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28
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

22 **Russell B. Toomey,**
23 Plaintiff,
24 v.
25 **State of Arizona; Arizona Board of Regents,**
26 **D/B/A University of Arizona,** a governmental
27 body of the State of Arizona; et al.,
28 Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

JOINT STATUS REPORT

1 Having met and conferred on September 29, 2020, the parties submit this Joint
2 Report per Federal Rule of Civil Procedure 26(f) and the Court’s order of August 14, 2020
3 (Doc. 114). The following numbered brief statements track those matters that the Court
4 laid out in its order. *Id.*

5 **1. Nature of the case.**

6 **Plaintiffs’ Position:**

7 Dr. Toomey is a man who is transgender, which means that he has a male gender
8 identity, but the sex assigned to him at birth was female. Being transgender is not a mental
9 disorder, but transgender men and women may require treatment for “gender dysphoria,”
10 which is the diagnostic term for the clinically significant distress experienced as a result of
11 the incongruence of one’s gender with their assigned sex and the physiological
12 developments associated with that sex. The widely accepted standards of care for treating
13 gender dysphoria are published by the World Professional Association for Transgender
14 Health (“WPATH”). Under the WPATH standards, medically necessary treatment for
15 gender dysphoria may require medical steps to affirm one’s gender identity and transition
16 from living as one gender to another. This treatment, often referred to as gender-affirming
17 care or transition-related care, may include hormone therapy, surgery (sometimes called
18 “sex reassignment surgery” or “transition related surgery”), and other medical services that
19 align individuals’ bodies with their gender identities.

20 In accordance with the WPATH Standards of Care, Dr. Toomey’s treating physicians
21 have recommended that he receive a hysterectomy as a medically necessary treatment for
22 gender dysphoria. Transition-related surgical care is routinely covered by private insurance
23 programs and recognized as medically necessary by every major medical organization in the
24 United States to consider the question. No major medical organization has taken the position
25 that transition-related care categorically is not medically necessary or advocated in favor of
26 a categorical ban on insurance coverage for transition-related procedures.

27 Dr. Toomey’s healthcare coverage is provided and paid for by the State of Arizona
28 through a self-funded health insurance plan (“the Plan”). The Plan generally provides

1 coverage for medically necessary care, subject to certain exclusions. In the event that the
2 Plan denies coverage for a treatment based on purported lack of medical necessity, the Plan
3 provides a right to appeal the decision to an independent reviewer at the third-party claims
4 administrator and, if necessary, to further appeal to an external independent review
5 organization.

6 The Plan does not apply these generally applicable standards and procedures for
7 evaluating medical necessity for surgical care for gender dysphoria. Instead, the Plan
8 categorically denies all coverage for “[g]ender reassignment surgery” regardless of whether
9 the surgery qualifies as medically necessary. All four of the health insurance companies who
10 serve as Network Providers for the Plan have adopted internal policies and standards for
11 determining when transition-related surgery for gender dysphoria is medically necessary
12 and, thus, covered. But, as a result of the Plan’s “gender reassignment surgery” exclusion,
13 the Network Providers do not apply those internal policies and standards when administering
14 the Plan to Arizona State employees and, instead, automatically deny coverage of transition-
15 related surgery.

16 As a result of the Plan’s categorical exclusion for “gender reassignment surgery,” Dr.
17 Toomey was denied preauthorization for a hysterectomy on August 10, 2018. The denial
18 was based solely on the Plan’s exclusion for “gender reassignment surgery.” Dr. Toomey
19 alleges that the “gender reassignment surgery” exclusion facially discriminates on the basis
20 of sex in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection
21 Clause of the Fourteenth Amendment. Both claims have been certified as class actions for
22 injunctive relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. For the
23 Title VII claim, the Class consists of: “Current and future individuals (including Arizona
24 State employees and their dependents), who are or will be enrolled in the self-funded Plan
25 controlled by the Arizona Department of Administration, and who have or will have medical
26 claims for transition-related surgical care.” For the equal protection claim, the Class consists
27 of: “Current and future employees of the Arizona Board of Regents who are or will be
28 enrolled in the self-funded Plan controlled by the Arizona Department of Administration,

1 and who have or will have medical claims for transition related surgical care.”

