UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEREK WASKUL, *et al.*, Plaintiffs, v. WASHTENAW COUNTY COMMUNITY MENTAL HEALTH, *et al.*, Defendants.	No. 2:16-cv-10936-LVP-EAS Hon. Linda V. Parker Hon. Elizabeth A. Stafford

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF A DECLARATION OF BINDING EFFECT

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INTRODUCTION

WCCMH and CMHPSM ("Local Defendants") seek to avoid their obligation to carry out the policies and procedures set forth in the settlement agreement (the "Agreement") that Plaintiffs have reached with Michigan's single state Medicaid agency (the Michigan Department of Health and Human Services ("MDHHS")). Local Defendants, however, are MDHHS's contractual agents. They "stand[] in the shoes of the MDHHS for purposes of providing Medicaid services in [their] service area," *Wiesner v. WCCMH*, 340 Mich.App. 572, 583 (2022), and they are contractually obligated to "implement any necessary changes in policies and procedures as required by the State" (ECF#316 Ex. 13). Accordingly, they must comply with such policies and procedures as a matter of single state Medicaid agency law.

Local Defendants and the State "work together to ensure CLS services are provided to qualifying recipients," *Waskul v. WCCMH*, 979 F.3d 426, 437 (6th Cir. 2020), but MDHHS does not interact directly with Plaintiffs; that is Local Defendants' job. It is they that are responsible for carrying out most of the policies and procedures spelled out in the Agreement. Unless Local Defendants do the job they have signed up for, Plaintiffs will be back where they were when this litigation began eight years ago.

Fortunately, Plaintiffs' settlement with the State resolves that issue. When the state Medicaid agency makes policy decisions in settling lawsuits, as it has done

here, its contractual agents are bound by those policy decisions. *Tennessee Ass'n of Health Maint. Org., Inc. v. Grier*, 262 F.3d 559 (6th Cir. 2001). That they are so bound results ***automatically*** from the State agency's relationship with its managed care agents. *Id*. Accordingly, Plaintiffs do not "seek" to bind Local Defendants to the terms of their consent decree with MDHHS (WCCMH Br. 1). Rather, Local Defendants ***are already bound***; they agreed to be so bound when they signed up to be MDHHS's Medicaid agents.

Local Defendants' immediate response to the Agreement was to deny that they were bound at all. They asserted that "the State cannot contractually bind WCCMH or CMHPSM to the Settlement Agreement because the State does not have the preexisting contractual power to dictate adherence to the Settlement Agreement's provisions" (WCCMH's Response (filed under seal) to ECF#301, p 7). They have further asserted that "neither WCCMH nor CMHPSM is an agent of the State such that Rule 65(d) would make the Settlement Agreement binding," and that "the State cannot bind WCCMH to the Settlement Agreement because the terms of the Settlement Agreement can only be effectuated by contract, not the State's policymaking authority" (*id*. at 8, viii).

These assertions reflect Local Defendants' long and well-documented history of refusing to comply with MDHHS's policies and procedures. The approval motion sets forth more than ten pages (ECF#316 PageID9420-9432) of unrebutted examples

of Local Defendants' refusal to follow the types of policies and procedures that the Agreement requires them to follow. Local Defendants dismiss these examples as a "laundry list of accumulated grievances" (WCCMH Br. 22), but the examples demonstrate why declaratory relief matters so much. Because Local Defendants are the entities directly tasked with implementing the Agreement's policies and procedures, Plaintiffs must be able to enforce those policies and procedures directly against ***them.***

Although Local Defendants now purport to concede that the provisions of the Agreement, when adopted by contract or Policy,[1] will be binding on them (WCCMH Br. 14; CMPHSM Br. 10), this does not speak to Plaintiffs' request for a declaration that the Agreement itself is *enforceable against* Local Defendants. For Plaintiffs actually to receive the relief that is spelled out in the Agreement, this Court must declare *both* that Local Defendants are bound to abide by the policies and procedures established by the Agreement *and* that Plaintiffs can enforce the Agreement against them when they do not.

