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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Spinedex Physical Therapy, U.S.A., Inc., et al., **Plaintiffs,** **vs.** **United Healthcare of Arizona, Inc.,** et al., **Defendants.**	**No. CV 08-457-PHX-ROS** **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, AND APPROVAL OF FORM AND CONTENT OF NOTICE TO SETTLEMENT CLASS**

Plaintiffs Spinedex Physical Therapy U.S.A., Inc. ("Spinedex") and Claude Aragon, individually and on behalf of all others similarly situated, respectfully file this memorandum of law in support of the Joint Motion for Conditional Certification of Settlement Class, Preliminary Approval of Settlement Agreement, and Approval of Form and Content of Notice to Settlement Class (the "Motion"). The Motion requests that the Court enter the proposed Preliminary Approval Order ("Preliminary Order") filed herewith, which would, *inter alia*, preliminarily certify a settlement class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. In support of the Motion, Plaintiffs respectfully submit the Declaration of Joseph A. Garofolo ("Garofolo Declaration" or "Garofolo Decl.") filed herewith and request that the Court consider all pleadings and records on file, all matters of judicial notice, and any arguments and evidence presented at any hearing on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

"[T]here is a strong policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (citation omitted). After more than 10 years of vigorous litigation, the parties have entered into a settlement agreement. Plaintiffs now seek preliminary approval of a settlement class of participants and beneficiaries of health plans who received nonsurgical spinal decompression therapy ("Decompression Therapy") and providers of such therapy. The settlement would require important revisions to two policies maintained by United[1] that apply to all plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), a meeting between United and stakeholders of Decompression Therapy to discuss its medical efficacy, and $1,475,000 in monetary consideration for the settlement class.

After three summary judgment motions, extensive discovery, an appeal to the

[1] Collectively, United Healthcare of Arizona, Inc., United Healthcare, Inc., United HealthCare Insurance Company, United HealthCare Services, Inc., UnitedHealth Group Inc., and Ingenix, Inc. are referred to as "United."

Ninth Circuit, and a petition for a writ of certiorari to review the judgment of the Ninth Circuit filed with the United States Supreme Court by United, the parties engaged in prolonged settlement discussions. The result is an arm's-length settlement that is fair and reasonable to the class and that eliminates significant risk if this case were to proceed to trial. The settlement satisfies all requirements for preliminary approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, including appropriate notice to the proposed class.

Accordingly, this Motion should be granted.

II. BACKGROUND

A. This Case Has a Long Procedural History Prior to Mediation.

1. Plaintiffs file suit and Defendants prevail on summary judgment.

This lawsuit was filed in March of 2008 as a class action with Spinedex as the only plaintiff. Three additional Plaintiffs, two plan participants and an association of chiropractors, joined this lawsuit prior to the filing of the Second Amended Complaint ("Amended Complaint" or "SAC") (Doc. 38) on July 9, 2008. The Amended Complaint alleges that United systematically violates ERISA when processing and denying physical therapy and Decompression Therapy claims submitted under employer-sponsored health plans.

As to United's processing and denials of claims for Decompression Therapy, Plaintiffs allege a class of plan participant and medical provider plaintiffs with assignments, including chiropractors, who submitted claims under ERISA-covered plans and were improperly denied claims based on a medical policy maintained by United. (SAC ¶ 97). That policy characterizes Decompression Therapy as experimental, investigational, or unproven and, therefore, not covered under ERISA plans. (*Id.* at ¶ 78). Plaintiffs allege that United's denial of such claims under the policy is improper and violates ERISA because it, *inter alia*, fails to consider the terms of the health plans and misapplies the terms of such plans. (*Id.* at ¶¶ 78-85).

As to processing of claims for Decompression Therapy and physical therapy,

Plaintiffs allege that United violates ERISA's full and fair review requirement and the corresponding claims regulation, 29 C.F.R. § 2560.503-1 ("Claims Regulation"), and generally breaches its fiduciary duties. (*Id.* at ¶¶ 110-119). Among the alleged violations, Plaintiffs assert that United: i) fails to consider terms of the formal plan instrument and instead relies only on summaries of the plan instrument; ii) describes benefit denials in a manner that cannot be understood by participants; iii) inhibits claims and appeals by failing to properly process appeals; and iv) fails to properly compile and preserve administrative records. (*See* Plfs.' Opposition to Defs.' Mot. for Partial Summary Judgment ("Third MSJ Opposition") (Doc. 726) at 19).

After the Court granted in part and denied in part Defendants' motion to dismiss and left Plaintiffs' claims largely intact, Defendants filed their first motion for summary judgment challenging various issues relating to Plaintiffs' claims on an exemplar basis. (*See* Defs.' Mot. for Partial Summary Judgment and Severance ("First MSJ") (Doc. 237) at 1). For example, Defendants argued that Plaintiffs lacked Article III standing to bring claims on behalf of an exemplar patient because Spinedex had not balance billed that patient; that Plaintiffs could not bring their claims because exemplar participants treated by Spinedex had not exhausted their respective plans' administrative processes; and that Plaintiffs' claims were barred by anti-assignment and contractual limitations provisions in exemplar plans. (*See id.*). United also argued that it could not be sued on a claim for benefits because it was not a proper party with regard to plans that it did not insure. (*See id.* at 21-22). In connection with these issues, Plaintiffs and Defendants served written discovery requests and Plaintiffs deposed an employee of United. The Court agreed with Defendants' arguments and granted summary judgment on the exemplar claims. (*See* Sealed Order dated March 30, 2011 ("3/30/11 Order") (Doc. 399) at 18).

