroll was a participant of a non-ERISA health benefit plan and
28 therefore did not bring any claims under ERISA.

1 IV and VI.

2 WHEREAS, on June 27, 2018, the Court denied summary judgment for both sides on: (1)
3 Count III; (2) Endicott's Count II claim; and (3) Carroll's Count V claim. [Dkt. No. 146.]

4 WHEREAS, on May 23, 2019, the Court denied without prejudice Plaintiffs' Motion for Class
5 Certification. [Dkt. No. 213.] Among other things, the May 23, 2019 Order held that "[i]t does not
6 appear that the named plaintiffs have standing to seek prospective relief because they are no longer
7 UHC plan participants." [*Id.* at 4.] On December 19, 2019, the Court denied Plaintiffs' Motion to
8 Grant Request for Intervention [Dkt. No. 259], which sought to add as a named plaintiff Teresa Harris,
9 a UHC insured, who asserted a claim under Count II, as set forth in the proposed amended complaint
10 (*id.*), with respect to the denial of her lactation claim, finding generally that Plaintiffs waited too long
11 to seek intervention of a new plaintiff. (*Id.*)

12 WHEREAS, on December 23, 2019, the Court granted in part and denied in part Plaintiffs'
13 renewed motion for class certification. [Dkt. No. 262.] The Court certified a Federal Rule of Civil
14 Procedure Rule 23(b)(2) class of ERISA plan participants who received the same denial letters for
15 lactation claims as Condry, Hoy, Endicott, Bishop, and Barber ("Denial Letter Class"), which the
16 Court had previously found violated ERISA under Count I when entering summary judgment in favor
17 of Condry, Hoy, Endicott, Bishop, and Barber on that issue. The Court denied certification of a
18 proposed class of members of Defendants' health benefit plans who were denied coverage or had cost-
19 shares imposed for out-of-network lactation services, which pertained to Counts II, III and V, finding
20 that Plaintiffs did not meet their burden under Federal Rule of Civil Procedure 23. [Dkt. No. 262.]

21 WHEREAS, with respect to the Denial Letter Class the Court ordered Defendants to send a
22 follow-up letter to each member of the Denial Letter Class, "that explain[s] the basis for denial in a
23 comprehensible fashion (which would, in turn, allow participants to meaningfully assess whether to
24 contest the denial)", and "that is worded so as to emphasize that if a participant believes her dispute
25 with the company was mooted by activity or communications subsequent to the initial denial letter,
26 she need not take further action in response to the new letter." [Dkt. No. 262.]

27 WHEREAS, both sides moved for interlocutory appeal of the Court's class certification
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1 decision, which the Ninth Circuit Court of Appeals denied on March 2, 2020.

2 WHEREAS, the remaining claims are: (i) Endicott's individual lactation counseling coverage
3 claim under ERISA (Counts II and III); and, (ii) Carroll's individual lactation counseling coverage
4 claim under the ACA's preventive care provisions which were incorporated by reference in her non-
5 ERISA health benefit plan (Count V). In the interest of efficiency and judicial economy, and solely
6 to resolve the claims that are remaining in the wake of the Court's previous fully litigated and contested
7 rulings, the Parties agree to the dismissal of the foregoing remaining claims.

8 WHEREAS, Plaintiffs' (except Carroll) claim under Count III alleging that Defendants should
9 be held jointly liable under ERISA is derivative of Plaintiffs' claim under Count II, pursuant to the
10 Court's order granting in part and denying in part the parties' cross-motions for summary judgment,
11 the Parties stipulate that judgment be entered under Count III for Bishop and Hoy and against Condry
12 and Barber. This stipulation does not reflect any settlement or concession relating to the issues
13 litigated on the cross-motions for summary judgment but instead is only intended to resolve the claims
14 asserted in Count III.

15 WHEREAS, upon entry of this Stipulated [~~Proposed~~] Final Judgment and Order, Plaintiffs and
16 Defendants both intend to file timely notices of appeal.

17 WHEREAS, the parties, by and through respective counsel, agree to the entry of this Stipulated
18 [~~Proposed~~] Final Judgment and Order, subject to reservations of right to appeal.