Plaintiffs do *not* on this motion seek declaratory relief on the merits of their underlying claims. If the Agreement is declared enforceable against Local Defendants, then Plaintiffs will have all they need. This case will be over.

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[1] The capitalized term "Policy" is the Agreement's way of referring to the Medicaid Provider Manual (*see* ECF#300-1 § B(17)), which even Local Defendants now appear to agree is binding on them.

ARGUMENT

I. UNDER THE SIXTH CIRCUIT'S DECISION IN *GRIER*, LOCAL DEFENDANTS MUST CARRY OUT THE POLICIES AND PROCEDURES ESTABLISHED BY THE AGREEMENT

A. *Grier* Remains Directly on Point and Controlling

The circumstances of *Grier* directly parallel those here. There, as here, the single state Medicaid agency entered into a consent decree[2] with the plaintiffs that set forth a number of policy and procedure decisions affecting the operation of the state's managed care Medicaid program. 262 F.3d at 562-63. Specifically, the parties in *Grier* "negotiated the policies and procedures through which the federal Medicaid due process requirements would be implemented in the context of the new managed care program." *Id*. There, as here, the managed care agents challenging the consent decree were not involved in its creation. *Id*. And there, as here, the managed care agents asserted "that since they were not parties to the consent decree, they can not be bound by it." *Id*. at 564.

The Sixth Circuit expressly rejected the managed care agents' contention that they were not bound by the policies and procedures contained in the consent decree. *Id*. Recognizing the general rule that a "party may not impose duties or obligations on a third party without that party's agreement," *id*. at 565 (citing *Loc. No. 93 Int'l*

[2] All agree (*see* WCCMH Br. 8; CMHPSM Br. 7) that the Agreement, if approved with direction to carry out its terms, will operate as a consent decree that includes prospective injunctive terms. *See* ECF#316 PageID9415.

Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986)), the *Grier* Court held that managed care Medicaid is an ***exception*** to that general rule, precisely because the state Medicaid entity's managed care agents ***consent*** to be bound by the state Medicaid entity's policies and procedures. *Id.*; *accord Wilson v. Gordon*, 822 F.3d 934, 953-54 (6th Cir. 2016) (citing with approval *Grier*'s holding that "that private entities that had contracted with [state Medicaid entity] are bound by a consent decree to which [state Medicaid entity] is a party"). Local Defendants' reliance on cases that address only the general rule and do not discuss the exception laid out in *Grier* (WCCMH Br. 2-4; CMHPSM Br. 5) is therefore misplaced.[3]

Central to *Grier*'s holding was the well-established principle that non-parties to a judgment "may be bound by the judgment . . . where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." 262 F.3d at 564 (quoting *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). This is the case here for at least two reasons.

First, injunctions bind not just the parties to the injunction, but also the parties' agents and those "in active concert or participation with" the parties or their agents,

[3] Local Defendants also say that "approval of a consent decree between some of the parties" may not "dispose of the valid claims of nonconsenting [parties]," and that "[t]hose claims remain to be litigated" (WCCMH Br. 3). But Local Defendants have no "claims" of their own to litigate in this action.

Fed.R.Civ.P. 65(d)(2), and both clauses apply here. On "agents," *Grier* says that Medicaid managed care organizations ("MCOs") are "agents" for purposes of Rule 65(d), 262 F.3d at 565, and *Wiesner* likewise says that Defendant WCCMH "stands in the shoes of the MDHHS for purposes of providing Medicaid services in its service area." 340 Mich.App. at 583. And on "active concert and participation," one need look no further than the Sixth Circuit's observation in this very case that State and Local Defendants "work together" to provide Medicaid services. 979 F.3d at 437. That is "active concert or participation" as a matter of simple English. The cases on "active concert" look to whether the non-parties and the consenting party are in privity. *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d 568, 574 (6th Cir. 2001). Because Local Defendants "stand in the shoes" of MDHHS for purposes of delivering Medicaid services, and because they are contractually bound to comply with MDHHS's policies and procedures, they are undoubtedly in privity with MDHHS for purposes of Rule 65(d). *Accord Katie A., ex rel. Ludin v. Los Angeles Cnty*, 481 F.3d 1150, 1162 (9th Cir. 2007) (separate state entity "in active concert" with enjoined state entity concerning plaintiffs' healthcare was bound by injunction's terms).