2 On behalf of himself and the certified Classes, Dr. Toomey seeks a declaration that the
3 “gender reassignment surgery” exclusion violates Title VII and the Equal Protection Clause;
4 a permanent injunction prohibiting Defendants from enforcing the “gender reassignment
5 surgery” to exclude coverage for gender affirming surgery that would otherwise be
6 recognized as medically necessary pursuant to the Plan’s generally applicable standards and
7 procedures; attorney’s fees; and such other relief that the Court deems just and proper.

8 **The State of Arizona’s, Paul Shannon’s, and Andy Tobin’s (collectively, the**
9 **“State Defendants”) Position:**

10 Dr. Toomey is a man who is transgender, which means that he identifies as having a
11 male gender but was born female—the sex assigned to him at birth. Transgender men and
12 women may require treatment for “gender dysphoria,” which is a term that describes the
13 feeling of discomfort or distress that might occur in people whose gender identity differs
14 from their sex assigned at birth or sex-related physical characteristics. Transgender people
15 might experience gender dysphoria at some point in their lives but not everyone is affected.
16 Some transgender people feel at ease with their bodies, either with or without medical
17 intervention. That is, not all transgender individuals feel significant distress, and not all
18 require treatment.

19 Some entities, including the World Professional Association for Transgender Health
20 (“WPATH”), have published standards of care for gender dysphoria. Treatments for gender
21 dysphoria may include hormone therapy, surgery (sometimes called “sex reassignment
22 surgery” or “transition related surgery”), and other medical services that align and
23 individual’s body to the individual’s gender identity.

24 Dr. Toomey receives healthcare coverage through a self-funded health plan (“Plan”)
25 provided by the State of Arizona through the Arizona Department of Administration
26 (“ADOA”). Under the Plan, a covered service is one that is *both* medically necessary and
27 eligible for payment under the Plan. Thus, coverage can be denied *either* because a service
28 is not medically necessary *or* because it is an excluded service (regardless of whether it is

1 medically necessary). Further, not all services, treatments, and procedures deemed
2 medically necessary by a clinician are covered under the Plan. The Plan identifies fifty-
3 three surgical procedures, treatments, and other medical services that are excluded from
4 coverage. One such exclusion is for “[g]ender reassignment surgery.” Each of these
5 exclusions applies regardless of the employee’s gender or sex. In the event that the Plan
6 denies coverage for a treatment (either because it is not medically necessary or is excluded),
7 the Plan provides a right to appeal the denial to an independent reviewer at the third-party
8 claims administrator and, if necessary, to further appeal to an external independent review
9 organization. As part of that process, the Plan allows Participants to appeal a denial the
10 Participant believes is contrary to law.

11 Dr. Toomey’s treating physicians recommended that he receive a hysterectomy as a
12 medically-necessary treatment for gender dysphoria. Dr. Toomey was denied
13 preauthorization for the surgery on August 10, 2018. The denial was based on the Plan’s
14 exclusion for “gender reassignment surgery”—a procedure health plans are not required to
15 cover. Dr. Toomey did not follow the appeal process, as described in the Plan, to challenge
16 this decision.

17 Dr. Toomey alleges that the “gender reassignment surgery” exclusion discriminates
18 based on his status as a transgender man in violation of Title VII of the Civil Rights Act of
19 1964 and the Equal Protection Clause of the Fourteenth Amendment. Both claims have been
20 certified as class actions for injunctive relief. On behalf of himself and the certified classes,
21 Dr. Toomey seeks a declaration that the “gender reassignment surgery” exclusion violates
22 Title VII and the Equal Protection Clause; a permanent injunction prohibiting Defendants
23 from enforcing the “gender reassignment surgery” exclusion and begin coverage for gender
24 affirming surgery that would otherwise be recognized as medically necessary pursuant to
25 the Plan’s generally applicable standards and procedures; attorneys’ fees; and such other
26 relief that the Court deems just and proper. If the Court finds that the Plan’s exclusion for
27 gender reassignment surgery violates Title VII or the Equal Protection Clause of the
28 Fourteenth Amendment or orders a permanent or preliminary injunction prohibiting

1 Defendants from enforcing the exclusion, then the Plan will need to determine on a case-by-
2 case basis, including Dr. Toomey’s case, whether a claim for gender reassignment surgery
3 is medically necessary and thus covered by the Plan.