Defendants also moved to sever physical therapy claims unrelated to Decompression Therapy based on the argument that such claims were not related to Decompression Therapy. (Defs.' First MSJ at 23-27). Although the Court denied that portion of Defendants' First MSJ, the Court explained that "Defendants' argument . . .

would be better suited to an opposition to class certification." (3/30/11 Order at 18:12-14).

Because Defendants' First MSJ was filed on an exemplar basis, Defendants filed a second motion for summary judgment on January 20, 2012 after receiving leave from the Court. (*See* Defs.' Mot. for Summary Judgment ("Second MSJ") (Doc. 460)). Defendants sought to apply the Court's 3/30/11 Order to the remainder of Spinedex's claims and also moved for summary judgment on the claims of Plaintiffs Jack Adams and the Arizona Chiropractic Society on statute of limitations and standing grounds. (*Id.* at 11-12, 16-21). After extensive briefing, the Court granted Defendants' Second MSJ on October 11, 2012 and entered final judgment on October 23, 2012.

2. Plaintiffs appeal and the Ninth Circuit reverses in part and affirms in part.

Plaintiffs appealed from the judgment entered by the Court and the Ninth Circuit reversed in part, affirmed in part, vacated in part, and remanded the case.[2] *See Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282 (9th Cir. 2014). The Ninth Circuit affirmed the dismissal of Plaintiffs Adams and the Arizona Chiropractic Society on statute of limitations and standing grounds and remanded the exhaustion issue with guidance as to how it should be analyzed with regard to remaining benefit denial claims. *See id.* at 1293, 1299. The appellate court affirmed this Court's ruling that Plaintiff Spinedex's assignments did not encompass ERISA claims for fiduciary breach and held that such assignments only covered benefit claims. *See id.* at 1292.

The Ninth Circuit also held that Plaintiff Aragon could only assert claims for fiduciary breach and could not assert claims for denied benefits because he had assigned his claims to Spinedex. *See id.* at 1293. The ruling left open the question of "whether, in the case's current procedural posture, [Plaintiff] Aragon has Article III standing." *Id.* at 1294. The appellate court elaborated by identifying the issue of "whether Aragon would have standing to bring a claim for breach of fiduciary duty if he cannot pursue his

[2] Appellants were represented by two of the three law firms representing Plaintiffs.

claim for denial of benefits because he has assigned it to Spinedex." *Id.* Finally, the Ninth Circuit vacated and remanded this Court's ruling that United was not a proper defendant with respect to Plaintiffs' benefit denial claims relating to self-funded plans for further factual development. *Id.* at 1298.

United filed a petition for a writ of certiorari asking the Supreme Court to review the issue of whether United was a proper Defendant with regard to self-funded plans.[3] On October 13, 2015, after briefing, the Supreme Court denied United's certiorari petition.

3. Defendants file a third summary judgment motion.

Thereafter, at a January 26, 2016 status conference, this Court permitted Defendants to file another summary judgment motion to address the standing issue identified by the Ninth Circuit relating to Plaintiff Aragon and other issues raised by Defendants. Defendants were also granted leave to expand their third summary judgment motion to include a statute of limitations argument relating to Plaintiff Spinedex's benefit denial claims based on *Blood Systems, Inc. v. Roesler*, 972 F. Supp. 2d 1150, 1154-57 (D. Ariz. 2013). In *Blood Systems*, this Court held that the statute of limitations relating to subrogation claims brought under ERISA was one year under Arizona Revised Statutes § 12-541(3). Defendants filed their third motion for summary judgment on February 29, 2016. (*See* Defs.' Mot. for Partial Summary Judgment ("Third MSJ") (Doc. 634)).

The Court permitted discovery relating to Defendants' Third MSJ. Plaintiffs deposed two United representatives pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and obtained additional documents, including complete administrative records for all participants' claims and designations of such records corresponding to each of Spinedex's participant-assignors' claims. (*See* Order dated March 16, 2016 (Doc. 648); Order dated June 15, 2015 (Doc. 685) at 2-3). During the course of this litigation, including discovery relating to the Third MSJ, Defendants have produced

[3] Plaintiffs were again represented by two of the firms serving as counsel in this case.

almost 60,000 pages of documents.

The Court granted in part and denied in part Defendants' Third MSJ in a detailed ruling. (*See* Order dated December 15, 2017 ("12/15/17 Order") (Doc. 768)). Answering the question raised by the Ninth Circuit, the Court held that Plaintiff Aragon has standing to bring claims for injunctive and declaratory relief. (*See id.* at 1-9). But the Court agreed with Defendants that a one-year statute of limitations applies to Plaintiff Spinedex's claims for benefits. (*See id.* at 9-15). Defendants were also granted summary judgment relating to anti-assignment provisions for five plans. (*Id.* at 15-17).

B. Arm's-Length Settlement Negotiations Result in Settlement.

After the Court entered final judgment in this litigation and prior to Plaintiffs' appeal, the parties briefly communicated regarding settlement. However, because of important and unsettled issues, and the parties' respective settlement positions, further discussions were not appropriate at that time. The parties subsequently engaged in additional arm's-length settlement negotiations in March and April of 2017, after briefing was completed on Defendants' Third MSJ, but were far apart in their positions and were unable to make progress toward settlement at that time.

