THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

M.R., on behalf of himself and all others similarly situated,

Plaintiff

v.

NICK LYON, in his official capacity Only as Executive Director of the MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.
_____/

No. 2:17-cv-11184-DPH-RSW

HON. DENISE PAGE HOOD
MAG. R. STEVEN WHALEN

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Plaintiff M.R. and Class Counsel Dickinson Wright, PLLC, for themselves and on behalf of the certified class, hereby move for final approval of the Class Action Settlement and Release Agreement preliminarily approved by this Court. Defendant does not oppose the relief sought in this Motion. This Motion is supported by the attached brief in support and accompanying exhibits. Furthermore, this Motion is filed on the timetable set by the Court's Order granting Plaintiff and Defendant's Joint Motion to Certify Class, Appoint Class Counsel, Approve Notice to Class Members, Grant Preliminary Approval of Proposed Class Action Settlement

and Set Date for Fairness Hearing approved by the Court on May 29, 2018.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: /s/ *Aaron V. Burrell*
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Dated: August 15, 2018

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Plaintiff

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

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ISSUE PRESENTED

Whether the Court should grant final approval of the Class Settlement Agreement, which the Court preliminarily approved on May 29, 2018 (DE 31), where it was entered into after significant and informed arm's-length negotiations and provides substantial benefits to the Class given the risks of litigation?

Plaintiff answers: yes

Defendant answers: yes

This Court should answer: yes

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

I. INTRODUCTION

Plaintiff M.R. ("Plaintiff" or "Class Representative") filed this putative class action in the United States District Court for the Eastern District of Michigan, Southern Division alleging that Defendant Nick Lyon, in his capacity as executive director of the Michigan Department of Health and Human Services ("Defendant"), violated several provisions of the Medical Assistance Program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 by use of its current prior-authorization criteria for hepatitis C treatment (the "MDHHS prior-authorization criteria"). Compl. ¶¶ 65–77. On January 17, 2018, Plaintiff's counsel, Defendant's counsel, and Defendant's corporate representatives participated in a formal mediation session with Magistrate Judge R. Steven Whalen. After several rounds of negotiations, the parties reached an agreement. Defendant has denied and continues to deny the claims alleged in this Action. Defendant maintains that it has a strong, meritorious defense to the claims alleged in the Action and was prepared to fully defend the Action. Nonetheless, given the uncertainty and risks inherent in litigation, as well as the inevitable delay of a result for class members whose lives hang in the balance, the parties have concluded that is desirable and beneficial to fully and finally settle this action upon the terms and conditions set forth in their Settlement Agreement.

A proposed settlement was preliminarily approved by this Court on May 29,

2018 (DE 31) (the "Settlement Agreement"). The Settlement Agreement is attached hereto as **Exhibit A**.

Inasmuch as the Settlement Agreement is fair, reasonable, and adequate under Fed. R. Civ. P. 23(e)(2), Plaintiff and Class Counsel respectfully request that the Settlement Agreement be approved in all respects.

II. BACKGROUND

On April 14, 2017, Plaintiff filed this putative class action in the United States District Court for the Eastern District of Michigan, Southern Division captioned J.V. on behalf of herself and all others similarly situated v. Nick Lyon, in his official capacity only as executive director of the Michigan Department of Health and Human Services, Case No.: 2:17-cv-11184- DPH-RSW (the "Action"). The complaint alleged that Defendant's current prior-authorization criteria for Hepatitis C treatment (the "MDHHS Prior Authorization Criteria") violates three separate provisions of the Medical Assistance Program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. by: (1) excluding qualified Medicaid recipients from "medically necessary" treatment as required by 42 U.S.C. § 1396a(a)(10)(A); (2) discriminating among similarly situated Medicaid recipients in violation of 42 U.S.C. § 1396a(a)(10)(B); and (3) failing to provide medically necessary treatment with "reasonable promptness" as required by 42 U.S.C. § 1396a(a)(8). Compl. ¶¶ 65–77.

In or around October 2017, the parties began to discuss the possibility of settlement and agreed to resolve the matter through mediation. On January 17, 2018, Plaintiff's counsel, Defendant's counsel, and Defendant's corporate representatives participated in a formal mediation session with Magistrate Judge R. Steven Whalen. After several rounds of negotiations, the parties reached an agreement as to the principal terms of the Settlement Agreement, attached hereto as **Exhibit A**.

Defendant has denied and continues to deny the claims alleged in the Action. Defendant maintains that it has strong, meritorious defenses to the claims alleged in the Action and was prepared to fully defend the Action. Nonetheless, taking into account the uncertainty and risks inherent in litigation, Defendant has concluded that it is desirable and beneficial to Defendant that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in the Settlement Agreement.

Plaintiff believes that the claims asserted in the Action against Defendant have merit, and that Plaintiff would have ultimately been successful in certifying the proposed class under Fed. R. Civ. P. 23 and in prevailing on the merits at summary judgment or trial. Nonetheless, Plaintiff and Class Counsel recognize the expense and delay associated with continued prosecution of the Action against Defendant. Therefore, Plaintiff believes that it is desirable that the Released Claims be fully and finally compromised, settled, and resolved pursuant to the terms and conditions set

forth in the Settlement Agreement. The terms of the Settlement Agreement include but are not limited to the following:

- Defendant agrees to replace the MDDHS Prior Authorization Criteria and institute the Amended Prior Authorization Criteria to provide coverage for direct-acting antiviral treatment to all Eligible Michigan Medicaid beneficiaries diagnosed with chronic Hepatitis C.
- Defendant agrees to expand direct-acting antiviral treatment coverage to all Eligible Michigan Medicaid beneficiaries diagnosed with chronic Hepatitis C based on the following schedule:
    - Defendant will provide coverage for all eligible beneficiaries with a metavir fibrosis score of F-1 and above on October 1, 2018 and
    - Defendant will provide coverage for all beneficiaries with a metarvir fibrosis score of F-0 an above on October 1, 2019.
- The Amended Prior Authorization Criteria will include, but is not limited to, the following provisions:
    - The direct-acting antiviral medication must be prescribed by a gastroenterologist, hepatologist, liver transplant or infectious disease physician. If the prescribing provider is not one of the identified specialists noted, the prescriber must submit documentation of consultation/collaboration of the specific case with one of the aforementioned specialists which reflects discussion of the history and agreement with the plan of care with the date noted in the progress note.
    - Documentation of the patient's use of Illegal Drugs or abuse of alcohol must be noted (i.e., current abuse of IV drugs or alcohol or abuse within the past 6 months). The Michigan Department of Health and Human Services will consider this information for the sole purpose of optimizing treatment.
    - Documentation of the patient's commitment to the planned course of treatment and monitoring (including SVR 12) as well as patient education addressing ways to reduce the risks for reinfection must be submitted.
    - Defendant reserves the right to revise the Amended Prior Authorization Criteria and Claim Form to incorporate updated clinical recommendations or other best practices, consistent with this Agreement.
- Defendant agrees to provide coverage for direct-acting antiviral

medications that are (i) approved by the U.S. Food and Drug Administration for the treatment of chronic Hepatitis C; (ii) have a federal Medicaid rebate; and (iii) are listed on Defendant's Preferred Drug List as preferred at the time the beneficiary is approved for treatment.