4 The State Defendants assert that the Plan’s exclusion violates neither Title VII or the
5 Equal Protection Clause, and that Dr. Toomey’s requested relief should be denied.

6 **Violations of Title VII**

7 **Plaintiffs’ Position: Dr. Toomey, on behalf of the certified class,** brings a claim
8 for violations of Title VII of the Civil Rights Act of 1964 against the State of Arizona and
9 the Arizona Board of Regents. The State of Arizona and the Arizona Board of Regents are
10 employers as that term is defined in Title VII, 42 U.S.C. § 2000e-(a) and (b). An employer-
11 sponsored health plan is part of the “compensation, terms, conditions, or privileges of
12 employment.” 42 U.S.C. § 2000e-2(a)(1).

13 The employer-sponsored health plan provided by the State of Arizona and the
14 Arizona Board of Regents facially discriminates based on transgender status and gender
15 nonconformity by categorically excluding coverage for all medically necessary “gender
16 reassignment surger[ies].” The “gender reassignment surgery” exclusion discriminates
17 because of sex because an employee’s sex assigned at birth is a but-for cause of their
18 transgender status and their need for surgery to treat gender dysphoria. The “gender
19 reassignment surgery” exclusion also facially discriminates against employees by explicitly
20 excluding medically necessary surgery because the surgery is performed for the gender-
21 nonconforming purpose of gender transition.

22 By providing a facially discriminatory employer-sponsored health plan, the State of
23 Arizona and the Arizona Board of Regents have unlawfully discriminated—and continue to
24 unlawfully discriminate—against Dr. Toomey and members of the proposed class “with
25 respect to [their] compensation, terms, conditions, or privileges of employment, because of
26 . . . sex.” 42 U.S.C. § 2000e-2(a)(1).

27 Title VII does not provide a “cost justification defense” for employers offering
28 facially discriminatory insurance policies. Defendants are not required to cover all medically

1 necessary surgeries, but Defendants may not adopt insurance exclusions that facially
2 discriminate on the basis of sex.

3 **The State Defendants’ Position:** The State Defendants argue that the Health Plan
4 exclusion does not discriminate on the basis of sex, sex stereotyping, or transgender status.
5 The Health Plan—which excludes “gender reassignment surgery” for members of both natal
6 sexes—applies neutrally to both men and women and does not result in disparate,
7 disadvantageous treatment of similarly-situated male or female employees. The Health Plan
8 provides coverage for some gender transition services, including mental health counseling
9 and hormone therapy deemed medically necessary by a clinician to treat gender dysphoria-
10 demonstrating the Health Plan does not eliminate coverage for all gender transition
11 treatment. Also, a medical plan is not required to cover all medically necessary procedures.
12 Aside from certain minimum requirements, health plans have broad discretion to exclude
13 treatments or procedures even if they are medically-necessary. Plans may exclude
14 medically-necessary services, treatments, and procedures even if they affect one sex more
15 than the other such as excluding coverage for breast reduction surgeries when it is medically
16 necessary. *See e.g., Martin v. Masco Indus. Employees’ Benefit Plan*, 747 F. Supp 1150,
17 1151 (W.D. Pa 1990). The gender reassignment surgery exclusion is just one of many
18 exclusions in the Health Plan-all of which apply to various individuals regardless of medical
19 necessity or sex of the health plan participant or beneficiary. Thus, there has been no
20 violation of Title VII.

21 **The Arizona Board of Regents’, Fred Duval’s, Jay Heiler’s, Ram Krishna’s,**
22 **Lyndel Manson’s, Larry Penley’s, Bill Ridenour’s, Karrin Taylor Robson’s, Ron**
23 **Shoopman’s (collectively, “ABOR”) Position:** Arizona law requires ABOR to “accept the
24 benefit level, plan design, insurance providers, premium level and other terms and
25 conditions determined by” the State Defendants. A.R.S. § 38-656(E); *see also* A.R.S. § 38-
26 656(B) (providing that, when ABOR participates in the State Defendants’ health insurance,
27 the State Defendants’ plan “shall be the only health . . . insurance coverage offered to”
28 ABOR’s employees). As such, ABOR argues that it has not had and does not have the

1 reasonable authority to independently offer the coverage outside the Plan or to remove the
2 Plan exclusion requested by Plaintiff.