After the 12/15/17 Order, the parties renewed their settlement discussions. Those settlement discussions became more focused in April of 2018 and the parties retained and worked with JAMS mediator Elliot Gordon. Mr. Gordon has extensive experience in the fields of health care, ERISA, and complex litigation. Following an intense full day of mediation with Mr. Gordon in Los Angeles on May 22, 2018, the parties continued to exchange settlement proposals. After further negotiations, and with significant assistance from Mr. Gordon, by early June of 2018, the parties had agreed upon a structure for potential settlement. The parties further negotiated material settlement terms with ongoing assistance of Mr. Gordon and executed a nonbinding term sheet on July 3, 2018. More detailed terms were negotiated in the subsequent months culminating in a final settlement agreement in December of 2018.

C. The Terms of the Settlement Agreement are Fair and Reasonable.

Material terms of the Settlement Agreement are summarized below. The Settlement Agreement and its exhibits are attached as Exhibit A of the Garofolo Declaration. Exhibits 9-10 of the Settlement Agreement have been filed under seal.

1. The Settlement Agreement defines a reasonable settlement class.

The settlement class (the "Class" or "Decompression Class") is defined as follows:

> (i) [A]ll Decompression Therapy service providers that provided Out-of-Network Decompression Therapy Services to a Plan Member, submitted a claim for reimbursement of those Decompression Therapy Services pursuant to an assignment of benefits received from that Plan Member, and received a Complete Claim Denial from any of the Released Parties during the period from March 7, 2002 through thirty (30) Days prior to the Claims Date; and (ii) all Plan Members who received Out-of-Network Decompression Therapy Services, submitted a claim for reimbursement of those Decompression Therapy Services (including, but not limited to, through an authorized representative), and received a Complete Claim Denial from any of the Released Parties during the period from March 7, 2002 through thirty (30) Days prior to the Claims Date.

(Settlement Agreement, § II.DDD).

Notably, the Class is limited to providers and participants and beneficiaries of ERISA plans that submitted Decompression Therapy claims. The settlement does not cover any class claims for physical therapy (not involving Decompression Therapy) and does not release class claims for physical therapy. As discussed below, *infra* at 20, 22, counsel carefully considered the interests of the putative Decompression Therapy and physical therapy classes and determined that it is in the interests of those who would have been covered by a physical therapy class to allow them to pursue individual claims rather than seek to settle or press class claims. Nonetheless, the named class representatives both broadly release their own claims because this was required by Defendants as a condition of settlement.

2. The settlement relief includes important revisions to United's policies and monetary consideration of $1,475,000.

The relief obtained pursuant to the settlement consists of revisions to United's policies governing ERISA claims, a meeting between Decompression Therapy stakeholders and United's medical policy committee, and a monetary component. The revisions to United's policies correspond to some of the most important allegations made by Plaintiff Aragon for declaratory and injunctive relief.

Specifically, the settlement requires United to revise its appeal policy applicable to ERISA plans so that it is required to request the plan document from the employer/customer under appropriate circumstances when considering appeals of denied claims. The settlement also requires United to unequivocally recognize that medical providers may be deemed authorized representatives of participants.

With respect to document requests submitted by ERISA plan participants, under a revised policy, United is required to provide all documents that fall within the definition of 29 C.F.R. 2560.503-1(m)(8), the portion of the Claims Regulation that defines relevant documents. Similarly, the policy specifies that the documents that must now be produced include United's internal communications when adjudicating a claim and that the plan document is among the documents that should be produced when responding to a participant request. These revisions directly impact the information available to participants and beneficiaries of ERISA plans upon request and Plaintiffs are hopeful that it will also impact the manner that United creates and retrieves administrative records.

The settlement further requires United to consider additional post-2010 medical literature and engage in a meeting with stakeholders (to be selected by Plaintiffs) to discuss the medical efficacy of Decompression Therapy. Although there are no guarantees that this will lead United to change its policy regarding coverage of Decompression Therapy under ERISA plans, this settlement term could have a positive outcome because Plaintiffs believe that Decompression Therapy is a safe and effective

treatment that would ultimately create savings for United and the plans it administers because costly spinal surgery would often be avoided.

Finally, the settlement provides for $1,475,000 in monetary consideration. Plaintiffs also secured reimbursement of mediation costs from United amounting to, $9,168.60, which otherwise would have been sought by counsel from the settlement fund. Thus, the total recovery from the Defendants is $1,484,168.60 when mediation costs are included. This amount was negotiated through multiple offers and temporary impasses and Plaintiffs believe that it is the maximum that Defendants were willing to pay in monetary consideration. Plaintiffs' additional analysis of the reasonableness of the monetary consideration is discussed in more detail below. *See infra* at 21-22.

The net settlement fund would be allocated to members of the Decompression Class based on the "Recognized Loss" of each eligible member of the Class. The Recognized Loss is 100% of the amount of the fully denied claim or claims for Decompression Therapy. However, 20% of the Recognized Loss is subtracted to arrive at the eligible payment amount from the settlement fund to take into account copayments, coinsurance, or deductibles that would ordinarily be due from the participant or beneficiary of the health plan. Should the amount of all submitted claims be less than or equal to the net settlement fund, all claimants would receive their full Recognized Loss. Should the amount of all submitted claims be greater than the net settlement fund, claimants would receive a percentage of their Recognized Loss based on a *pro rata* allocation. To be eligible for payment, *inter alia*, medical providers would be required to affirm that they have received an assignment and participant or beneficiary Class members would be required to have paid their medical providers any portion of the amount billed by their medical provider above copayment, coinsurance, or deductible amounts. (*See* Settlement Agreement, Exs. 1-2). The settlement administrator may request information, including assignments, from members of the Class.

