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AMERICAN CANCER SOCIETY CANCER ACTION NETWORK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

ROBERT MENDOZA, an individual; KALANA PENNER, an individual; DAVID PENNER, an individual; THE LOS ANGELES COUNTY MEDICAL ASSOCIATION, a California corporation, Plaintiffs, v. HEALTH NET, INC., a corporation; HEALTH NET OF CALIFORNIA, INC., a corporation; HEALTH NET LIFE INSURANCE COMPANY, a corporation; and DOES 1 through 100, inclusive, Defendants.	Case No. BC491954 [Assigned for all purposes to the Honorable John Shepard Wiley, Dept. 311] **APPLICATION OF AMERICAN CANCER SOCIETY CANCER ACTION NETWORK FOR LEAVE TO APPEAR AND FILE BRIEF AS *AMICUS CURIAE*** Date Action Filed: 9/12/12 FAC Filed: 10/24/12

TO THE HONORABLE JOHN SHEPARD WILEY, JUDGE OF THE SUPERIOR COURT:

This application of proposed *amicus curiae* American Cancer Society Cancer Action Network ("ACS CAN") respectfully shows:

1. Applicant is the nation's leading advocacy organization dedicated to defeating cancer. Created in 2001 as the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society (ACS), ACS CAN supports evidence-based policy and legislative solutions designed to

eliminate cancer as a major health problem.

Based on evidence of the importance of health insurance status to cancer outcomes, ACS CAN advocates for access to meaningful health insurance coverage that serves the needs of patients and is adequate, available, affordable, and administratively simple. ACS CAN believes that patients should have timely access to, and coverage for, the complete continuum of quality, evidence-based healthcare services, including treatment of cancer as well as management of pain and other cancer-related symptoms.

Promoting an appropriate definition of "medical necessity" is an important element of this goal. ACS CAN also believes that treating physicians must play an important role in the assessment of "medical necessity" – an issue that is critical to the disposition of the present case.

2. Applicant is familiar with the nature of this case, the issues involved, and the scope of their presentation to date.

3. Applicant believes its participation as *amicus curiae* will assist the Court in addressing the threshold question of whether Defendants' definition of "medical necessity" complies with California law. ACS CAN has had extensive involvement in policy issues surrounding health insurance coverage, medical necessity, and evidence-based practice. ACS CAN believes its perspective as an advocate for the needs of cancer patients will be helpful to this Court in determining the parties' cross-motions for summary adjudication now pending.

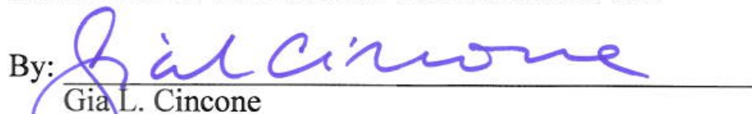
4. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the proposed amicus and its counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

WHEREFORE, ACS CAN respectfully requests leave to appear as *amicus curiae* in this action, and asks that the proposed brief attached to this application be deemed filed as of this date.

DATED: June 4, 2013

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: 
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

ROBERT MENDOZA, an individual; KALANA PENNER, an individual; DAVID PENNER, an individual; THE LOS ANGELES COUNTY MEDICAL ASSOCIATION, a California corporation,

Plaintiffs,

v.

HEALTH NET, INC., a corporation; HEALTH NET OF CALIFORNIA, INC., a corporation; HEALTH NET LIFE INSURANCE COMPANY, a corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No. BC491954
[Assigned for all purposes to the Honorable John Shepard Wiley, Jr., Dept. 311]

MEMORANDUM OF AMICUS CURIAE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

Date: June 11, 2013
Time: 8:30 a.m.
Department 311

Date Action Filed: 9/12/12
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1 **I. INTRODUCTION**

2 This case involves two individuals who were denied insurance access for cancer treatment 3 and pain management procedures that their treating physicians deemed appropriate. Their health 4 insurance company, Health Net, decided that the recommended procedures were not "medically 5 necessary" because other alternatives were available, but did not establish that the advice of the 6 treating physicians was unreasonable or contrary to good medical practice. The Los Angeles 7 County Medical Association has also joined the lawsuit.

8 The parties have stipulated to the filing of early cross-motions for summary adjudication 9 on the question whether Health Net's definition of "medical necessity," as set forth in paragraphs 10 33 and 49 of the First Amended Complaint, complies with California law. The American Cancer 11 Society Cancer Action Network ("ACS CAN") seeks the Court's leave to present its views on this 12 issue, which is of critical importance to Californians. ACS CAN believes any definition of 13 "medical necessity" should incorporate the views of the treating physician. California residents 14 who are suffering from cancer and in need of treatment for the disease or its symptoms should be 15 entitled to rely on their providers' advice, unless that advice is shown to be misguided. ACS CAN 16 joins the plaintiffs in asking this Court to hold that Health Net's definition of "medical necessity" 17 is contrary to California law.