3 ABOR has, however, consistently urged the State Defendants to remove the types of
4 coverage exclusions at issue in this case, but the State Defendants have not eliminated all of
5 those exclusions. That decision was in the State Defendants' sole control.

6 ABOR does not object to the Plaintiff's requested preliminary or permanent
7 injunctive relief against the State Defendants. ABOR also does not object to the requested
8 preliminary or permanent injunctive relief against it so long as the injunction (1) is entered
9 contemporaneously with and is no greater than the injunction entered against the State
10 Defendants, and (2) is not entered against the individually named Regents because the
11 injunction entered against ABOR would apply to them under Federal Rule of Civil
12 Procedure 65(d)(2)(B) and because the Regents are predictably subject to change.

13 **Violations of the Equal Protection Clause**

14 **Plaintiffs' Position: Dr. Toomey, on behalf of the certified class,** brings a claim
15 for violations of the Equal Protection Clause of the Fourteenth Amendment against the
16 individual members of the Board of Regents and against Andy Tobin, Director of the
17 Arizona Department of Administration, and Paul Shannon, Assistant Director of the Benefit
18 Services Division of the Arizona Department of Administration.

19 At all relevant times, Defendants Shoopman, Krishna, Ridenour, Penley, Manson,
20 Robson, Heiler, DuVal, Shannon and Tobin have acted under color of State law. Pursuant
21 to 42 U.S.C. § 1983, Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson,
22 Heiler, DuVal, Shannon and Tobin are liable in their official capacities, for declaratory and
23 injunctive relief for violations of the Equal Protection Clause.

24 In their official capacity as officers and members of the Arizona Board of Regents,
25 Defendants Shoopman, Krishna, Ridenour, Penley, Manson, Robson, Heiler, and DuVal are
26 responsible for the terms and conditions of employment at the University of Arizona.

27 In his official capacity as Director of the Arizona Department of Administration,
28 Defendant Andy Tobin is responsible for "determin[ing] the type, structure, and components

1 of the insurance plans made available by the Department [of Administration].” Ariz. Admin.
2 Code R2-6-103.

3 In his official capacity as Acting Assistant Director of Benefit Services Division of
4 the Arizona Department of Administration, Defendant Paul Shannon has direct oversight
5 and responsibility for administering the benefits insurance programs for State employees,
6 including employees of the Arizona Board of Regents.

7 The Equal Protection Clause of the Fourteenth Amendment provides: “No State shall
8 . . . deny to any person within its jurisdiction the equal protection of the laws.” Arizona State
9 employees are protected by the Equal Protection Clause. The employer-sponsored health
10 plan provided by the State of Arizona and the Arizona Board of Regents facially
11 discriminates based on sex and transgender status by categorically excluding coverage for
12 all medically necessary “gender reassignment surgery.”

13 Discrimination based on sex and transgender status is subject to heightened scrutiny
14 under the Equal Protection Clause and must be substantially related to an important
15 governmental interest. Under Ninth Circuit precedent, discrimination based on sex and
16 transgender status is subject to heightened scrutiny under the Equal Protection Clause and
17 must be substantially related to an important governmental interest. *Karnoski v. Trump*, 926
18 F.3d 1180, 1200 (9th Cir. 2019).

19 Because medical transition from one sex to another inherently transgresses gender
20 stereotypes, denying medically necessary coverage for based on whether surgery is
21 performed for purposes of “gender reassignment” constitutes impermissible discrimination
22 based on gender nonconformity.

23 Because the need to undergo gender transition is a defining aspect of transgender
24 status, discrimination based on gender transition is discrimination against transgender
25 individuals as a class.

26 The “gender reassignment surgery” exclusion is not substantially related to a
27 legitimate governmental interest in controlling costs because the Supreme Court has held
28 that concerns about costs are insufficient to justify gender-based discrimination in the

1 distribution of employment-related benefits under heightened scrutiny.