- If a direct-acting antiviral medication is no longer approved by the U.S. Food and Drug Administration for the treatment of chronic Hepatitis C or no longer on Defendant's Preferred Drug List, it will no longer be covered.

On May 29, 2018, the Court issued an Order granting the parties' Joint Motion to Certify Class, Appoint Class Counsel, Approve Notice to Class Members, Grant Preliminary Approval of Class Action Settlement and Set Date for Fairness Hearing (DE 31). Pursuant to the schedule laid out in that Motion, Plaintiff now submits this motion for final approval of the Settlement Agreement.

On June 15, 2018, Defendant forwarded notices to the Class informing Class Members of the impending settlement. Immediately following this mailing, Class counsel received a large number of phone calls and letters inquiring as to the details of the settlement and expressing enthusiastic support. On July 3, 2018, Kirk Leaphart filed the sole substantive objection to the settlement, arguing, among other things, that the complaint was defective against the Defendant as a governmental entity, he and others who administratively appealed a prior denial should receive financial remuneration, and the fees requested were excessive. (DE 39).

On August 8, 2018, the Court held a hearing on Class Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Expenses and a Fairness

Hearing (DE 37). Mr. Leaphart appeared for the hearing. Both Class Counsel and Defendant's counsel offered rebuttals to Mr. Leaphart's objections. At the conclusion of the hearing, the Court indicated that it would take the matter under advisement. Plaintiff M.R. and the certified class now submit this settlement to the Court for final approval.

III. ARGUMENT

A. THE LEGAL STANDARDS FOR SETTLEMENT APPROVAL

The law favors the voluntary settlement of class action litigation. *UAW v. General Motors Corp.*, 2006 WL 891151, at *12 (E.D. Mich. March 31, 2006). *See also Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am.*, *AFL-CIO*, 803 F.2d 878, 880 (6th Cir. 1986) (per curiam); *Berry v. Sch. Dist. of City of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998). Once the district court has granted preliminary approval to a settlement, as here, "an individual who objects has a heavy burden of proving the settlement is unreasonable." *In re S. Ohio Corr. Facility*, 173 F.R.D. at 211; *see also UAW v. General Motors Corp.*, 2006 WL 891151, at *13. In reviewing a class action settlement, the role of the district court is "limited to a determination of whether the terms proposed are fair and reasonable to those affected." *Steiner v. Fruehauf Corp.*, 121 F.R.D. 304, 305 (E.D. Mich. 1988). Settlement embodies "a bargained give and take between the litigants that is presumptively valid," *Berry*, 184 F.R.D. at 97, about which "[t]he Court should not

substitute its judgment for that of the parties." *Steiner v. Fruehauf Crop.*, 121 F.R.D. 304, 306 (E.D. Mich. 1988). Further, the Court should not decide the merits of the dispute. *See UAW v. General Motors Corp.*, 2006 WL 891151, at *14; *Clark Equip. Co.*, 803 F.2d at 880; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974). Nor should the Court engage in the "detailed and thorough investigation that it would undertake if it were actually trying the case," *Berry*, 184 F.R.D. at 98 (quoting *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980) (citation omitted)), since the "whole purpose behind a compromise is to avoid a trial." 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure § 1797.5 (2008).

"In assessing the settlement, the Court must determine 'whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation.*'" In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993) (quoting *Fisher Bros. v. Cambridge-Lee Indus.*, 630 F. Supp. 482, 489 (E.D. Pa. 1985)). An appropriate range of reasonableness recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion*." Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). Under this standard, "[a] just result is often no more than an arbitrary point between competing notions of reasonableness." *In re*

Corrugated Container Antitrust Litig. (II), 659 F.2d 1322, 1325 (5th Cir. 1981); *see Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 338 (W.D. Pa. 1997) *aff'd,* 166 F.3d 581 (3d Cir. 1999).

Approval of a class action settlement is committed to the discretion of the district court. *Clark Equip. Co.*, 803 F.2d at 880; *Detroit Police Officers Ass'n v. Young*, 920 F. Supp. 755, 761 (E.D. Mich. 1995). In exercising that discretion, the court "may limit the fairness hearing 'to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001) (quoting *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990)). The Court may consider briefs, declarations, and the arguments of counsel, and need not conduct an evidentiary hearing. *See e.g. Grier*, 262 F.3d at 567 (rejecting the suggestion that "the fairness hearing must entail the entire panoply of protections afforded by a full-blown trial on the merits"); *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994) ("there is no requirement that an evidentiary hearing be conducted as a precondition to approving a settlement in a class action suit"). "Even when the Court becomes aware of one or more objecting parties, the Court ... may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also UAW v. General Motors*

Corp., 2006 WL 891151, at *14.

In reaching the settlement here, the parties recognized the risks and uncertainties inherent in litigation. Although Plaintiff and Defendant disagree on the merits of their dispute, the parties recognize that the prospect of "a long, arduous [trial] requiring great expenditures of time and money on behalf of both the parties and the court" weighs in favor of settlement. *In re Cincinnati Policing*, 209 F.R.D. 395, 400 (S.D. Ohio 2002); *see Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974) ("[T]he Court should ... compare the significance of immediate recovery ... to the mere possibility of relief in the future, after protracted and expensive litigation.").

Factors relevant to the court's evaluation of the fairness of the settlement are: (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest. *UAW v. General Motors Corp.*, 2006 WL 891151, at *14*; In re Cardizem CD Antitrust Litig.*, 218 F.R.D.

508, 522 (E.D. Mich. 2003); *see also, e.g., Berry*, 184 F.R.D. at 98. Where the Court has already granted preliminary approval, as it did in this case, "the settlement is presumptively reasonable, and an individual who objects has a heavy burden of proving the settlement is unreasonable." *Robinson v. Ford Motor Co.*, 2005 WL 5253339, at *3 (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)); *Fussell v. Wilkinson*, No. 1:03-CV-704, 2005 WL 3132321, at *3 (S.D. Ohio Nov. 22, 2005); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991). Under these standards, the parties' settlement here is fair, reasonable and adequate, and final approval is warranted.