19 **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

20 1. This Court has jurisdiction over the Parties and over the subject matter in issue, and
21 venue is proper in this District.

22 2. In the interest of efficiency and judicial economy, Plaintiffs and Defendants agree to
23 stipulate to entry of a final judgment, and the relief awarded herein is expressly conditioned on the
24 Parties' reservations of their rights of appeal as set forth below in paragraph 3.

25 3. The Parties stipulate that they have expressly reserved their rights on appeal to
26 challenge all rulings or orders in this case. If any aspect of a ruling or order is reversed or vacated on
27 appeal, wholly or partially, this Stipulated Final Judgment and Order shall be set aside to the extent
28

1 inconsistent with any such decision on appeal or ruling of this Court on remand.

2 4. Subject to paragraphs 2-3 above, final judgment is hereby entered in favor of the Denial
3 Letter Class on Count I, finding that Defendants violated ERISA for the reasons set forth in the Court's
4 summary judgment order. [Dkt. No. 146.] The Denial Letter Class is defined as:

5 All participants and beneficiaries, in one or more of the ERISA employee health benefit plans
6 administered by Defendants in the United States, which provide benefits for healthcare services
7 and for which claims administration duties are delegated to one or more of the Defendants,
8 who received from August 1, 2012 to present, an explanation of benefits for Comprehensive
9 Lactation Services rendered by an out-of-network provider, that included one or more of the
10 following denial reasons (the "Remark Codes"):

- 11 (1) Remark code KM ("This is not a reimbursable service. There may be a more
12 appropriate CPT or HCPCS code that describes this service and/or the use of the
13 modifier or modifier combination is inappropriate.")
14 (2) Remark code I5 ("This service code is not separately reimbursable in this setting.")
15 (3) Remark code 13 ("Your plan does not cover this non-medical service or personal
16 item.")
17 (4) Remark code B5 ("Payment for services is denied. We asked the member for more
18 information and didn't receive it on time.")

19 Excluded from the Class are Defendants, their subsidiaries or affiliate companies, their legal
20 representatives, assigns, successors and employees and the Court and all Court personnel
21 involved in the handling of this case.

22 5. Subject to paragraphs 2-3 above, Barber, Bishop, Condry, Endicott, and Hoy are hereby
23 appointed as Class Representatives of the Denial Letter Class, and Chimicles Schwartz Kriner &
24 Donaldson-Smith LLP and Shepherd, Finkelman, Miller & Shah, LLP are hereby appointed as Co-
25 Lead Class Counsel, and Axler Goldich LLC is hereby appointed as Class Counsel of the Denial Letter
26 Class.

27 6. Subject to paragraphs 2-3 above, final judgment is hereby entered with respect to the
28 Denial Letter Class, ordering Defendants to send a follow-up letter ("Letter") to each member of the
Denial Letter Class, "that explain[s] the basis for denial of the lactation claim in a comprehensible
fashion (which would, in turn, allow participants to meaningfully assess whether to contest the
denial)," and that is "worded so as to emphasize that if a participant believes her dispute with the
company was mooted by activity or communications subsequent to the initial denial letter, she need

1 not take further action in response to the new letter.” [Dkt. No. 262.] However, the Parties agree to
2 stay execution of the order directing Defendants to send the Letter until after the aforementioned
3 appeals are fully resolved.

4 7. Subject to paragraphs 2-3 above, final judgment is hereby entered in favor of Plaintiff
5 Hoy on Counts II and III in the amount of \$345 and \$49 in prejudgment interest², for a total of \$394,
6 for the reasons set forth in the Court’s summary judgment order. [Dkt. No. 146.] However, the Parties
7 agree to stay execution of payment of said amount, with no additional accrual of interest of any kind,
8 until after the aforementioned appeals are fully resolved.

9 8. Subject to paragraphs 2-3 above, final judgment is hereby entered in favor of Plaintiff
10 Bishop on Counts II and III in the amount of \$130 and \$19.38 in prejudgment interest, for a total of
11 \$149.38, for the reasons set forth in the Court’s summary judgment order. [Dkt. No. 146.] However,
12 the Parties agree to stay execution of payment of said amount, with no additional accrual of interest of
13 any kind, until after the aforementioned appeals are fully resolved.