2 The “gender reassignment surgery” exclusion is not even rationally related to a
3 legitimate governmental interest in controlling costs because it arbitrarily distinguishes
4 between similarly situated groups based on animus, sex stereotypes, and moral disapproval.

5 **State Defendants’ Position:** State Defendants argue that the Health Plan does not
6 target transgender persons. The gender reassignment surgery exclusion is one of many
7 different exclusions in the Health Plan that apply to various individuals (both transgender
8 and cisgender) regardless of medical necessity. Further, transgender individuals are covered
9 under the Health Plan, and they receive coverage for medically necessary treatments in the
10 vast majority of cases. All persons-transgender and cisgender-are subject to numerous
11 exclusions for various treatments, procedures, or surgery that may be “medically necessary.”
12 Further, the Health Plan provides coverage for some gender transition services, including
13 mental health counseling and hormone therapy deemed medically necessary by a clinician.
14 The Health Plan does not eliminate coverage for all gender transition treatment. Further,
15 numerous courts have held that transgender persons are not a suspect or quasi-suspect class,
16 and as a result, applied the rational basis test to classifications based on transgender status.
17 The Supreme Court of the United States’ recent decision in *Bostock v. Clayton Cty., Georgia*
18 , ___ U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) does not change this. In *Karnoski*
19 *v. Trump*, the Ninth Circuit Court of Appeals did not find that transgender persons are a
20 suspect or quasi-suspect class. 926 F.3d 1180, 1200-01 (9th Cir. 2019). The court in
21 *Karnoski* applied a level of scrutiny greater than a rational basis test because the policy at
22 issue was facially discriminatory, which is not the case here. *Id.* at 1200. It is the State
23 Defendants’ position that Plaintiff cannot overcome a strong presumption of validity that
24 the exclusion does not bear a rational relation to a legitimate state purpose.

25 **ABOR’s Position:** ABOR incorporates here its position on the Title VII issue above,
26 which is directly applicable to Dr. Toomey's legal arguments on the Equal Protection claims
27 against ABOR.

28

1 **2. Factual and legal issues genuinely in dispute, and whether they can be narrowed**
2 **by stipulation or motion.**

3 Whether the “gender reassignment surgery” exclusion discriminates against
4 employees because of sex, in violation of Title VII.

5 Whether the “gender reassignment surgery” exclusion discriminates against
6 beneficiaries on the basis of sex under the Equal Protection Clause.

7 Whether the “gender reassignment surgery” exclusion discriminates against
8 beneficiaries on the basis of transgender status under the Equal Protection Clause.

9 Whether discrimination against transgender individuals is subject to heightened
10 scrutiny under the Equal Protection Clause.

11 Whether the “gender reassignment surgery” exclusion is substantially related to an
12 important governmental interest. The parties have narrowed the issues in this dispute by
13 agreeing that the medical necessity of gender affirming surgery will not be an issue in this
14 case. That is, if it is determined that the exclusion violates Title VII or the Equal Protection
15 Clause of the Fourteenth Amendment, the Plan will then need to determine medical
16 necessity on case by case basis. However, the State Defendants, by agreeing with this
17 stipulation, do not concede that Plaintiff’s requested procedure (or those that other members
18 of the Classes may request) is medically necessary. The parties may also be able to narrow
19 the issues in dispute by stipulating that the only governmental interest relied upon by State
20 Defendants is an interest in controlling costs.

21 Whether the “gender reassignment surgery” exclusion is rationally related to a
22 legitimate governmental interest. The parties may also be able to narrow the issues in
23 dispute by stipulating that only governmental interest relied upon by State Defendants is an
24 interest in controlling costs.

25 Whether the decision to exclude gender reassignment surgery in the Health Care
26 Plan was actually motivated by a legitimate governmental interest.

27 **3. Jurisdictional basis of the case.**

28 Plaintiff asserts that the Court has jurisdiction over this action per 28 U.S.C. §1331

1 because it arises under the Constitution of the United States.