B. THE SETTLEMENT AGREEMENT IS FAIR, REASONABLE AND ADEQUATE, AND FINAL APPROVAL IS WARRANTED

1. The likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement supports final approval of the Settlement Agreement.

According to the Sixth Circuit, "[t]he fairness of each settlement turns in large part on the bona fides of the parties' legal dispute." *Int'l Union, UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). This inquiry requires the court to "'weigh the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.'" *Id.* (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)*; see In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999). In assessing the relative risk and benefits of the settlement, the court must

not, however, "decide the merits of the case or resolve unsettled legal questions[.]" *Carson*, 450 U.S. at 88 n.14. The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement. *Id*. As the record indicates, the parties both believe that they have legitimate claims and could prevail on the merits of their respective positions. Both parties are aware that regardless of how strongly they believe in the merits of their respective positions, the outcome would be subject to the inherent uncertainties of litigation. As such, there is a legitimate and bona fide disagreement that makes settlement of the parties' dispute entirely proper. Finally, and independent of the relative merits of the parties' factual and legal arguments, Plaintiff and the Class have ample reason to control the resolution of this dispute through negotiation sooner than later as many Class members need this life-saving medication as soon as possible.

2. The risk, length, and expense of further litigation strongly support final approval of the Settlement Agreement.

Complex litigation of this sort is costly and time-consuming, as demonstrated by previous class action lawsuits in this circuit. See, e.g., *Sprague v. Gen. Motors Corp*., 133 F.3d 388, 402 (6th Cir. 1998) (in suit challenging GM's modification of salaried retirees' benefits, GM prevailed after ten years of litigation, including a trial and a hearing); *Bittinger v. Tecumseh Prods.*, 201 F.3d 440 (6th Cir. 1999) (*per curiam*), *aff'g* 83 F. Supp. 2d 851 (E.D. Mich. 1998) (litigation resolved in favor of employer after more than eight years of litigation). The obvious costs and

uncertainty of such lengthy and complex litigation weigh in favor of settlement. *See In re Cincinnati Policing*, 209 F.R.D. 395, 400 (S.D. Ohio 2002) ("the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court.... [That] prospect ... clearly counsels in favor of settlement.") (internal quotations and citations omitted). Similarly, in this case, the delay necessary to litigate the parties' dispute benefits no one.

3. The judgment of experienced counsel supports approval of the Settlement Agreement.

The endorsement of the parties' counsel is entitled to significant weight and supports the fairness of the class settlement: "It is ... well recognized that the court should defer to the judgment of experienced counsel who has competently evaluated the strength of the proofs." *UAW v. General Motors Corp.*, 2006 WL 891151, at *18; see also *Cotton v. Hinton*, 559 F.2d 1326, 1329 (5th Cir. 1977) ("the trial court is entitled to rely upon the judgment of experienced counsel for the parties"); *Berry v. Sch. Dist. of City of Benton Harbor*, 184 F.R.D. 93, 104 (W.D. Mich. 1998) ("the court generally will give deference to plaintiffs' counsel's determination to settle a case").

Here, counsel for all parties are reputable practitioners and trial counsel experienced in complex class action litigation. Counsel for both parties have spent significant time analyzing, negotiating, discussing, and arguing over this case and

settlement. Thus, under the law, the parties' respective counsels' collective judgment in favor of the Settlement Agreement is entitled to considerable weight. *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co*., 211 F.R.D. 457, 467 (S.D. Fla. 2002) ("the Court must rely upon the judgment of experienced counsel and, absent fraud, 'should be hesitant to substitute its own judgment for that of counsel"') (citation omitted).

4. The Settlement is based on adequate information, discovery, and evidence.

It is axiomatic that in order to evaluate a proposed settlement, the court need not possess sufficient "evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation." 4 Newberg on Class Actions § 11:45; *In re Rio Hair*, 1996 WL 780512, at *13 (E.D. Mich. Dec. 20, 1996). Instead, the district judge need only have "sufficient facts before him to intelligently approve or disapprove the settlement." *Epstein v. Wittig*, No. 03-4081-JAR, 2005 WL 3276390, at *7 (D. Kan. Dec. 2, 2005) (internal quotation omitted). In this regard, the absence of formal discovery is not unusual or problematic, so long as the parties and the court have adequate information in order to evaluate the relative positions of the parties. See *Newby v. Enron Corp.*, 394 F.3d 296, 306 (5th Cir. 2004) ("Formal discovery [is not] a necessary ticket to the bargaining table.") (internal quotation and citation omitted); *See Cotton*, 559 F.2d at 1332 (upholding settlement despite fact that little formal discovery had been conducted); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) ("documents filed by plaintiffs

and evidence obtained through informal discovery yielded sufficient undisputed facts" to evaluate the settlement).

There was significant information available to the parties to negotiate their compromise, and there is more than an adequate basis and evidentiary record on which the Court can assess the parties' agreement. As such, parties and the Court have been supplied with adequate information regarding the policy at issue, the treatment itself, and the position of the Class Members to make an informed decision regarding the terms of settlement.

5. The Settlement is fair to absent Class Members, and the sole objection to the Settlement is unfounded.

The Class is cohesive, and the Settlement Agreement affects similarly-situated class members the same. Under the terms of the settlement, the Class Representative would receive a small payment in the amount of $5,000.00. Such a payment is appropriate as it is well established that a class representative may be entitled to a fee award for his time and expense incurred in bringing a class action. *Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) ("[T]here is something to be said for rewarding those [plaintiffs] who protest and help to bring rights to [others]"). Sixth Circuit courts have often found that where an incentive award is "fair, reasonable, and properly based on the benefits to the class members generated by the litigation," such an award does not give preferential treatment to Class Representatives and should be granted. *Gascho v. Glob Fitness Holdings,*

LLC, No. 2:11-CV-436, 2014 WL 1350509, at *26–27 (S.D. Ohio Apr 4, 2014), *aff'd*, 822 F3d 269 (6th Cir. 2016).