14 9. Subject to paragraphs 2-3 above, final judgment is hereby entered against Barber and
15 Condry on Counts II and III, for the reasons set forth in the Court’s summary judgment order. [Dkt.
16 No. 146.]

17 10. Subject to paragraphs 2-3 above, final judgment is hereby entered against the Plaintiffs
18 on Count IV, for the reasons set forth in the Court’s summary judgment order. [Dkt. No. 146.]

19 11. Subject to paragraphs 2-3 above, Counts II and III are dismissed with prejudice as to
20 Endicott as the result of a partial settlement, which settled only the portion of Endicott’s individual
21 claims that was not decided by previous order of this Court, but which did not settle her class claims
22 and the portions of her claims that this Court previously decided and which remain contested and
23 subject to further appeals.

24
25 _____
26 ² The Parties stipulate and agree to Pre-judgment interest at the rate of 3% per annum,
27 calculated from the date of when Defendants first notified the plaintiff that it would not cover the
28 lactation claim to the date of the entry of this Judgment, and, therefore, stipulate and agree to the pre-
judgment interest calculations, depending on the date judgment is entered for Hoy and Bishop, set
forth in Appendix A.

1 12. Subject to paragraphs 2-3 above, Count V is dismissed with prejudice as to Carroll as
2 the result of a partial settlement, which settled only the portion of Carroll’s claim that was not decided
3 by previous order of this Court, but which did not settle her class claims and the portions of her claims
4 that this Court previously decided and which remain contested and subject to further appeals.

5 13. Except with respect to Endicott’s and Carroll’s individual claims that are the subject of
6 the partial settlements, the Parties reserve the right under this Stipulated Final Judgment and Order to
7 move for an award of reasonable attorneys’ fees and/or costs, including pursuant to 29 U.S.C. §
8 1132(g), and each Party reserves the right to object to the others’ motion. The Parties agree to wait
9 until appellate issues are resolved before briefing such issues.

10 14. This Court shall retain continuing jurisdiction over the Parties to this Stipulated Final
11 Judgment and Order and over the subject matter of this action for the purposes of interpreting and
12 enforcing the terms of this Stipulated Final Judgment and Order, subject to the Parties’ right of appeal
13 as set forth in paragraphs 2-3 above.

14 DATED: September 4, 2020

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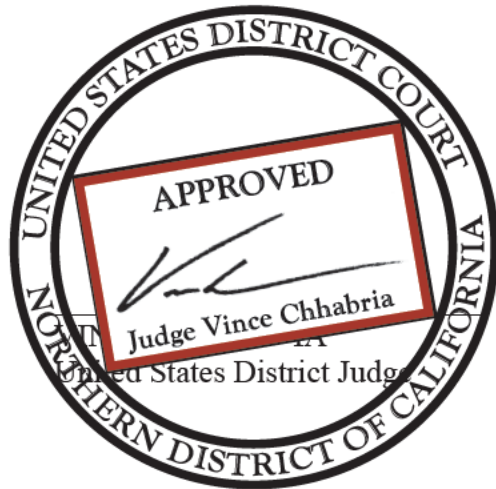
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Counsel for Plaintiffs and the Denial-Letter Class

IT IS SO ORDERED

Dated: September 15, 2020



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APPENDIX A

If Judgment Entered on	PREJUDGMENT INTEREST ACCRUED AS OF DATE OF ENTRY OF JUDGMENT		TOTAL	
	Hoy	Bishop	Hoy	Bishop
September 8, 2020	\$48.80	\$19.31	\$393.80	\$149.31
September 15, 2020	\$49.00	\$19.38	\$394.00	\$149.38
September 22, 2020	\$49.20	\$19.46	\$394.20	\$149.46
September 29, 2020	\$49.40	\$19.53	\$394.40	\$149.53
Per diem at 3%	\$0.0286	\$0.01		