2 **4. Parties not yet served, and parties that have not filed an answer or other**
3 **appearance.**

4 All parties have been served and/or Defendants do not contest service at this time.
5 All parties have filed an answer.

6 **5. Names of parties not subject to the Court's jurisdiction.**

7 Defendants do not contest the Court's personal jurisdiction at this time.

8 **6. Dispositive or partially dispositive issues to be decided by pretrial motions, and**
9 **legal issues about which pretrial motions are contemplated.**

10 Plaintiffs filed a Motion for Preliminary Injunction which has been fully briefed by
11 the parties. The parties anticipate filing cross-motions for summary judgment at the close
12 of discovery.

13 **7. Whether the case is suitable for reference to arbitration, to a special master, or**
14 **a United States Magistrate Judge.**

15 The parties do not consent to referring the case to arbitration, a special master, or a
16 United States Magistrate Judge.

17 **8. The status of related cases.**

18 The plaintiffs in *D.H., et al. v. Snyder*, No. 4:20-cv-00335-TUC-SHR, filed a Motion
19 to Transfer Case to Judge Rosemary Marquez on August 11, 2020. (Doc. 113). That case
20 challenges a categorical exclusion for "gender reassignment surgery" in Arizona's Medicaid
21 program for minors. The Court denied that motion on October 20, 2020.

22 **9. Statement of the parties' compliance with the discovery requirements of the**
23 **Mandatory Initial Discovery Pilot Project.**

24 The parties have exchanged initial disclosures and document productions consistent
25 with the Mandatory Initial Discovery Pilot Program.

26 Plaintiff served the parties with his initial discovery responses on April 17, 2019, and
27 his amended initial discovery responses on March 26, 2020.

28 Defendant ABOR served the parties with their initial disclosures on April 17, 2019.
Defendant ABOR then served the parties with a total of six supplemental disclosures on the

1 following dates: April 22, 2019, May 29, 2019, July 9, 2019, April 17, 2020, June 10, 2020,
2 and July 15, 2020.

3 State Defendants served the parties with their initial disclosures on February 5, 2020,
4 and their First Amended Mandatory Initial Discovery Responses on September 28, 2020.

5 **10. Suggested changes, if any, in the limitations on discovery imposed by the Local
6 Rules and the Federal Rules of Civil Procedure.**

7 None.

8 **11. Proposed deadlines for:**

EVENT	DEADLINE
Filing motions to amend the complaint and to join additional parties	NOVEMBER 30, 2020
Pretrial disclosure of lay witnesses, expert witnesses, and expert testimony	DECEMBER 21, 2020; FEBRUARY 1, 2021; MARCH 15, 2021 (RESPECTIVELY)
Completing discovery	MAY 3, 2021
Filing of dispositive motions	JUNE 7, 2021
Lodging proposed joint pretrial order	Within 30 days after resolution of the dispositive motion; if no dispositive motion is filed then July 5, 2021.
Filing a joint letter to the Court concerning the status of settlement discussions	Plaintiffs propose that the parties will meet and confer regarding the timing of this deadline, and propose dates prior to the close of fact discovery.

19 **12. Estimated date and length of trial.**

20 Plaintiffs propose that the parties will meet and confer regarding these deadlines and
21 requirements and submit proposed dates prior to the close of fact discovery. The parties
22 anticipate the trial length to be no longer than two weeks in duration.

23 **13. Whether a jury trial has been requested.**

24 A jury trial has not been requested.

25 **14. The prospects for settlement, including any request to have a settlement
26 conference before a United States Magistrate Judge.**

27 The parties do not think a settlement conference would be productive at this stage
28

1 of the case, but may request a settlement conference after the Court rules on Plaintiff's
2 Motion for a Preliminary Injunction.

3 **15. Whether any unusual, difficult, or complex problems or issues exist that would**
4 **require this case to be placed on the complex track for case management purposes.**

5 The parties do not believe this case poses any unusual, difficult, or complex problems
6 that would merit the case being placed on the complex track for case management purposes.

7 **16. Any other matters that the parties feel will aid the Court in expediting the**
8 **disposition of this matter efficiently.**

9 None at this time.

10 Respectfully submitted this 23rd day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee
Christine K. Wee