As stated above, the class members are receiving a substantial benefit by receiving access to a life-saving treatment that may save them from succumbing to a life-threatening disease. Out of the over 1,200 individuals to receive the notice, only one individual objected. In this case, the Class overwhelmingly supports the Settlement. The sole objection (DE 39) is without merit, and both parties provided arguments in response at the fairness hearing on August 8, 2018. Specifically, counsel argued that, for the reasons noted in Plaintiff's response to the Defendant's Motion to Dismiss (DE 19), Plaintiff properly brought this case against the Defendant; concerns relative to the administrative appeal process and the ability to change plans under Medicaid are beyond the scope of this action; and both the fees and incentive award requested are appropriate under Sixth Circuit precedent.

"A court should not withhold approval of a settlement merely because some class members object." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Chrysler LLC*, No. 07-CV-14310, 2008 WL 2980046, at *29 (E.D. Mich. July 31, 2008); 7B Wright, et al., Federal Practice & Procedure § 1797.1 ("the fact that there is opposition does not necessitate disapproval of the settlement"). This is because even though the court must evaluate any objections, it "has an obligation to protect the interests of the silent class majority, despite vociferous opposition by

a vocal minority to the settlement." *Id*.; *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). *See also* Manual For Complex Litigation § 21.643 (4th ed. 2004) ("Unless a number of class members raise similar objections, individual objectors rarely provide much information about the overall reasonableness of the settlement.").

Furthermore, numerous Class Members inquiring about the terms of the Settlement have been extremely pleased with the current Agreement. Indeed, one Class Member, Patricia Kelly even submitted a letter in which she stated, "I'm so happy that the Plaintiff in this Class Action lawsuit stepped forward and took it upon [himself] to help. I was beginning to lose hope that eventually something would finally change with this major drug we all need to be cured…" (DE 40). Considering the overwhelming support for the settlement among class members, and in the absence of any meritorious objections, the settlement is fair, reasonable and adequate, and should be approved.

6. The Settlement was the product of arm's-length negotiations.

According to the Sixth Circuit, the district court should presume the absence of fraud or collusion unless there is evidence to the contrary. *Lasalle Town Houses Coop. Ass'n v. City of Detroit*, No. 4:12-CV-13747, 2016 WL 1223354, at *8 (E.D. Mich. Mar. 29, 2016). Courts customarily demand evidence of improper incentives

for the class representative or class counsel before abandoning the presumption that the class representative and counsel handled their responsibilities with the independent vigor that the adversarial process demands. *In re Rio Hair Naturalizer Prods. Liab. Litig.*, MDL No. 1055, 1996 WL 780512, at *14 (E.D. Mich. Dec. 20, 1996) ("Courts respect the integrity of and presume good faith in the absence of fraud or collusion in settlement negotiations, unless someone offers evidence to the contrary"); *see also Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992) ("Absent evidence of fraud or collusion, such settlements are not to be trifled with.") (citation omitted).

Here, as the Court is aware, there is an ongoing adversarial relationship between the Defendant and Plaintiff and the Class on the question of whether the MDHHS Policy, which denies coverage of DAA treatment based on metavir fibrosis score, violates the Medicaid Act. The Settlement was the result of comprehensive and extensive negotiations. Class counsel were provided full access to all relevant information and undertook their own independent review and analysis of the relevant issues and the possibility of settlement. Moreover, if the settlement agreement itself is fair, reasonable and adequate, the Court may assume that the negotiations were proper and free of collusion. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992) ("In essence, under this test, if the terms of the proposed settlement are fair, then the court may assume the negotiations were proper.").

7. The Settlement is in the public interest.

The settlement benefits both of the Class Members and Defendant, and simultaneously serves the public interest by achieving certainty for parties. Beyond that, the Settlement Agreement provides life-saving medication for thousands of Medicaid Recipients. The public interest is also served by resolving disputes in federal courts with efficiency and expediency, aiding in judicial economy. *See Cardizem*, 218 F.R.D. at 530 (citations omitted) ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources."). Therefore, the public interest factor, too, favors approval of the settlement.

IV. CONCLUSION

For the foregoing reasons, the Court should grant final approval of the Settlement Agreement. The record confirms that the Settlement Agreement is the result of hard-fought, arm's-length negotiations conducted after an extensive investigation and analysis of the relevant information. Given the risks of continued litigation, the absence of meaningful objections, and the significant benefits provided to the Class, the settlement is fair, reasonable, and adequate and Plaintiff respectfully requests that it be approved.

DICKINSON WRIGHT PLLC

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Dated: August 15, 2018

PROOF OF SERVICE

I hereby certify that on August 15, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

/s/ Aaron V. Burrell (P73708)
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DETROIT 74785-1 1470997v1

EXHIBIT A

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J.V., on behalf of herself and all others similarly situated,

Plaintiff

v.

NICK LYON, in his official capacity only as Executive Director of the MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.
_____/

No. 2:17-cv-11184-DPH-RSW

HON. DENISE PAGE HOOD
MAG. R. STEVEN WHALEN

CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release (the "Agreement") is entered into by M.R.[1] individually, and on behalf of the Settlement Class ("Plaintiff" or "M.R.") and Nick Lyon, in his official capacity only as Executive Director of the Michigan Department of Health and Human Services ("Defendant") (collectively referred to as the "Parties"). The Parties intend to fully, finally, and forever resolve, discharge, and settle the Released Claims (as defined below), upon and subject to the terms and conditions of this Agreement, and subject to the final approval of the Court.

RECITALS

[1] The Parties stipulated and agreed to substitute original Plaintiff J.V. with Plaintiff M.R. This Settlement Agreement reflects that change and has substituted "M.R." for "J.V." except as to the caption and references thereto, which has not changed as of the date of revision of this Settlement Agreement. Due to Plaintiff's interest in protecting his privacy, the sensitive subject matter of this case, the Court's Stipulated Order Granting Plaintiff's Motion to Proceed Under a Pseudonym (Dkt. No. 11), and the Parties' St Plaintiff's full name has been omitted.

A. On April 14, 2017, Plaintiff filed a putative class action in the United States District Court for the Eastern District of Michigan, Southern Division captioned *J.V., on behalf of herself and all others similarly situated v. Nick Lyon, in his official capacity only as executive director of the Michigan Department of Health and Human Services*, Case No.: 2:17-cv-11184-DPH-RSW (the "Action"). The complaint alleged that Defendant's current prior-authorization criteria for Hepatitis C treatment (the "MDHHS Prior Authorization Criteria") violates three separate provisions of the Medical Assistance Program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. by: (1) excluding qualified Medicaid recipients from "medically necessary" treatment as required by 42 U.S.C. § 1396a(a)(10)(A); (2) discriminating among similarly situated Medicaid recipients in violation of 42 U.S.C. § 1396a(a)(10)(B); and (3) failing to provide medically necessary treatment with "reasonable promptness" as required by 42 U.S.C. § 1396a(a)(8).