Second, and overlapping with "active concert," *Grier* holds that Medicaid agents that agree in their contracts with the state Medicaid entity to be bound by policies and procedures that the State subsequently effects are bound to a consent

decree for that reason as well. In *Grier*, the managed care agents had agreed in their contracts to follow "additional appeal process guidelines or rules" that the state entity might develop. *Grier*, 262 F.3d at 565. Here, Local Defendants have agreed, among other things,[4] to "implement any necessary changes in policies and procedures as required by the State" (ECF#316 Ex. 13).[5]

Accordingly, notwithstanding that only Plaintiffs and MDHHS are "parties" to the Agreement, Local Defendants will be bound both by their contracts and by Rule 65(d) to comply with the policies and procedures set forth in the Agreement when and as MDHHS rolls out implementation.

B. Defendants' Obligation To Carry Out the Agreement's Policies and Procedures Is for the Benefit of Plaintiffs

Under Medicaid regulations, only the single state entity—*i.e.*, MDHHS—can "develop or issue policies, rules, and regulations on program matters." 42 C.F.R. § 431.10(e). And it is indisputable that the policies and procedures MDHHS set forth in the Agreement here are both "on program matters" and for Plaintiffs' benefit. MDHHS agreed *with Plaintiffs* to adopt the policies and procedures in Section C of the Agreement and Attachments A and B. MDHHS further agreed *with Plaintiffs* to adopt the policies and procedures in Attachment C if the Minimum Fee Schedules

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4 *See* ECF#316 PageID9415-9416.

5 After initially eliding the key part of this contractual provision (*see* ECF#316 PageID9414-9415), Local Defendants now appear to concede that they are so obligated (WCCMH Br. 14).

do not come into effect. MDHHS is subject to enforcement *by Plaintiffs* if it does not do these things.

In managed care Medicaid, however, the single state entity itself does not directly carry out these policies and procedures. Rather, the MCOs do. That is how the system works. But the MCOs do not have a free hand: they must comply with the State's requirements lest they negate policies and procedures that only MDHHS can establish. *Grier*, 262 F.3d at 565; *accord K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107 (4th Cir. 2017). That is the meaning of the State and Local Defendants' "work[ing] together" to provide services. *Waskul*, 979 F.3d at 437.

Consequently, as the State rolls out implementation of the Agreement and the listed policies and procedures come into effect, those policies and procedures will be enforceable under the Agreement by Plaintiffs against Local Defendants as a consequence of the Agreement itself and of MDHHS's having entered into the Agreement ***for the benefit of these Plaintiffs.*** While other PIHPs and CMHSPs[6] will surely be bound by the Agreement's policies and procedures as they become part of the Medicaid Provider Manual, they will not be bound to follow them ***by the Agreement***,

[6] Medicaid lives in acronym land. "CMHSP" stands for "Community Mental Health Service Provider" and is the class of entities to which Defendant WCCMH belongs. It is *not* the same as "CMHPSM," which is the abbreviation for the name of the other Local Defendant here, the "Community Mental Health Partnership of Southeast Michigan."

nor will they be answerable to the Plaintiffs here in the way that Local Defendants will be.

C. Contingencies Affect How the Agreement Will Be Implemented, Not Whether It Will Be Implemented

Contrary to Local Defendants' assertions, if the Agreement is approved it is not a question of "if" but "when" and "how" these policies and procedures will take effect. Local Defendants' repeated assertions that the Agreement itself is contingent on their signing contract amendments (WCCMH Br. 1, 7-9; CMHPSM Br. 6) are false. This issue has come up before, but Local Defendants do not deign even to mention, let alone address substantively, our previous showing (ECF#318 PageID 9917-9918) that the contingencies do not affect *whether* the Agreement will be implemented, but only *how* it will be implemented.

