

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,**
Individually and on behalf of all others
similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

**DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL
SERVICES'S MOTION TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT**

Now come Defendants, William Crouch, Cynthia Beane, and the West Virginia Department of Health and Human Resources, Bureau for Medical Services (“WVDHHR”), by counsel Lou Ann S. Cyrus, Roberta F. Green, Caleb B. David, Kimberly M. Bandy, and Shuman McCuskey Slicer PLLC, and request that the Plaintiffs’ Class Action Complaint be dismissed

against them.¹ Defendants William Crouch, Cynthia Beane, and the WVDHHR move, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for dismissal of Plaintiff Christopher Fain's claims asserted in the Complaint on the bases that; 1) he has not been denied coverage, and therefore, he lacks standing to assert his claims; and 2) they are not ripe for judicial determination. To the extent Mr. Fain is proposing to represent a class of individuals, he cannot be an adequate representative because he has not suffered the injuries alleged. Additionally, these Defendants move, pursuant to Rule 12(b)(6), that Mr. Fain has failed to exhaust administrative remedies in connection with his claims asserted in Count Two for violation of Section 1557 of the Patient Protection and Affordable Care Act, and they should be dismissed.

In support of this Motion, these Defendants attach Exhibit A, *Affidavit of Angela Wowczuk*, Exhibit B, *Affidavit of Brian Thompson*, and Exhibit C, *Affidavit of Unicare Health Plan of West Virginia, Inc.*

Wherefore, for the reasons more fully set forth in their Memorandum of Law filed contemporaneously herewith, these Defendants request that their Motion to Dismiss be granted, that the Complaint be dismissed against them, and for such other and further relief as the court may direct.

**WILLIAM CROUCH,
CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,**

By counsel

¹ These Defendants previously moved for partial dismissal of Plaintiffs' Complaint. (ECF Nos. 23, 25). The arguments raised in this motion are in addition to those previously asserted, which these Defendants incorporate by reference.

/s/ Lou Ann S. Cyrus

Lou Ann S. Cyrus, Esquire (WVSB #6558)

Roberta F. Green, Esquire (WVSB #6598)

Caleb B. David, Esquire (WVSB #12732)

Kimberly M. Bandy, Esquire (WVSB #10081)

SHUMAN MCCUSKEY SLICER PLLC

P.O. Box 3953

Charleston, WV 25339

(304) 345-1400; (304) 343-1826 (fax)

lcyrus@shumanlaw.com

rgreen@shumanlaw.com

cdavid@shumanlaw.com

kbandy@shumanlaw.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,**
Individually and on behalf of all others
similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department Of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

CERTIFICATE OF SERVICE

Now come Defendants, William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources, by counsel, and do hereby certify that on the 2nd day of February, 2021, the foregoing **“DEFENDANTS WILLIAM CROUCH, CYNTHIA BEANE, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES’S MOTION TO DISMISS PLAINTIFFS’ CLASS ACTION COMPLAINT”** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to, and constitutes service on:

Walt Auvil (WVSB#190)
Counsel for Plaintiffs
The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101-4323
(304) 485-3058
(304) 485-6344 (fax)
auvil@theemploymentlawcenter.com

Avatara Smith-Carrington, Visiting Attorney
Counsel for Plaintiffs
Lambda Legal
3500 Oak Lawn Avenue, Suite 500
Dallas Texas 75219-6722
(214) 219-8585
(214) 219-4455 (fax)
asmithcarrington@lambdalegal.org

Perry W. Oxley (WVSB#7211)
David E. Rich (WVSB#9141)
Eric D. Salyers (WVSB#13042)
Christopher K. Weed (WVSB#13868)
Oxley Rich Sammons, PLLC
Counsel for Ted Cheatham
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
(304) 522-1138
(304) 522-9528 (fax)
poxley@oxleylawwv.com
drich@oxleylawwv.com
esalyers@oxleylawwv.com
cweed@oxleylawwv.com

Stuart A. McMillan (WVSB#6352)
Counsel for The Health Plan of West Virginia, Inc.
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25301
(304) 347-1110
(304) 347-1746 (fax)
smcmillan@bowlesrice.com