B. In or around October 2017, the Parties began to discuss the possibility of settlement and agreed to resolve the matter through mediation.

C. On January 17, 2018, Plaintiff's counsel, Defendant's counsel, and Defendant's corporate representatives participated in a formal mediation session with Magistrate Judge R. Steven Whalen. After several rounds of negotiations, the Parties reached an agreement as to the principal terms of this Agreement.

D. Defendant has denied and continues to deny the claims alleged in the Action. Defendant maintains that it has strong, meritorious defenses to the claims alleged in the Action and was prepared to fully defend the Action. Nonetheless, taking into account the uncertainty and risks inherent in litigation, Defendant has concluded that it is desirable and beneficial to

Defendant that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Agreement.

E. Plaintiff believes that the claims asserted in the Action against Defendant have merit, and that Plaintiff would have ultimately been successful in certifying the proposed class under Fed. R. Civ. P. 23 and in prevailing on the merits at summary judgment or trial. Nonetheless, Plaintiff and Class Counsel recognize the expense and delay associated with continued prosecution of the Action against Defendant. Therefore, Plaintiff believes that it is desirable that the Released Claims be fully and finally compromised, settled, and resolved pursuant to the terms and conditions set forth in this Agreement.

F. The Parties agree that the terms and conditions of this Agreement are fair, reasonable, and adequate to the Plaintiff, and that it is in the best interests of the Parties to settle the claims raised in the Action pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff and Defendant that in consideration of the terms, conditions, and promises set forth herein, the Action and the Released Claims shall be fully and finally compromised, settled, and released, and the Action shall be dismissed with prejudice, upon and subject to the terms and conditions set forth in this Agreement.

AGREEMENT

1. DEFINITIONS

As used in this Agreement, the following terms have the meanings specified below:

1.1. "Action" means the above captioned lawsuit, presently pending in the United Stated District Court for the Eastern District of Michigan, Southern Division, Case No. 2:17-cv-11184-DPH-RSW, captioned *J.V., on behalf of herself and all others similarly situated v. Nick*

Lyon, in his official capacity only as executive director of the Michigan Department of Health and Human Services.

1.2. **"Agreement"** means this Class Action Settlement and Release Agreement between Plaintiff and Defendant.

1.3. **"Amended Prior Authorization Criteria and Claim Form"** means the form attached hereto as Exhibit D, as approved by the Court. The Amended Prior Authorization Criteria, which outlines Defendant's clinical criteria and other coverage requirements for Eligible Michigan Medicaid Beneficiaries to receive direct-acting antiviral treatment is substantially in the form of pages 1 and 2 of Exhibit D attached hereto. The Claim Form, which must be completed and signed or verified electronically by a physician for Class Members who wish to have Defendant process his or her request for direct-acting antiviral treatment, is substantially in the form of pages 3 and 4 of Exhibit D attached hereto.

1.4. **"Class Counsel"** means Dickinson Wright PLLC.

1.5. **"Class Representative"** means M.R. as representative of the Settlement Class.

1.6. **"Court"** means the United States District Court for the Eastern District of Michigan, Southern Division, the Honorable Denise Page Hood presiding, or any judge who shall succeed her as the Judge in this Action.

1.7. **"Defendant"** means Nick Lyon, in his official capacity only as Executive Director of the Michigan Department of Health and Human Services.

1.8. **"Effective Date"** means the fifth business day after which all of the events and conditions specified in Paragraph 8.1 have been met and have occurred.

1.9. **"Eligible Michigan Medicaid Beneficiary"** means a person who is eligible for Michigan Medicaid at the time he or she seeks coverage of Direct Acting Antiviral medications,

and who meets the criteria listed on the Amended Prior Authorization Criteria and Claim Form, consistent with Section 3 of the Agreement.

1.10. "Fee Award" means the amount of attorneys' fees and reimbursement of costs awarded by the Court to Class Counsel.

1.11. "Final Approval Hearing" means the hearing before the Court where the Parties will request the Final Judgment be entered by the Court approving the Agreement, Incentive Award, and Fee Award as fair, reasonable, and adequate.

1.12. "Final Approval" or **"Final Judgment"** means the Final Judgment and order(s) of the Court approving the Agreement, Fee Award, and Incentive Award as fair, reasonable and adequate, after the Final Approval Hearing, and dismissing this case with prejudice.

1.13. "Illegal Drug" means a controlled substance obtained without a valid prescription.

1.14. "Incentive Award" means an amount awarded by the Court to M.R. for his time and effort bringing the Action and serving as Class Representative.

1.15. "MDHHS" means the Michigan Department of Health and Human Services.

1.16. "MDHHS Prior Authorization Criteria" means Defendant's current prior-authorization criteria for Hepatitis C treatment.

1.17. "Medicaid Act" means Medical Assistance Program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*.

1.18. "Notice" means the notice of this proposed Agreement and Final Approval Hearing, which is to be sent to Class Members. Two notices will be sent by Defendant to Class Members. Each notice will be sent via first class Unites States mail to the Class Member's last known address in MDHHS' Bridges system. The First Notice will be sent after this Court enters

an order preliminarily approving the settlement and is substantially in the form of Exhibit A attached hereto. The Second Notice will be sent after this Court enters a final order approving the settlement and is substantially in the form of Exhibit B attached hereto.

1.19. "**Parties**" means collectively Plaintiff and Defendant, and each of them is a "**Party**."

1.20. "**Preliminary Approval**" means the Court's certification of the Class for settlement purposes, preliminary approval of this Agreement, and approval of the form of the Notice.

1.21. "**Preliminary Approval Order**" means the order(s) preliminarily approving this Agreement, certifying the Settlement Class for settlement purposes, and directing notice thereof to be distributed to the Settlement Class, which will be agreed upon by the Parties.

1.22. "**Released Claims**" means any and all claims, causes of action, allegations, liabilities, demands, and obligations that were asserted or could have been asserted in the Action, or may arise from the operative facts in the Action, by Plaintiff or any Class Member, including unknown claims, demands, rights, liabilities, and causes of action under federal law or the law of any state, whether based on statutory law, administrative rule, regulation or policy, common law, or equity, whether class or individual in nature, known or unknown, concealed or hidden, regardless of forum, including administrative tribunal, state or federal court, against the Released Parties.