18 **II. STATEMENT OF INTEREST**

19 ACS CAN is the nation's leading advocacy organization dedicated to defeating cancer. 20 Created in 2001 as the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society 21 (ACS), ACS CAN supports evidence-based policy and legislative solutions designed to eliminate 22 cancer as a major health problem. Based on evidence of the importance of health insurance status 23 to cancer outcomes, ACS CAN also advocates for access to meaningful insurance coverage that 24 serves the needs of patients.

25 ACS CAN is a proponent of evidence-based practice, which takes into account the strength 26 of the science regarding both the risks and benefits that a course of treatment might carry in a 27 particular case. ACS played a leading role in establishing evidence-based guidelines beginning 28 over three decades ago, helping physicians and others understand the importance of using such

standards in cancer-related health examinations. As discussed in more detail below, ACS CAN firmly believes that evidence-based practice is fully consistent with appropriate deference to the advice and recommendations of treating physicians.

III. ARGUMENT

A. Health Insurance Issues Have A Dramatic Impact On Cancer Patients

ACS estimates that about 1,660,290 new cancer cases will be diagnosed in 2013, including 171,330 in California. About 580,350 Americans are projected to die of cancer in 2013 – almost 1,600 people per day. Cancer is the second most common cause of death in the United States, accounting for nearly one of every four deaths. *See* "Cancer Facts and Figures 2013" (ACS 2013).[1] Moreover, an extensive ACS study published in 2008 determined that uninsured Americans are less likely to get screened for cancer, more likely to have their cancer diagnosed at an advanced stage, and less likely to survive that diagnosis than their insured counterparts. *See* E. Ward et al., "Association of Insurance with Cancer Care Utilization and Outcomes," *CA: A Cancer Journal for Clinicians* 58:1 (Jan./Feb. 2008).[2] This established link between insurance status and medical outcomes makes access to health insurance a top priority for ACS CAN.

An estimated 70% of cancer patients under age 65 have private health insurance. But even those cancer patients who have insurance are often unprotected against high health care costs. Cancer patients are vulnerable to the high costs of treatment, and often struggle to cope with the complexities of the health insurance system. *See generally* K. Schwartz et al., "Spending to Survive: Cancer Patients Confront Holes in the Health Insurance System" (Kaiser Family Found. & ACS, Feb. 2009).[3] A study published in May of this year found that cancer patients are over two and a half times as likely to file for bankruptcy as people who do not have cancer.[4] Cancer patients and their families often suffer severe financial hardships as a result of the costs of their

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[1] Available at http://www.cancer.org/research/cancerfactsstatistics/cancerfactsfigures2013/.

[2] Available at http://www.cancer.org/cancer/news/report-links-health-insurance-status-with-cancer-care.

[3] Available at http://www.cancer.org/acs/groups/content/@corporatecommunications/documents/document/acsq-017518.pdf.

[4] Available at http://content.healthaffairs.org/content/early/2013/05/14/hlthaff.2012.1263.

treatment; another study found that one-third of families lost most or all of their savings following a cancer diagnosis. *See* M. Arozullah et al., "The Financial Burden of Cancer: Estimates From a Study of Insured Women with Breast Cancer," 2 *J. Support Oncology* 3 (2004).[5] For this reason, ACS CAN works to promote access to *meaningful* health insurance that is adequate, available, affordable, and administratively simple. ACS CAN believes that patients should have timely access to, and coverage for, the complete continuum of quality, evidence-based healthcare services, including treatment of cancer as well as management of pain and other cancer-related symptoms.

The inherent challenges confronted by cancer patients can be magnified by insurance companies' approach to care. One noted commentator on the health care system has observed:

> Many health insurance companies . . . impose barriers – like requiring prior authorization for tests and treatments and denying payment for covered services, which forces patients to appeal – to discourage patients from using the medical services for which they are insured and to attempt to avoid paying for those services. While these barriers can reduce waste by preventing unnecessary care, they can also discourage patients from receiving care they need, as well as impose administrative burdens on doctors and patients.