Aaron C. Boone (WVSB#9479)
Counsel for The Health Plan of West Virginia, Inc.
BOWLES RICE LLP
Fifth Floor, United Square
501 Avery Street, P.O. Box 49
Parkersburg, WV 26102
(304) 420-5501
(304) 420-5587 (fax)
aboone@bowlesrice.com

/s/ Lou Ann S. Cyrus

Lou Ann S. Cyrus, Esquire (WVSB #6558)
Roberta F. Green, Esquire (WVSB #6598)
Caleb B. David, Esquire (WVSB #12732)
Kimberly M. Bandy, Esquire (WVSB #10081)
***Counsel for William Crouch, Cynthia Beane, and
West Virginia Department of Health and Human
Resources, Bureau for Medical Services***
SHUMAN MCCUSKEY SLICER PLLC
P.O. Box 3953
Charleston, WV 25339
(304) 345-1400; (304) 343-1826 (fax)
lcyrus@shumanlaw.com
rgreen@shumanlaw.com
cdavid@shumanlaw.com
kbandy@shumanlaw.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,**

*Individually and on behalf of all others
similarly situated,*

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

AFFIDAVIT OF ANGELA WOWCZUK, DOCTOR OF PHARMACY, BCPS, AAHIVE

STATE OF WEST VIRGINIA,

COUNTY OF Monongalia

I, Angela Wowczuk, Doctor of Pharmacy, BCPS, AAHIVE, duly sworn, make oath upon
my knowledge as follows:

1. I currently serve as Director of the Rational Drug Therapy Program at the West
Virginia University School of Pharmacy in Morgantown, West Virginia.

2. The Rational Drug Therapy Program is part of West Virginia University School of Pharmacy's Department of Pharmaceutical Systems and Policy and supported through a contract with the West Virginia Bureau for Medical Services (WVBMS). The program provides prior authorization and consultative services for West Virginia Bureau of Medical Services' Medicaid pharmaceuticals program.

3. I have reviewed the Prior Authorization history for Christopher Fain. Mr. Fain had an approval for testosterone from March 8, 2019, to February 20, 2020.

4. A Prior Authorization request for testosterone for Mr. Fain came in by fax on May 12, 2020. The Prior Authorization request was for a non-standard dosing regimen, so more information was needed from the provider for a decision. The Rational Drug Therapy Program sent a fax back to the provider that same day, seeking clarification because the patient had been on weekly dosing, and the new request sought dosing every 5 days. (General Drug Prior Authorization Form, attached as Exhibit 1 to this Affidavit). Prior Authorizations are drug and dose specific.

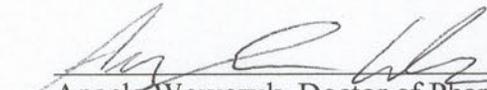
5. The Rational Drug Therapy Program did not receive information back from the provider in response to the request to clarify the change in dosing. Therefore, the Prior Authorization for testosterone did not go beyond a "pending" status.

6. The Prior Authorization request for testosterone for Mr. Fain that came in by fax on May 12, 2020 has not been denied. It has neither been denied nor approved because additional information requested from the provider regarding dosing was not received. The Rational Drug Therapy Program has not sent anything to Mr. Fain indicating either approval or denial.

7. In providing prior authorization services for the West Virginia Bureau of Medical Services' Medicaid pharmaceuticals program, the Rational Drug Therapy Program does not have a policy of denying testosterone for treatment of gender dysphoria. The patient history for

Christopher Fain indicates that testosterone was approved for quite some time. It was only the dose change that required additional information for Prior Authorization, which was not received from the provider.

AND FURTHER AFFIANT SAYETH NOT.



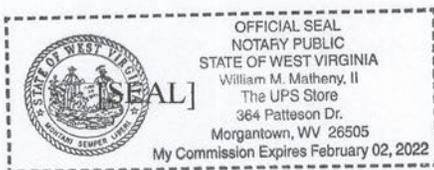
Angela Wowczuk, Doctor of Pharmacy, BCPS,
AAHIVE
Director
Rational Drug Therapy Program

Sworn and subscribed to before me this 2nd day of February, 2021.