The gross settlement fund would be reduced by settlement administration

expenses, any award of attorney's fees and costs, and any services awards granted by the Court. Plaintiffs' counsel has designated KCC Class Action Services, LLC (and its affiliates) as the settlement administrator, an experienced administrator chosen after interviewing and soliciting bids from three potential providers. The settlement administrator estimates that notice, processing of claims and opt outs, and distribution of the settlement fund and related activities contemplated by Section III.A. of the Settlement Agreement will cost between approximately $154,000 and $209,000, including $19,130 for the cost of published notice. As part of the Preliminary Order, the Court would i) approve of the settlement administrator and direct it to perform the functions set forth in the Settlement Agreement and ii) find that the costs and expenses of settlement administration are fair and reasonable and preliminarily approve the same. Defendants are responsible for paying the costs of notice to appropriate state and federal officials pursuant to the Class Action Fairness Act of 2005 ("CAFA"), and the Preliminary Order approves the form and content of the CAFA notice attached as Exhibit 11 of the Settlement Agreement.

In their petition for attorney's fees, costs, and request for service awards, counsel intends to request up to $126,000.00 for costs and expenses relating to the litigation (including expert witness and special master fees, but not including mediation fees to be directly reimbursed to Plaintiffs' counsel under the Settlement Agreement by United) and attorney's fees up to 33⅓% of the monetary consideration of $1,475,000, or $491,666.66, collectively for all three firms that represented Plaintiffs (at 33⅓%, Plaintiffs' attorneys would receive less than one tenth of a lodestar award).[4] The

[4] As will be discussed and supported in detail in their petition for attorney's fees, costs, and service awards, Plaintiffs' counsel has devoted extraordinary efforts to this case to obtain a strong result in the face of significant risks. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) ("Selection of the [25%] benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case."); *Dudum v. Carter's Retail, Inc.*, 2016 U.S. Dist. LEXIS 166881, at*24-25 (N.D. Cal. Dec. 2, 2016) ("This unusual negative multiplier supports the reasonableness of the fee request."); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (approving award of approximately 33⅓% of a common fund and

percentage would be less than 33⅓% if the value of the non-monetary relief is taken into account. As discussed in more detail below with regard to adequacy of the Plaintiffs as Class representatives, counsel also intends to request service awards not to exceed a collective total of $50,000.

3. The settlement release is appropriate.

For Class members that do not opt out, the settlement agreement releases claims against United and related parties and ERISA plans administered by United from March 2, 2002 through 30 days prior to the "Claims Date"[5] that were asserted or could have been asserted based on or arising from United's administration or determination of out-of-network benefits for Decompression Therapy.

Plaintiffs Spinedex and Aragon more broadly release any claims that were or could have been asserted against United and related parties and ERISA plans administered by United through the date of execution of a separate release. Plaintiffs Aragon and Spinedex receive no additional consideration for these releases notwithstanding the fact that Spinedex had physical therapy claims against United exceeding $200,000 before it ceased doing business in 2008.[6]

As discussed in more detail below, Plaintiffs carefully considered the settlement and determined that it is fair, adequate, and reasonable to the Decompression Class and also in the best interests of the alleged physical therapy class.

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recognizing that the "typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33⅓% of the total settlement value").

[5] The Claims Date is "60 days after the Notice Date." (Settlement Agreement, § III.B.). The "Notice Date" is no later than 60 days after any preliminary approval order entered by this Court. (*Id.* at § VI.I.).

[6] Thomas Blankenbaker, D.C., who owns the rights to Spinedex's claims, also is the owner of a clinic that currently provides treatment for neck and back pain. Pursuant to a separate settlement agreement that would release all of his claims, including claims associated with his current clinic that are outside the scope of the pleadings in this action, through the effective date of the Settlement Agreement, Dr. Blankenbaker would receive $20,000. Dr. Blankenbaker's settlement was negotiated by separate counsel and Dr. Blankenbaker was not represented by Plaintiffs' counsel (*i.e.*, proposed class counsel).

III. ARGUMENT

A. Courts Undertake a Two-Step Process in Reviewing Class Action Settlements.

"Parties may settle a class action before class certification and stipulate that a defined class be conditionally certified for settlement purposes." *In re Wireless Facilities, Inc. Sec. Litig.*, 253 F.R.D. 630, 633 (S.D. Cal. 2008) (citing *Molski v. Gleich*, 318 F.3d 937 (9th Cir.2003)); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-622 (1997). When deciding whether to approve a proposed class action settlement, the Court should engage in a two-step process.

First, the Court should make a preliminary determination that the proposed class satisfies the criteria set forth in Rule 23(a) of the Federal Rules of Civil Procedure and at least one of the subsections of Rule 23(b). *Id.* at 634. As part of the first step of the process, a court also "must evaluate the fairness, reasonableness, and adequacy of the proposed settlement." *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 363 (D. Ariz. 2009) (citing *In re Syncor*, 516 F.3d at 1100). Second, after the Court grants preliminary approval and notice is provided to the class, the Court holds a hearing where it makes a final determination of the fairness of the class settlement. *Id.*

In the instant case, Plaintiffs seek certification of an opt-out class under Rule 23(b)(3). For the reasons set forth below, the Class meets the requirements for certification of a settlement class and is fair, reasonable, and adequate.

B. The Class Meets the Requirements of Rule 23(a) and (g) for Settlement Purposes.

Rule 23(a) of the Federal Rules of Civil Procedure provides that a class action may be maintained if the following requirements are satisfied: "i) the class is so numerous that joinder of all members is impracticable; ii) there are questions of law or fact common to the class; iii) the claims or defenses of the representative parties are typical of those of the class; and iv) the representative parties will fairly and adequately protect the interests of the class." Rule 23(g) guides the Court in assessing the adequacy of proposed class counsel.