All of the policy amendments summarized in the Motion for Approval (ECF #316 ¶¶ 32-34; ECF#301 PageID7192-7193) become effective thirty days after the Order of Approval regardless of any contingencies (ECF#300-1 § E(1)). MDHHS will commence implementing the Policy amendments required by the Agreement on the day it is approved, and it will roll those amendments into the Medicaid Provider Manual as they are finished (*id*. § E(1)(a)). Notwithstanding WCCMH's incorrect assertion (ECF#336 § C.5 PageID10193-10195) in its opposition to the Approval portion of this motion, MDHHS ***does not*** need to go through either formal rulemaking procedures or "consultation" to implement these policies. As set forth in more

detail in Point B.1 of our Reply Brief in Support of Approval, MDHHS has broad authority under MCL 400.6(4) to promulgate Medicaid policies that are "effective and binding on all those affected by the programs," and such policies "are exempt from the rule promulgation requirements of [Michigan's APA]."[7]

Should WCCMH and CMHPSM refuse to sign new contracts, then the minimum fee schedule provisions will not come into effect (ECF#300-1 § D(1)(b)), but

- ***Schedule C***, which implements the "costing out" requirement of the HSW, ***will take effect instead*** (*id*. § E(4)), and
- all but one[8] of the contract amendment provisions will go into the Medicaid Provider Manual (*i.e.*, become "Policy"[9]) instead of into Local Defendants' contracts (*id*. §§ C(7), C(9)(f, g)).

Accordingly, as has been clear to all since January, Local Defendants ***cannot prevent implementation of the Agreement by refusing to sign new contracts***.[10]

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7 Also as set forth in the cited Reply Brief, MCL 400.111a, the only provision Local Defendants cite that mentions "consultation" requirements, relates only to provider requirements and has no bearing on MDHHS's right to make policy that binds its managed care agents. *See, e.g.*, MCL 400.111b (explaining what MCL 400.111a means by "condition of participation and requirements of providers" and explaining who gets to be a service provider and under what circumstances).

8 *Id.* § C(9)(e), which requires Defendant CMHPSM to comply with administrative law judges' decisions.

9 The Manual is the official compendium of MDHHS "policy" regarding Medicaid matters (*id*. § B(17); ECF#316 PageID9413-9414).

10 While the Agreement does not (and could not) obligate Local Defendants to sign new contracts (WCCMH Br. 17-18; CMHPSM Br. 6), what matters is

II. THE REQUEST FOR DECLARATORY RELIEF SHOULD BE GRANTED

A. There Is an Existing Dispute Concerning, at Least, Plaintiffs' Right to Enforce the Agreement Against Local Defendants

Declaratory judgments permit "actual controversies to be settled before they ripen into violations of law or a breach of contractual duty." C. Wright & A. Miller, 10B Fed. Prac. & Proc. Civ. 4th § 2751 (2024). Consent judgments are of a contractual nature, and Plaintiffs here seek to clarify Local Defendants' obligations as MDHHS's Medicaid agents under the Agreement.

Plaintiffs have asserted that Local Defendants are bound by the Agreement to carry out the Agreement's policies and procedures for Plaintiffs' benefit, and Local Defendants have asserted that they are not. As set forth above, Local Defendants asserted in response to the filing of the Settlement that MDHHS cannot contractually bind them to the Agreement, that the Agreement is not binding because they are not MDHHS's Rule 65(d) Medicaid agents, and that the Agreement's policies and procedures cannot be effectuated by MDHHS's policymaking authority (WCCMH's Response (filed under seal) to ECF#301, pp viii, 7-8). Given their stated positions,

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that Local Defendants, should they choose to continue operating as MDHHS's Medicaid agents, will be bound by the terms of the Agreement in that capacity. *See Wilder v. Bernstein*, 645 F.Supp. 1292, 1319-20 (S.D.N.Y. 1986) ("Were the agencies—including the objecting defendants—to continue to contract with SSC to provide foster care services for New York City children, they would unquestionably be 'in active concert or participation with' the City defendants for purposes of enforcing the terms of the Stipulation under Rule 65(d)."). Should Local Defendants choose to step aside, then their successors will be bound.

there is a clear dispute between Plaintiffs and Local Defendants as to their rights and obligations under the Agreement. *See Skurka Aerospace, Inc. v. Eaton Aerospace, L.L.C.*, 2013 WL 12130432, at *4 (N.D.Ohio Mar. 22, 2013).