My commission expires: 2-2-2022



NOTARY PUBLIC



General Drug Prior Authorization Form



West Virginia Medicaid Drug Prior Authorization Form
http://www.dhr.wv.gov/ems/Pharmacy/PriorAuthForm.aspx

Rational Drug Therapy Program
WVU School of Pharmacy
PO Box 9511 HSCN
Morgantown, WV 26506
Fax: 1-800-931-7787
Phone: 1-800-847-3859



Patient Name (Last)	(First)	(MI)	WV Medicaid 11 Digit ID#	Date of Birth (MM/DD/YYYY)
Fain	Christopher			

Prescriber Name (Last)	(First)	(MI)
Kuhl		

Prescriber Address (Street)	(City)	(State)	(Zip)
143 Peyton St.	Baldwinsville	WV	25504

Prescriber 10-Digit NPI#	Phone # (111-222-3333)	Fax # (111-222-3333)
1679571905		(304) 697-1641

Pharmacy Name (if applicable)

Pharmacy Address (Street)	(City)	(State)	(Zip)
---------------------------	--------	---------	-------

Pending- Please clarify the every 5 day dosing. This was previously reported as qweek dosing.

By RDTP ID# 6019 at 3:25 pm on May 12, 2020

Important Notes: Prior authorization for medical necessity does not guarantee payment. The use of pharmaceutical samples will not be considered when evaluating the member's medical condition or prior prescription history for drugs that require prior authorization.

Drug Name	Strength	Route of Administration
Testosterone Cypionate 100MG/ML Solution	100MG/ML	Intramuscular

Directions	Diagnosis	ICD Diagnosis Code (if available)
30ML @ 5days	Transgender	F64.0

Previous Treatment History

Other Pertinent Information

Attestation: Your signature (manually or electronically) certifies that the above request is medically necessary, does not exceed the medical needs of the member, and is documented in your medical records. Medical/Pharmacy records must be made available upon request.

Check here for electronic signature

Prescriber or Pharmacy Signature

Date



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

**CHRISTOPHER FAIN; ZACHARY
MARTELL; and BRIAN MCNEMAR,**
Individually and on behalf of all others
similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as
Cabinet Secretary of the West Virginia
Department of Health and Human Resources;
CYNTHIA BEANE, in her official capacity as
Commissioner for the West Virginia Bureau for
Medical Services; **WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, BUREAU FOR MEDICAL
SERVICES; TED CHEATHAM**, in his official
Capacity as Director of the West Virginia Public
Employees Insurance Agency; and **THE
HEALTH PLAN OF WEST VIRGINIA, INC.**

Defendants.

AFFIDAVIT OF BRIAN THOMPSON, M.S. PharmD

STATE OF WEST VIRGINIA,

COUNTY OF Kanawha

I, Brian Thompson, M.S., PharmD, duly sworn, make oath upon my knowledge as follows:

1. I currently serve as Director of Pharmacy Services in the Office of Pharmacy Services, West Virginia Bureau for Medical Services (WVBMS).
2. I have reviewed the patient history for Christopher Fain as it relates to a prior authorization request for testosterone faxed on May 12, 2020 to the Rational Drug Therapy

Program. The prescription requires Prior Authorization to be covered under the Medicaid pharmaceuticals program. Prior Authorization services are provided by The Rational Drug Therapy Program through a contract with WVBMS.

3. The West Virginia Bureau of Medical Services' Medicaid pharmaceuticals program does not have a policy of denying testosterone for treatment of gender dysphoria.

4. Based on my review of the patient history, neither the Rational Drug Therapy Program nor WVBMS actively denied coverage of testosterone for Mr. Fain. The request was placed on "pending" status, and clarification was requested from the provider regarding dosing.

5. Mr. Fain could have contacted WVBMS directly at any time to determine the coverage status of his medication. WVBMS did not receive an Appeal from Mr. Fain or from anyone on his behalf regarding testosterone to be administered every 5 days for gender dysphoria.

AND FURTHER AFFIANT SAYETH NOT.



Brian Thompson, M.S., PharmD,
Director of Pharmacy Services
West Virginia Bureau for Medical Services

Sworn and subscribed to before me this 15th day of February, 2021.

My commission expires: May 30, 2022



NOTARY PUBLIC