The Class meets these requirements for purposes of settlement certification as

does proposed counsel for the Class ("Class Counsel").

1. The Decompression Class is numerous.

Rule 23(a)(1)'s numerosity requirement focuses on "the difficulty or inconvenience of joining all members of the class" rather than the impossibility of joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-914 (9th Cir. 1964). There is a presumption of numerosity when a class covers 40 or more members. *Amone v. Aveiro*, 226 F.R.D. 677, 684 (D. Haw. 2005).

Here, it is estimated that the Class may include as many as 81,187 members, including 60,769 participants and beneficiaries and 20,148 medical providers. The numerosity requirement for certification of a settlement class is easily satisfied.

2. The Class satisfies Rule 23(a)'s commonality requirement.

A class meets the commonality requirement of Rule 23(a)(2) when "shared legal issues with divergent factual predicates" are involved or when there "is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In the instant case, commonality exists because all of the class member are participants in ERISA plans who were subject to the same Decompression Therapy policy and were subject to the same or similar administrative process relating to claims for Decompression Therapy.

3. Plaintiffs' claims are typical of the Decompression Class.

Rule 23(a) requires that a class representative's claims be typical of the class. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* at 1020.

Plaintiffs' claims are typical of the Class because they "arise[] from the same event, practice, or course of conduct that gives rise to the claims of the other class members . . . and . . . [their] claims are based on the same legal theory." W. Rubenstein, *Newberg on Class Actions* ("*Newberg*") § 3:29 (5th ed. 2011). Plaintiff Spinedex, as an assignee of plan participants, submitted Decompression Therapy claims that were denied

under United's policy covering such claims and Decompression Therapy claims submitted by or on behalf of Plaintiff Aragon proceeded through the administrative process offered by United and challenged in this lawsuit.

Accordingly, the claims of Spinedex and Aragon are typical of the Class.

4. Plaintiffs Spinedex and Aragon are adequate representatives of the Class.

The fourth requirement of Rule 23(a) is that the class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) focuses on the class representatives as opposed to counsel, and requires that "(1) the class representatives must not have interests antagonistic to the unnamed class members and (2) the representative must be able to prosecute the action 'vigorously through qualified counsel.'" *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 573 (C.D. Cal. 2008) (quoting *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)); Fed. R. Civ. P. 23 advisory committee note (2003 amendments; subdivision (g)).

Plaintiffs Spinedex and Aragon have no antagonistic interests to the Class and have vigorously represented the Class. Like the other medical providers and participants in the Class, Spinedex stands to benefit from recovery from the settlement fund for denied Decompression Therapy claims. Notably, federal courts have recognized that an assignee may be an appropriate representative of a class consisting of those who have not assigned claims and assignees. *See McDaniel v. N. Am. Indem. N.V.*, 2003 U.S. Dist. LEXIS 1663, at *10-13 (S.D. Ind. Jan. 27, 2003); *In Re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 300, 305-06 (E.D. Mich. 2001); *see also Southwestern Bell Telephone Co. v. Marketing on Hold, Inc.*, 170 S.W.3d 814, 814-27 (Tex. App. 2005). Plaintiff Aragon, like other participants (and providers with broad assignments), maintained his right to assert fiduciary breach claims due to alleged claims processing issues and is an appropriate representative for Class relief obtaining revisions to United's policies governing ERISA claims.

While Spinedex and Aragon both seek service awards, this request does not create any issues that would call into question their adequacy as Class representatives.

The Ninth Circuit recently explained that, with regard to service awards, the relevant inquiry is the same as the general analysis of adequacy: "(1) do the named plaintiffs . . . have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 943 (9th Cir. 2015) (quoting *Hanlon*, 150 F.3d at 1020). In *Resnick*, the court focused on whether there "were any structural differences in the claims of the class representative and the other class members." *Id.* at 943 (citing *Hanlon*, 150 F.3d at 1021).

In the instant case, service awards were addressed in the Settlement Agreement only after all material terms had been agreed upon. (Garofolo Decl. ¶ 6). The same is true with regard to Plaintiffs' attorney's fees and costs. Moreover, the settlement is not contingent on the Court granting service awards or awarding attorney's fees. (*Id.*; Settlement Agreement, Art. VI).

Plaintiffs intend to submit additional information supporting the amount of the service awards in counsel's motion for attorney's fees, costs, and service awards, but will not seek more than $50,000 as the total amount of service awards for the Class representatives to be allocated appropriately amongst the two Plaintiffs. The Class representatives have devoted significant time to this case. (Garofolo Decl. ¶ 5). Both Plaintiffs have remained Class representatives and vigorously prosecuted this lawsuit despite the fact that this case has been pending for more than 10 years, including before the Ninth Circuit and on a petition for certiorari to the Supreme Court. (*See id.)*; *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (emphasizing that the class representative's participation "lasted through many years of litigation" in awarding a $50,000 award to a single representative); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 49477, at *47 n.8 (N.D. Cal. April 22, 2010) ("Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class."). Further, in addition to giving up their claims that would be

released as part of the settlement, they are providing a general release, which was required by the Defendants in order to settle the case. *See Eddings v. Health Net, Inc.*, 2013 U.S. Dist. LEXIS 84811, at *22-23 (C.D. Cal. June 13, 2013) (citing as support for a service award the fact that the plaintiff agreed to a "general release that will resolve her individual claims, as well as the class claims").