1.23. "**Released Parties**" means Defendant, its insurer, as well as any and all of their respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parent companies, subsidiaries, agents, associates, affiliates, divisions, holding companies, employers, employees, consultants, independent contractors, insurers, directors,

managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, companies, firms, trusts, and corporations.

1.24. "Settlement Class," "Settlement Class Member," and **"Class Member"** means all individuals who:

a. are or will be enrolled in Michigan's Medicaid Program at the time this Agreement is preliminarily approved by the Court;

b. have been or will be diagnosed with a chronic infection of the Hepatitis C Virus;

c. are 18 years or age or older;

d. require, or in the future will require, treatment for Hepatitis C with direct-acting antiviral medication; and

e. do not meet the Michigan Department of Health and Human Services' current treatment criteria, which restricts direct-acting antiviral treatment to individuals with a minimum metavir fibrosis score criteria of F-2 or who meet other MDHHS clinical criteria.

2. REQUIREMENT OF COURT APPROVAL AND STIPULATIONS OF THE PARTIES

2.1. This Agreement is conditioned upon Preliminary Approval and Final Approval of the Court. The Parties agree that this Agreement shall be null and void in the event that Court approval is denied. If the Court fails to grant either Preliminary Approval or Final Approval, the Parties shall be restored to their respective positions prior to the time of the execution of this

Agreement. The Parties and their counsel, however, agree to work together, in good faith, to cure any minor or procedural issues that may have caused the Court to initially deny the settlement.

2.2. The Parties stipulate and agree that the Settlement Class and/or Settlement Class Members shall consist of individuals who:

a. are or will be enrolled in Michigan's Medicaid Program at the time this Agreement is preliminarily approved by the Court;

b. have been or will be diagnosed with a chronic infection of the Hepatitis C Virus;

c. are 18 years or age or older;

d. require, or in the future will require, treatment for Hepatitis C with direct-acting antiviral medication; and

e. do not meet the Michigan Department of Health and Human Services' current treatment criteria, which restricts direct-acting antiviral treatment to individuals with a minimum metavir fibrosis score criteria of F-2 or who meet other MDHHS clinical criteria.

2.3. For purposes of settling this Action only, the Parties conditionally stipulate that the prerequisites for establishing class certification have been met with respect to the Settlement Class. If the Court fails to grant either Preliminary Approval or Final Approval, the Parties shall be restored to their respective positions prior to the time of the execution of this Agreement, and there shall be no presumption against Defendant that any class should be certified in this Action, or that the prerequisites for certification have been satisfied, by virtue of Defendant having entered into this Agreement. The Parties stipulate and agree that:

a. The Settlement Class is ascertainable and sufficiently numerous as to make it impracticable to join all Class Members as named Plaintiffs.

b. There are common questions of law and fact including, but not limited to, whether the MDHHS Prior Authorization Criteria, which denies coverage of direct acting antiviral treatment based on metavir fibrosis score, violates the Medicaid Act.

c. Plaintiff's claims are typical of the claims of the Settlement Class Members.

d. Plaintiff will fairly and adequately protect the interests of the Settlement Class.

e. Dickinson Wright PLLC should be deemed and appointed as Class Counsel and will fairly and adequately protect the interests of the Settlement Class.

f. The prosecution of separate actions by individual members of the Settlement Class would create the risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct.

g. The questions of law and fact common to the members of the Settlement Class predominate over any questions affecting any individual member in such class, and a class action is superior to other available means for the fair and efficient adjudication of the controversy.

2.4. For purposes of effectuating this Agreement, the Parties agree to the designation of the Dickinson Wright PLLC as Class Counsel for the Settlement Class.

2.5. For purposes of effectuating this Agreement only, the Parties agree to the appointment of M.R. as the class representative.

3. TERMS OF SETTLEMENT

3.1. Defendant agrees to replace the MDDHS Prior Authorization Criteria and institute the Amended Prior Authorization Criteria to provide coverage for direct-acting antiviral treatment to all Eligible Michigan Medicaid beneficiaries diagnosed with chronic Hepatitis C. The Amended Prior Authorization Criteria is attached hereto as pages 1 and 2 of Exhibit D.

3.2. Defendant agrees to expand direct-acting antiviral treatment coverage to all Eligible Michigan Medicaid beneficiaries diagnosed with chronic Hepatitis C based on the following schedule:

a. Defendant will provide coverage for all eligible beneficiaries with a metavir fibrosis score of F-1 and above on October 1, 2018 and

b. Defendant will provide coverage for all beneficiaries with a metavir fibrosis score of F-0 an above on October 1, 2019.

3.3. The Amended Prior Authorization Criteria will include, but is not limited to, the following provisions:

a. The direct-acting antiviral medication must be prescribed by a gastroenterologist, hepatologist, liver transplant or infectious disease physician. If the prescribing provider is not one of the identified specialists noted, the prescriber must submit documentation of consultation/collaboration of the specific case with one of the aforementioned specialists which reflects discussion of the history and agreement with the plan of care with the date noted in the progress note.

b. Documentation of the patient's use of Illegal Drugs or abuse of alcohol must be noted (i.e., current abuse of IV drugs or alcohol or abuse within the past 6 months). The Michigan Department of Health and Human Services will consider this information for the sole purpose of optimizing treatment.

c. Documentation of the patient's commitment to the planned course of treatment and monitoring (including SVR 12) as well as patient education addressing ways to reduce the risks for re-infection must be submitted.

3.4. Defendant reserves the right to revise the Amended Prior Authorization Criteria and Claim Form to incorporate updated clinical recommendations or other best practices, consistent with this Agreement.

3.5. Defendant agrees to provide coverage for direct-acting antiviral medications that (i) are approved by the U.S. Food and Drug Administration for the treatment of chronic Hepatitis C; (ii) have a federal Medicaid rebate; and (iii) are listed on Defendant's Preferred Drug List as preferred at the time the beneficiary is approved for treatment.

3.6. If a direct-acting antiviral medication is no longer approved by the U.S. Food and Drug Administration for the treatment of chronic Hepatitis C or no longer on Defendant's Preferred Drug List, it will no longer be covered.

4. RELEASE

4.1. The obligations incurred pursuant to this Agreement shall be a full and final disposition of the Action and any and all Released Claims, as against all Released Parties.

4.2. Upon the Effective Date, Plaintiff, and the Settlement Class, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims against the Released Parties.

5. NOTICE TO THE SETTLEMENT CLASS

5.1. Within thirty (30) days of entry of the Preliminary Approval Order, Defendant shall provide, at its own expense, a First Notice describing the Final Approval Hearing, the basic

terms of the compromise embodied in this Agreement to potential Class Members. The First Notice is attached hereto as Exhibit A.