E. Emanuel and J. Liebman, "The End of Health Insurance Companies" (Jan. 30, 2012).[6]

B. What Is "Medical Necessity"?

Under many insurance plans, carriers must pay for treatment that is "medically necessary." Determining medical necessity can be complicated, and insurance contracts written by insurers often put the onus of proving what is medically necessary largely on the provider and patient. In many scenarios, this practice results in large administrative burdens for patients and doctors, with the worst scenario being adverse patient outcomes resulting from complete denial of payment for treatment. Accordingly, promoting an appropriate definition of "medical necessity" is an important element of ACS CAN's goal of ensuring that cancer patients have access to meaningful health insurance.

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[5] Available at http://jso.imng.com/jso/journal/articles/0203271.pdf.

[6] Available at http://opinionator.blogs.nytimes.com/2012/01/30/the-end-of-health-insurance-companies/.

"Medical necessity" is different from "coverage." Coverage is a broad policy determination as to what an insurance carrier will pay for generally under a policy, while medical necessity encompasses the treatment that is necessary to protect and enhance the health of a particular patient in accordance with accepted standards of medical practice. Medical necessity defines what the carrier will pay for in specific, individual instances. A coverage determination is a policy decision about categories of health interventions provided to a population, and is defined by statutory mandate and by insurance policy terms that may provide coverage above the statutory minimum. A medical necessity determination, on the other hand, concerns the appropriateness of a specific treatment for a specific patient. Thus, medical necessity entails an individual assessment, rather than a general determination of what works in the ordinary case. *See generally* C. Ulmer et al., "Perspectives on Essential Health Benefits: Workshop Report," *Board on Health Care Services* at 51-52 (2012).[7]

Medical necessity can be difficult to determine, and can be defined differently depending on the language of the insurance contract involved and the law of the state that applies to the contract. The Supreme Court has emphasized the importance of the medical necessity assessment:

> Although coverage for many conditions will be clear and various treatment options will be indisputably compensable, physicians still must decide what to do in particular cases. The issue may be, say, whether one treatment option is so superior to another under the circumstances, and needed so promptly, that a decision to proceed with it would meet the medical necessity requirement that conditions [the carrier's] obligation to provide or pay for that particular procedure at that time in that case. . . . In practical terms, these eligibility decisions cannot be untangled from physicians' judgments about reasonable medical treatment.

Pegram v. Herdrich, 530 U.S. 211, 229 (2000).

C. The Importance Of The Treating Physician's Role

ASC CAN believes that treating physicians must play an important role in the determination of what is medically necessary. The ACS weighed in on this issue in 2007, in connection with Congressional hearings on the Breast Cancer Protection Act. In its Policy Position, the ACS stated:

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[7] Available at http://books.nap.edu/catalog.php?record_id=13182.

> The Society strongly supports the ability of a physician and patient to freely discuss and decide together what treatment . . . is medically necessary and appropriate for the patient. To that end, the Society opposes any effort on the part of a health plan or health insurance organization that seeks to arbitrarily limit patient access to available treatments deemed medically necessary by a physician.

American Cancer Society, Policy Position: Breast Cancer Protection Act (2007).

The California Supreme Court has pointed out that there are policy considerations that weigh against giving the treating physician sole authority over the determination of medical necessity. *See Sarchett v. Blue Shield of California*, 43 Cal. 3d 1, 11-12 (1987). At the same time, however, the court recognized that the treating physician is in a unique position to assess the individual needs of his or her patient, and that in most cases, the treating physician's judgment should be respected: "We trust that, with doubts respecting coverage resolved in favor of the subscriber, there will be few cases in which the physician's judgment is so plainly unreasonable, or contrary to good medical practice, that coverage will be refused." *Id.* at 13; *see also Hughes v. Blue Cross of Northern California*, 215 Cal. App. 3d 832, 846 (1989), *cert. dismissed*, 495 U.S. 944 (1990) ("good faith demands a construction of medical necessity consistent with community medical standards that will minimize the patient's uncertainty of coverage in accepting his physician's recommended treatment").

Many other courts have reiterated the principle that, although the treating physician may not be the sole arbiter of what is "medically necessary" within the meaning of the insurance contract, the physician is in the best position to evaluate his or her patient's history and condition, and should retain "the primary responsibility of determining what treatment should be made available to his patients." *Rush v. Parham*, 625 F.2d 1150, 1156 (5th Cir. 1980); *see, e.g., Sprague v. Bowen,* 812 F.2d 1226, 1230 (9th Cir. 1987) ("The rationale for giving greater weight to a treating physician's opinion is that he is employed to cure and has a greater opportunity to know and observe the patient as an individual."); *Royal v. Cook*, 2012 U.S. Dist. LEXIS 84537 at *26 (N.D. Ga. 2012) (opinion of treating physician as to medical necessity "is more persuasive and is entitled to much greater weight" than opinions of reviewing physicians); *Lopez v. Blue Cross of Louisiana*, 397 So. 2d 1343, 1345 (La. 1981) (evaluation of patient "is best done by the treating physician"); *Snyder v. San Francisco Feed and Grain*, 230 Mont. 16, 27 (1987) (treating