5. Plaintiffs' attorneys should be appointed as Class Counsel.

Rule 23(g) sets forth the factors that a district court must consider in appointing class counsel. *See Cevantez*, 253 F.R.D. at 574. Those factors are the following:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A).

Plaintiffs' counsel should be appointed as counsel for the Class pursuant to Rule 23(g). Plaintiffs request that all three firms that represent Plaintiffs be appointed as counsel for the Class and that Garofolo & Ramsdell, LLP be appointed as lead class counsel. Class Counsel spent substantial time investigating the case and identifying claims. (Garofolo Decl. ¶ 7). Attorneys at all three firms have substantial experience in litigating ERISA cases, including ERISA class actions and health plan cases. (*Id.*). All three firms are extremely knowledgeable about the law. (*Id.*) Counsel at Garofolo & Ramsdell, LLP regularly serves as an expert witness on ERISA matters, including cases involving health plans. (*Id.* at ¶ 8). Counsel has devoted substantial resources to this litigation during the more than 10 years that it has proceeded, including by retaining experts on summary judgment and devoting resources to discovery. (*Id.* at ¶ 9). Counsel has also demonstrated their resolve by litigating this case throughout its lengthy history, including defending three summary judgment motions, filing a successful appeal

to the Ninth Circuit, and defeating a petition for certiorari. *See* Fed. R. Civ. P. 23(g)(1)(B) (permitting consideration of "any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class").

C. The Class Meets the Requirements of Rule 23(b)(3) for Settlement Purposes.

In addition to satisfying the requirements of Rule 23(a), a settlement class must meet one of the requirements of Rule 23(b). Rule 23(b)(3) provides that "questions of law or fact common to class members [must] predominate over any questions affecting only individual members, and . . . a class action [must be] superior to other available methods for fairly and efficiently adjudicating the controversy." As a general matter, predominance focuses on "'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*, 521 U.S. at 623). The assessment of whether a class action is "superior" within the meaning of Rule 23(b)(3) "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id.* at 1023.

Rule 23(b)(3) lists four factors relevant to the determination of whether a class is certifiable because it meets the necessary predominance and superiority requirements. However, "[w]hile Rule 23 states that these factors are pertinent to the assessment of predominance and superiority, most courts analyze the Rule 23(b)(3)(A) to (D) factors solely in determining whether a class suit would be a superior method of litigation." *Newberg* § 4:47. The first three factors are the following: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class member; [and] (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(A)-(C). The fourth factor, manageability, is not relevant to a settlement class. *See Amchem*, 521 U.S. at 620.

Here, the Class satisfies the requirements of predominance and superiority. The Class is cohesive in that all of the proposed members submitted claims for

Decompression Therapy and were subject to the same policy or policies implemented by United concluding that Decompression Therapy is an experimental, investigational, or unproven treatment. They also proceeded through the claims process administered by United with respect to which the settlement requires business practice revisions.

As to superiority, the Class is certifiable when tested against Rule 23(b)(3)'s three factors. "A primary purpose of class action lawsuits, particularly money damages claims aggregated under 23(b)(3), is to enable the litigation of claims that are worth too little money to be pursued individually." *Newberg* § 4:65. The Class consists of participants and beneficiaries and medical providers. Defendants have indicated that as many as 60,769 participants and beneficiaries may be part of the Class compared to 20,418 medical providers. The dollar value of claims for participants likely is quite small. And because United's policy likely causes medical providers to cease submitting Decompression Therapy claims, the dollar value of each provider's claims also likely is not high. Therefore, the first factor, the "class members' interests in individually controlling the prosecution . . . of separate actions" supports a conclusion that the Class meets Rule 23(b)(3)'s superiority requirement.

The second factor, "the extent and nature of any litigation concerning the controversy already begun by or against class members," also supports certification under a superiority analysis. Plaintiffs are not aware of other lawsuits against United involving Decompression Therapy with the exception of two prior consolidated lawsuits brought by Spinedex or Spinedex's principal. Accordingly, the second factor also supports certification. *See Wolph v. Acer Amer. Corp.*, 272 F.R.D. 477, 489 (N.D. Cal. 2011).

Finally, superiority is supported by the third factor that weighs the "desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. (b)(3)(C). "[C]lass actions in a particular forum are particularly appropriate when that court has already made several preliminary rulings, when a particular forum is more geographically convenient for the parties, when other similar actions have been

consolidated . . . or . . . when the defendant is located in the forum state." *Newberg* § 4:71. The first of these considerations is compelling. This Court has made numerous rulings over the course of this litigation that has spanned more than 10 years.

Accordingly, the Class meets the conditions of Rule 23(b)(3) and should be preliminarily certified for settlement purposes.

D. The settlement is fair, reasonable, and adequate.

The Ninth Circuit has held that the following eight factors should be considered by a district court in determining whether a settlement is fair, reasonable, and adequate:

> [i] the strength of the plaintiffs' case; [ii] the risk, expense, complexity, and likely duration of further litigation; [iii] the risk of maintaining class action status throughout the trial; [iv] the amount offered in settlement; [v] the extent of discovery completed and the state of the proceedings; [vi] the experience and views of counsel; [vii] the presence of a governmental participant; and [viii] the reaction of the class members to the proposed settlement.

Resnick, 779 F.3d at 944.

These factors weigh heavily in favor of granting preliminary approval.

1. The strength of the case, the risk, expense, complexity, and likely duration, the settlement amount offered, and counsel's views all support approval.