5.2. Defendant will provide Notice via: (1) U.S. Mail to all denied beneficiaries at their last known address, (2) Defendant's website at http://www.michigan.gov/mdhhs/, and (3) posters located in all of Defendant's county offices. The posters will be in substantially the form of Exhibit C, attached hereto.

5.3. The Claim Form must include the required supporting documentation, including approved specialist documentation, in order to ensure the most clinically appropriate and cost-effective treatment.

5.4. Claim Forms submitted to Defendant that do not include approved specialist documentation will be denied and a denial notice will be sent to the beneficiary.

5.5. Defendant will provide claimants with information regarding administrative hearing procedures to adjudicate individual claims that are denied. This information shall include, but is not limited to, the following:

a. Denied claimants have the right to an administrative hearing to contest the Michigan Department of Health and Human Services' denial.

b. Contact information for local legal aid organizations.

5.6. All denial notices will include information regarding the claimant's right to an administrative hearing to contest the denial.

5.7. Defendant will have ninety (90) days to process the Claim Forms. If Defendant does not process the Claim Form within ninety (90) days, Class Counsel must notify Defendant and allow Defendant a reasonable time to investigate, and take corrective action before filing a

motion for show cause with the Court. Defendant will process all Claim Forms consistent with the Amended Prior Authorization Criteria and the terms of this Agreement.

6. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER

6.1. Within fourteen (14) days after the execution of this Agreement, Class Counsel shall submit this Agreement together with its exhibits to the Court and shall move the Court for entry of Preliminary Approval of the settlement set forth in this Agreement, which shall include, among other provisions, a request that the Court:

a. appoint Class Counsel and Class Representative;

b. certify the Settlement Class under Fed. R. Civ. P. 23 for settlement purposes only and without prejudice to Defendant's right to contest class certification if this Agreement is not approved;

c. preliminarily approve this Agreement for purposes of disseminating Notice to Class Members;

d. approve the form and contents of the Notice, the Claim Form, as well as the method of dissemination;

e. schedule a Final Approval Hearing to review any comments and/or objections regarding this Agreement, to consider its fairness, reasonableness and adequacy; to consider the application for a Fee Award, Incentive Award to the Class Representative; to consider whether the Court shall issue a Final Judgment approving this Agreement; and to consider dismissing the Action with prejudice.

6.2. After the First Notice is given, Class Counsel shall move the Court for entry of a Final Judgment, which shall include, among other provisions, a request that the Court:

a. approve the Agreement and the proposed settlement as fair, reasonable and adequate as to, and in the best interests of, the Settlement Class; direct the Parties and their counsel to implement and consummate the Agreement according to its terms and conditions; and declare the Agreement to be binding on, and have res judicata and preclusive effect in, all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiff;

b. find that the Notice implemented pursuant to the Agreement: (i) constitutes the best practicable notice under the circumstances, (ii) constitutes notice that is reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action and their right to appear at the Final Approval Hearing, (iii) is reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice, and (iv) meets all applicable requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution, and the rules of the Court;

c. find that the Class Representative and Class Counsel adequately represented the Class Members for purposes of entering into and implementing the Agreement.

d. dismiss the Action with prejudice, without fees or costs to any Party except as provided in this Agreement;

e. incorporate the Release set forth above, make the Release effective as of the date of the Final Judgment, and forever discharge the Released Parties as set forth herein;

f. authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications, and expansions of the Agreement and its

implementing documents (including all exhibits to this Agreement) that (i) shall be consistent in all material respects with the Final Judgment, and (ii) do not limit the rights of Class Members; and

g. incorporate any other provisions, consistent with the material terms of this Agreement, as the Court deems necessary and just.

6.3. Within 21 days of the Final Approval Order. Defendant shall send to class members:

a. The Second Notice, attached hereto as Exhibit B;

b. The Amended Prior Authorization Criteria and Claim Form, attached hereto as Exhibit D.

7. FEE AWARD AND INCENTIVE AWARD

7.1. Class Counsel will apply to the Court for a Fee Award of one hundred ninety-nine thousand dollars ($199,000.00), which is inclusive of all costs and expenses incurred in the Action. Defendant will not oppose this request for a Fee Award that is in compliance with this paragraph 7.1.

7.2. Defendant shall pay to Class Counsel, within thirty (30) days measured from the Effective Date or an Order from the Court approving the Fee Award, whichever is later, the Fee Award approved by the Court. Any Fee Award payment shall be made via check made payable and mailed to Class Counsel.

7.3. Class Counsel will request that the Court award Class Representative an Incentive Award of five thousand dollars ($5,000.00). Defendant will not oppose an Incentive Award that is in compliance with this paragraph 7.3 and agrees to pay the Incentive Award granted by the Court, without reducing any of the other commitments set forth herein.

7.4. Defendant shall pay to M.R. the Incentive Award, as approved by the Court, within thirty (30) days measured from the Effective Date or an order dismissing the case with prejudice, from the Court approving the Fee Award, whichever is later. Payment of this Incentive Award shall be made via check, such check to be sent care of Class Counsel.

8. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION, OR TERMINATION

8.1. The Effective Date of this Agreement shall not occur unless and until each of the following events occurs.

a. This Agreement has been signed by the Parties, Class Counsel and Defendant's Counsel;

b. The Court has entered an order granting Preliminary Approval of the Agreement;

c. The Court has entered an order finally approving the Agreement, following notice to Class Members, and a Final Approval Hearing, as provided in the Federal Rules of Civil Procedure, and has entered the Final Judgment, or a judgment substantially consistent with this Agreement; and

d. The Final Judgment has become final, or, in the event that the Court enters an order and final judgment in a form other than that provided above ("Alternative Judgment") to which the Parties have consented, that Alternative Judgment has become final.

e. *Disputes Concerning the Effective Date of Settlement.* If Parties disagree as to whether each and every condition set forth in paragraph 8.1 has been satisfied or waived, they shall promptly confer in good faith and, if unable to resolve their differences within ten (10) business days thereafter, shall present their dispute to the Court for resolution.