physician normally has more contact with, and greater knowledge of, patient's condition and is "generally in the best position to give an informed opinion"); *A.M. Medical Services, P.C. v. Deerbrook Ins. Co.*, 859 N.Y.S.2d 892 (NY Civ. Ct. 2008) ("the patient's treating physician is always in the best position to prescribe care and treatment for the patient"). For this reason, Social Security regulations require deference to the treating physician's opinion unless that opinion is "contradicted by substantial evidence" – the so-called "treating physician rule." *See, e.g., Gartmann v. Secretary of HHS*, 633 F. Supp. 671, 680 (E.D.N.Y. 1986).

D. ACS CAN Opposes Any Definition Of Medical Necessity That Arbitrarily Limits Patient Access To Available Treatments Deemed Medically Necessary By The Patient's Physician

As is obvious from the facts of this case, the question of medical necessity highlights what can be a critical conflict between doctor-recommended treatment and insurance business practices. ACS CAN is concerned that the definition of medical necessity set forth in Health Net's policies, and advocated by Health Net in this case, does not accord proper deference to the opinion of the treating physician and interferes unduly with the relationship between provider and patient. Under Health Net's interpretation, the definition places undue burdens on the provider and patient to prove why a treatment *is* medically necessary, rather than placing the burden on the insurance company to establish why the treating physician's recommendation should be disregarded.

In particular, ACS CAN questions Health Net's argument that deference to the opinion of the treating physician would somehow require insurance companies to accede to treatments or procedures that are not supported by the medical evidence. Evidence-based medicine is not intended to supplant the recommendations of the treating physician, but to supplement them:

> External clinical evidence can inform, but can never replace, individual clinical expertise, and it is this expertise that decides whether the external evidence applies to the individual patient at all and, if so, how it should be integrated into a clinical decision.

D. Sackett et al., "Evidence Based Medicine: What It Is And What It Isn't: It's About Integrating Individual Clinical Expertise And The Best External Evidence," *Brit. Med. J.* 312:71 (Jan. 13, 1996).[8] Health Net's assumption that there is an inherent conflict between deference to the

[8] Available at http://www.bmj.com/content/312/7023/71. *See also* D.M. Eddy, "Guidelines for the

treating physician, and coverage only for treatment that is medically appropriate, is false.

ACS CAN does not question the right of health insurance companies to exercise oversight regarding coverage and medical necessity. ACS CAN does, however, suggest that Health Net's definition of medical necessity is inadequate to protect the health and needs of cancer patients, because it does not require either (1) appropriate consideration of the recommendation of the treating physician who is in the best position to assess the condition and needs of the patient, or (2) acceptance of that recommendation unless Health Net can establish that there is a substantive and significant reason not to do so. Cancer patients should be entitled to assume that, barring some evidence to the contrary, the advice of their doctors will be accepted and followed by their insurance companies. Health Net's policy does not provide that assurance.

IV. CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion for Summary Adjudication and supporting Memorandum of Points and Authorities, ACS CAN urges this Court to grant the plaintiffs' motion and hold that Health Net's policy does not comply with California law.

DATED: June 4, 2013

KILPATRICK TOWNSEND & STOCKTON LLP

By:
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Attorneys for Amicus Curiae
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Cancer-Related Checkup: Recommendations and Rationale," *CA: A Cancer Journal for Clinicians* 30, no. 4 at 193-240 (1980).

PROOF OF SERVICE

I, Linda Tan, declare:

I am employed in the City and County of San Francisco, California; I am over the age of 18 years and not a party to the within action; my business address is Two Embarcadero Center, Eighth Floor, San Francisco, California 94111. On the date set forth below, I served a true and accurate copy of the document(s) entitled: **APPLICATION OF AMERICAN CANCER SOCIETY CANCER ACTION NETWORK FOR LEAVE TO APPEAR AS *AMICUS CURIAE*; MEMORANDUM OF AMICUS CURIAE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION** on the party(ies) in this action as follows:

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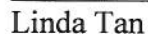
☒ [By Electronic Service] I caused said document to be sent by electronic transmission to the e-mail address(es) indicated for the party(ies) listed above.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this date at San Francisco, California.

Dated: June 4, 2013



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