This dispute would exist even if Local Defendants did not appear to finally acknowledge that they will be bound by the Agreement's policies and procedures once they are put into the Medicaid Provider Manual (WCCMH Br. 14, CMHPSM Br. 10). This is because Local Defendants are not merely bound to comply with policies and procedures by operation of normal single state agency principles. They are also bound—specifically by virtue of the Agreement—to carry out the policies and procedures embodied in the Agreement ***for Plaintiffs' benefit***.[11] Local Defendants refuse to concede *that* point, so there remains a live controversy as to enforceability.[12]

B. Declaratory Relief Would Clarify Enforceability and, by Doing So, Would Resolve the Underlying Litigation

In the context of a dispute like this one, bringing clarity to the legal rights and obligations of the parties to a dispute is the *raison d'être* of declaratory relief. This is why the first two (and most important) declaratory relief factors examine "whether

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[11] For this reason, Local Defendants are wrong to say (WCCMH Br. 20) that the normal operation of the Agreement, without a declaration that it is binding on and enforceable by Plaintiffs against Local Defendants, necessarily resolves the case.

[12] Declaratory relief may lead to attorney fees, but its primary purpose here, as Plaintiffs have said (ECF#309-1 PageID8754), is to ensure enforcement.

the declaratory action would settle the controversy" and "whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 554 (6th Cir. 2008). As this Court recently held in *State Farm Fire & Cas. Co. v. Skarl*, 2021 WL 1244219 (E.D.Mich. 2021), declaratory relief is appropriate even where it would *not* settle the full underlying controversy, so long as it would help clarify the legal relations between the parties.

The declaratory relief sought here would both clarify the legal relations in issue *and* resolve the underlying controversy. Given the settlement with the State, without declaratory relief Plaintiffs would pursue their underlying claims against Local Defendants, but solely to ensure obtaining enforceable relief against those Defendants. Accordingly, if this Court declares enforceability, then Plaintiffs will have everything they need and this case will be over. The two "principal criteria" involved in evaluating requests for declaratory relief (that the judgment will serve a useful purpose in clarifying and settling the legal relations at issue, and that it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding) are therefore clearly met. *Grand Trunk Western R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984).[13]

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[13] Because the declaratory relief sought here would concretely resolve a currently existing and clearly delineated dispute as to enforceability, it would in no way be akin to the type of advisory opinion condemned in *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 592 (6th Cir. 2009), where plaintiff asked the court to "explicate, as a part of a formal declaration, the relevant

1. Declaratory Relief Is Appropriate to Resolve the Discrete Legal Issue of Whether Local Defendants are Bound to Carry Out the Agreement's Policies and Procedures for Plaintiffs' Benefit

A primary purpose of declaratory judgments is to resolve discrete legal ***issues*** whose resolution serves to resolve a dispute involving distinct legal ***claims***.[14] *Continental Cas. Co. v. Indian Head Industries, Inc.*, 941 F.3d 828, 835 (6th Cir. 2019) ("The whole point of a declaratory judgment action is to decide only a single issue in dispute."). Two of the cases cited in Plaintiffs' approval motion are of this nature. *Suggs ex rel. Posner v. Gen. Am. Life Ins. Co.*, 2006 WL 1109270, at *4-5 (E.D. Mich. Apr. 24, 2006); *Esurance Prop. & Cas. Ins. Co. v. Lawson*, 2022 WL 7454219, at *6-8 (E.D.Mich. Oct. 13, 2022). So is *Western World Ins. Co. v. Hoey*, 773 F.3d 755 (6th Cir. 2014) (affirming declaratory judgment clarifying insurer's obligations to defendant in a separate negligence action involving separate tort claims). *Accord TERA II, LLC v. Rice Drilling D, LLC*, 679 F.Supp.3d 620, 645-46 (S.D.Ohio 2023) (resolving whether two geological formations were separate and whether plaintiffs had reserved mineral rights in one of them would clarify parties' relationships and helpfully bear on underlying tort claims); *Skurka Aerospace, Inc.*,

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Supreme Court holdings on state taxation of Indians," but had failed to point to a single existing and concrete dispute with the state over its tax obligations.