8.2. If some or all of the conditions specified in paragraph 8.1 are not met, or in the event that this Agreement is not approved by the Court, or the settlement set forth in this Agreement is terminated or fails to become effective in accordance with its terms, then this Agreement shall be canceled and terminated subject to paragraph 8.3, unless Class Counsel and Defendant's Counsel mutually agree in writing to proceed with this Agreement. If any Party is in material breach of the terms hereof, any other Party, provided that it is in substantial compliance with the terms of this Agreement, may terminate this Agreement on notice to all other Parties. Notwithstanding anything herein, the Parties agree that the Court's decision as to the amount of the Fee Award to Class Counsel set forth above or the Incentive Award to the Class Representative, regardless of the amounts awarded, shall not prevent the Agreement from becoming effective, nor shall it be grounds for termination of the Agreement.

8.3. Effect of reversal on appeal:

a. Court of Appeals Reversal. If the Sixth Circuit Court of Appeals reverses the Court's order approving the Settlement, then, provided that no appeal is then pending from such a ruling, this Agreement shall automatically terminate and thereupon become null and void, on the 31st day after issuance of the order referenced in this section.

b. Supreme Court Reversal. If the Supreme Court reverses the Court's order approving the Settlement, then, provided that no appeal is then pending from such a ruling, this Agreement shall automatically terminate and thereupon become null and void, on the 31st day after issuance of the order referenced in this section.

c. Pending Appeal. If an appeal is pending of an order declining to approve the Settlement, this Agreement shall not be terminated until final resolution of dismissal of any such appeal, except by written agreement of the Parties.

8.4. If this Agreement is terminated or fails to become effective for the reasons set forth in paragraphs 8.1, 8.2 or 8.3 above, the Parties shall be restored to their respective positions in the Action as of the date of the signing of this Agreement. In such event, any Final Judgment or other order entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, and the Parties shall be returned to the status quo with respect to the Action as if this Agreement had never been entered into and, pursuant to paragraph 9.4 below, this Agreement shall not be used for any purpose whatsoever against the Parties.

9. MISCELLANEOUS PROVISIONS

9.1. The Parties: (i) acknowledge that it is their intent to consummate this Agreement; and (ii) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Agreement and to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Agreement. Class Counsel and Defendant's Counsel agree to seek entry of the Preliminary Approval Order and the Final Judgment, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Agreement.

9.2. The Parties intend this Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims by Plaintiff and the Settlement Class against the Released Parties. Accordingly, the Parties agree not to assert in any forum that the

Action was brought by Plaintiff or defended by Defendant, or each or any of them, in bad faith or without a reasonable basis.

9.3. The Parties have relied upon the advice and representation of counsel, selected by them, concerning the claims hereby released. The Parties have read and understand fully this Agreement and have been fully advised as to the legal effect hereof by counsel of their own election and intend to be legally bound by the same.

9.4. Whether the Effective Date occurs or this Agreement is terminated, neither this Agreement nor the settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of this Agreement or the settlement:

a. is, may be deemed, or shall be used, offered or received against the Released Parties, or each or any of them as an admission, concession or evidence of, the validity of any Released Claims, the truth of any fact alleged by Plaintiff, the deficiency of any defense that has been or could have been asserted in the Action, the violation of any law or statute, the reasonableness of the settlement, the Fee Award, or of any alleged wrongdoing, liability, negligence, or fault of the Released Parties;

b. is, may be deemed, or shall be used, offered or received against Defendant as, an admission, concession or evidence of any fault, misrepresentation or omission with respect to any statement or written document approved or made by the Released Parties;

c. is, may be deemed, or shall be used, offered or received against Plaintiff or the Settlement Class as an admission, concession or evidence of, the infirmity or strength of any claims asserted in the Action, the truth or falsity of any fact

alleged by Defendant, or the availability or lack of availability of meritorious defenses to the claims raised in the Action;

9.5. The headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

9.6. Definitions apply to the singular and plural forms of each term defined.

9.7. References to a person include references to an entity, and include successors and assigns.

9.8. All of the exhibits to this Agreement are material and integral parts hereof and are fully incorporated herein by reference.

9.9. Should any provision in this Agreement be declared or determined to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected, and all remaining provisions shall remain valid and enforceable.

9.10. This Agreement and its exhibits set forth the entire agreement and understanding of the Parties with respect to the matters set forth herein, and supersedes all prior negotiations, agreements, arrangements and undertakings with respect to the matters set forth herein. No representations, warranties or inducements have been made to any party concerning this Agreement or its exhibits other than the representations, warranties and covenants contained and memorialized in such documents.

9.11. This Agreement may not be changed, altered, modified or amended except in writing and signed by the Parties hereto and their respective counsel and approved by the Court. This Agreement may not be discharged except by performance in accordance with its terms or by a writing signed by the Parties.

9.12. Each counsel or other Person executing this Agreement, any of its exhibits, or any related settlement documents on behalf of any party hereto, hereby warrants and represents that such Person has the full authority to do so and has the authority to take appropriate action required or permitted to be taken pursuant to the Agreement to effectuate its terms.

9.13. This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Signature by digital, facsimile, or in PDF format will constitute sufficient execution of this Agreement. A complete set of original executed counterparts shall be filed with the Court if the Court so requests.

9.14. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Michigan without reference to the conflicts of law provisions thereof.

9.15. Defendant waives any and all claims for fees, costs, indemnity, or contribution against the Class Representative, Settlement Class Members, or Class Counsel arising out of the Released Claims.

9.16. This Agreement does not supersede any legislative changes to the Medicaid program or changes to federal regulations, policies, guidelines or informal guidance. Nor does it prevent Defendant from seeking, negotiating, or obtaining, through waivers or other means, more competitive prices on direct-acting antiviral medications.

9.17. This Agreement is deemed to have been prepared by counsel for all Parties, as a result of negotiations among the Parties. Whereas all Parties have contributed substantially and materially to the preparation of this Agreement, it shall not be construed more strictly against one party than another.

9.18. Where this Agreement requires notice to the Parties, such notice shall be sent to the undersigned counsel:

If to Plaintiff's Counsel
Dickinson Wright PLLC
Attn: Aaron V. Burrell
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
aburrell@dickinsonwright.com

If to Defendant's Counsel
Department of Attorney General
Health, Education, and Family Svc. Div.
Attn: Joshua S. Smith
PO Box 30758
Lansing, MI 48909
(517) 373-7700
smithj46@michigan.gov

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties hereto have caused this Class Action Settlement and Release Agreement to be executed, by their duly authorized attorneys.

Dated: 5-11-18

M.R., individually and on behalf of the Settlement Class Members,

By: _____

Dated: 5/23/18

Kathleen Stiffler, Deputy Director, Medical Services Administration, for NICK LYON, in his official capacity only as Executive Director of the MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

By: _____

DETROIT 74785-1 1448515v2