Not surprisingly in light of the history of this case, Plaintiffs have a strong understanding of this litigation, including the strength of Plaintiffs' claims and the risk, expense, complexity, and likely remaining duration of the litigation.

As to the strength of the case, Defendants have raised many defenses to Plaintiffs' claims, some of which Defendants prevailed on and after Plaintiffs' appeal. For example, Defendants succeeded in obtaining a ruling that the statute of limitations for Plaintiff Spinedex's benefit denial claims is one year, absent an appeal, effectively limiting any period for a contested class to final claims denials occurring one year before the original complaint in this action was filed, or March 7, 2007. (*See* 12/15/17 Order at 9-15). Plaintiffs disagree with this ruling, but it certainly bears on the strength of the

case. Defendants were granted summary judgment with regard to anti-assignment provisions for five health plans. (*Id.* at 15-17). Further, notwithstanding their broad challenges to Plaintiffs' claims on summary judgment, Defendants did not press their exhaustion defense, which they reasonably argued is preserved for another summary judgment motion or trial. (*See* Third MSJ at 2 n.3; Rule 16 Scheduling Order (Doc. 781) at 4:10-11 (permitting Defendants to file a fourth summary judgment motion)).

Moreover, the parties disputed the standard of review applicable to claims involving Decompression Therapy and physical therapy—an issue not yet addressed by the Court. (*See* Joint Proposed Case Management Plan (Doc. 617) at 24:3-9). If Defendants were to have prevailed on this issue, an abuse of discretion standard would have been much more difficult to have overcome for Plaintiffs. *See Day v. AT&T Disability Income Plan*, 698 F.3d 1091, 1096 (9th Cir. 2012) ("Under the deferential abuse of discretion standard of review, the plan administrator's interpretation of the plan will not be disturbed if reasonable.") (internal quotations and citations omitted).

Plaintiff Aragon's fiduciary breach claims against United no longer sought monetary relief and still faced substantial risks. United raised standing arguments that this Court rejected, but United could still appeal that issue absent a settlement. (*See* Defs.' Reply in Further Support of Mot. for Partial Summary Judgment (Doc. 739) at 6-9). In addition to arguing that it did not engage in deviations from ERISA that were anything more than *de minimis*, United argued that injunctive relief would not be appropriate because the relief requested by Plaintiff Aragon would be "draconian." (Joint Proposed Case Managed Plan at 16:17-17:22).

Simply stated, the issues remaining in this case are complex and Plaintiffs would face substantial risk in proceeding. Similarly, and in part because of the complexity of the case, this litigation would have been expensive to continue to litigate and likely would have continued for years. Expert deadlines were rapidly approaching and despite the fact that substantial discovery has been taken in this case, significant discovery remained. The case would have continued regardless of the outcome of further summary

judgment rulings or trial because the losing side likely would appeal.

In sum, Plaintiffs had a difficult case relating to claims for Decompression Therapy and, for the reasons mentioned below relating to class certification, an even more difficult case relating to physical therapy claims. Indeed, the best result under the circumstances has been achieved—appropriate consideration has been obtained relating to Decompression Therapy and no release has been provided relating to putative class claims relating to physical therapy. Accordingly, the first two factors that the Ninth Circuit requires to be considered strongly support approval of a settlement that achieves all of the following: i) important revisions to United's policies; ii) monetary consideration of $1,475,000; iii) the possibility of revisions to United's policy relating to Decompression Therapy after a stakeholder meeting; and iv) preservation of physical therapy claims that do not involve Decompression Therapy.

This conclusion is bolstered by the amount offered in settlement and the experience and views of counsel, the fourth and sixth factors used to evaluate the fairness, reasonableness, and adequacy of settlement. During the course of settlement negotiations, Defendants provided information for the period from March 7, 2002 through March 7, 2008 indicating that a total of $3,188,189 in claims submitted under Healthcare Common Procedure Coding System S9090 and Current Procedural Terminology code 97012 of over $70—a monetary cut-off designed to target Decompression Therapy claims[7]—were denied in full under a range of codes that correlated with a substantive reason for denial relating to class allegations. Additionally, Defendants disclosed the existence and amount of older claims (amounting to approximately $500,000) that could fall under the foregoing criteria, but may not.

Accordingly, counsel ultimately totaled all available monetary data as the starting

[7] Because the 97012 code is not exclusive to Decompression Therapy claims, the parties agreed to use a $70 monetary cut-off to target Decompression Therapy claims rather than other physical therapy treatments. By comparison, Plaintiff Spinedex charged approximately $130 per Decompression Therapy treatment. Therefore, this cut-off likely resulted in the inclusion of claims that were not Decompression Therapy claims, which would inflate the overall amounts in the data.

point for evaluating the exposure of Defendants.[8] In addition to the reasons set forth above, Plaintiffs' figure likely overstates the amount to which participants or providers would be entitled under the terms of health plans from March 7, 2002 through March 7, 2008 because it does not account for copayments, coinsurance, deductibles, or usual, customary, and reasonable ("UCR") reductions that properly would be applied under the terms of plans administered or insured by United. Therefore, Plaintiffs evaluated the appropriateness of monetary recovery by assuming that discounts ranging from 20%-30% would be applicable. This is again a very conservative estimate in light of the fact that most of the plans sued in this lawsuit require coinsurance of 30% or greater and have annual deductibles.

Plaintiffs then extrapolated from the information that Defendants agreed to provide because Defendants required the Decompression Class to cover the period from March 7, 2002 through the period 30 days prior to the Claims Date. As discussed above, the Claims Date is defined under the Settlement Agreement as 60 days after the Notice Date and the Notice Date runs 60 days after any Preliminary Order entered by this Court. Plaintiffs proceeded under the assumption that this Court will grant preliminary approval by January 30, 2019. Based on this assumption, the Claims Date would be May 30, 2019, and 30 days prior to the Claims Date would be April 30, 2019. This means that the Decompression Class will cover 17 years and 2 months, or from March 7, 2002 through April 30, 2019.

Plaintiffs determined that the monetary consideration obtained from Defendants amounts to between approximately 11% and 13% of the their estimated exposure, including interest, from March 7, 2002 through April 30, 2019, or between approximately 18% and 20% if a period from March 7, 2007 to April 30, 2019 (12 years

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[8] UCR reductions were not included because Defendants advanced strong arguments for a settlement bar due to the resolution of *American Medical Association, et al. v. United Healthcare Corporation, et al.*, Master File No. 00-2800 (LMM) (GWG), a case that settled almost a year after commencement of this lawsuit and included prospective relief addressing UCR reductions. (*See* Proposed Case Management Plan at 67-68).

and two months, consistent with the Court's ruling that there is a one-year statute of limitations applicable to ERISA benefit claims). Plaintiffs' counsel, experienced ERISA litigators with significant class action experience, concluded that the monetary consideration was well within the range of reasonableness and a good result based on all relevant considerations. (*See* Garofolo Decl. ¶ 10). Moreover, counsel's opinions are consistent with the amount offered in settlement negotiations that were prolonged and contentious, and Plaintiffs remain convinced that the monetary consideration was the maximum that could be obtained.

Counsel also believes that it is appropriate to allow putative physical therapy class claims (not involving Decompression Therapy) to effectively be dismissed without a release because of this Court's ruling suggesting that such claims could not be certified (*see* 3/30/11 Order at 18:12-14), the numerous colorable defenses that remained available to Defendants, and because Defendants were unwilling to consider stipulating to a physical therapy settlement class.

Finally, it is important to emphasize that the settlement was achieved after intense arm's-length negotiations, absent collusion. (Garofolo Decl. ¶ 10). As recognized by the District of Arizona, when determining whether to grant preliminary approval, a court "must consider only whether the settlement agreement appears to be the product of serious, informed, non-collusive negotiations, is fair, and has no obvious deficiency." *Horton*, 266 F.R.D. at 363 (internal quotations and citation omitted).

2. The risk of maintaining class action status through trial supports approval.

While certifying and maintaining a contested Decompression Therapy class through trial was reasonably possible for the same reasons described above explaining why the Decompression Class is appropriate, including United's maintenance of a uniform policy covering Decompression Therapy, there was, nonetheless, a significant risk that such a class might not be certified. Defendants have preserved colorable arguments, including those directed toward manageability of a Decompression Therapy class, such as exhaustion defenses. Therefore, the risk associated with maintaining a

class action through trial supports preliminary approval of the settlement.

3. The status of discovery supports preliminary approval and the remaining factors are neutral at this time.

Defendants produced substantial documents, including complete administrative records, documents and instruments governing the named plans that were sued, and voluminous documents regarding United's policies and procedures. Depositions and written discovery provided additional information regarding United's claims practices. The status of discovery, therefore, supports preliminary approval.

Finally, the remaining two factors—the presence of a governmental participant and the reaction of the class members to the proposed settlement—presently have no bearing on preliminary approval. There is no governmental participant involved in the litigation and Class members have not yet had the opportunity to object to the settlement. Nevertheless, Plaintiffs believe that the reaction to this settlement will be favorable because of the relief obtained.

Accordingly, the foregoing factors strongly support preliminary approval.

E. The Proposed Notice to the Settlement Class Meets the Requirements of Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure.

Rule 23(c)(2)(B) provides that, with regard to opt-out settlement classes, a district court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Moreover, notice must state "clearly and concisely" and "in plain, easily understood language" the following: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Here, all of the foregoing requirements are satisfied. Based on information

provided by United, the Notice of Proposed Settlement of Class Action and Final Fairness Hearing ("Mailed Notice") attached as Exhibit 3 of the Settlement Agreement will be mailed to the last known addresses of approximately 81,187 members, including 60,769 participants and beneficiaries and 20,418 medical providers that fall within the parameters described above. The settlement administrator will also cause the notice ("Published Notice") attached as Exhibit 5 of the Settlement Agreement to be published once in *USA Today*, a paper with a large national circulation.

Finally, the Mailed Notice has been drafted in plain and understandable language that meets all of the conditions of Rule 23(c)(2)(B). For example, the Mailed Notice provides a description of the nature of the action, the definition of the Decompression Class, the right to opt out, and the effect of a class judgment.

Accordingly, Plaintiffs request that the Court approve the Mailed and Published Notices, enter the Preliminary Order filed herewith, and approve of the schedule attached to this Motion as Exhibit 1, which would, *inter alia*, set the deadline for the Mailed Notice 60 days from any preliminary approval, an objection and opt-out deadline of 120 days from preliminary approval, the deadline for Plaintiffs to move for attorney's fees, costs, and service awards 140 days after preliminary approval, the deadline for Plaintiffs to move for final approval 170 days from preliminary approval, and a final fairness hearing 180 days after preliminary approval.

IV. CONCLUSION

For the foregoing reasons, this Motion should be granted, and the Court should preliminarily approve the settlement and enter the proposed Preliminary Order filed herewith.

DATED this 21st day of December, 2018

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a notice of Electronic Filing to the following CM/ECF registrants:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on this 21st day of December, 2018, at Lafayette, California.

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