[14] As the statute itself says, declaratory relief may issue "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

2013 WL 12130432, at *5 (declaratory relief would clarify contract terms and govern parties' relationship for period not covered by jury verdict).

The Sixth Circuit in *Hoey* affirmed the district court's judgment that "it would be helpful for the parties to know whether Western World was on the hook for Hoey's legal fees and potential liability." 773 F.3d at 761. Here, it would indisputably be helpful for the parties to know whether Plaintiffs may enforce Local Defendants' obligations to carry out Agreement's policies and procedures for Plaintiffs' benefit, as resolution of that question in Plaintiffs' favor would end this action.

Local Defendants incorrectly assert that Plaintiffs must prevail on a particular legal claim to receive the declaratory relief sought here. This is not the standard. It is true (as it is for any form of relief) that, when a plaintiff seeks declaratory relief directly related to the merits of a particular legal claim, the plaintiff must necessarily establish an entitlement to relief on that claim. But that is not what is happening here. Here, Plaintiffs seek declaratory relief on an issue that ***did not even exist*** when this action was filed. The purpose of the enforceability declaration sought here is to *obviate* the need to resolve the underlying merits.

None of Local Defendants' cases speaks to this scenario. In *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176, 1180 n.1 (6th Cir. 2023), for example, the Court determined that the plaintiff had failed to allege state action and was therefore entitled to *no* relief on his Section 1983 claim, declaratory or otherwise. Defendant

WCCMH cites this case for the proposition that, "[u]nless and until a party prevails on a particular cause of action, the party's 'request for declaratory relief to resolve [its] substantive rights also fail[s]'" (WCCMH Br. 21), but that is not what *Littler* held. *Littler* simply held that no meritorious claim = no right to declaratory relief *on the merits of that claim*, not that declaratory relief of any sort is unavailable pending the resolution of a party's legal claims.[15] In fact, as set forth above, such a premise

[15] Local Defendants' other citations are in the same vein. In *Weiner v. Klais & Co.*, 108 F.3d 86 (6th Cir. 1997), for example, the plaintiff asserted a standalone claim for declaratory relief, but he could not make out any meritorious claim entitling him to *any* relief. And *Kondaur Cap. Corp. v. Smith*, 802 F. App'x 938, 948 (6th Cir. 2020), merely recognized that "[a] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *See also Duncan v. Tennessee Valley Auth. Retirement Sys.*, 123 F.Supp.3d 972 (M.D. Tenn. 2015) (declaratory relief sought specifically related to claim that defendants had violated retirement system rules that were unenforceable); *International Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Auth.*, 108 F.3d 658, 667-68 (6th Cir. 1997) (no declaratory relief to vindicate time-barred claim). In *Wal-Mart Real Estate Bus. Trust v. Eastwood, LLC*, 2015 WL 12910670 (WD.Mich. July 27, 2015), the declaratory relief sought depended on proving the merits of an underlying breach of contract claim. The *Wal-Mart* court cited *In re Rospatch Securities Litigation*, 760 F.Supp. 1239, 1265 (E.D.Mich. 1991) for the proposition that it would not order declaratory relief "unless and until the plaintiffs established their right to relief under one of the substantive claims," but there too the request for declaratory relief was interpreted to be a request for relief specifically on the merits of plaintiffs' other claims. Again, these cases go no further than to hold that no meritorious legal claim = no declaratory relief *on the merits of that claim*. Likewise, *Acrisure, LLC v. Hudak*, 618 F.Supp.3d 642, 650 (W.D.Mich. Aug. 1, 2022), merely construed ostensibly standalone claims for declaratory relief as requests for declaratory relief on the plaintiff's breach of contract claims.

is antithetical to the nature of declaratory judgments, which are frequently used to resolve discrete legal issues that bear on separate legal claims.

2. The Relief Sought Is Clear and Specific

(a) The Agreement Directly Addresses Local Defendants' Conduct

Local Defendants are incorrect that the Agreement "mentions them only indirectly" and contains no provisions that "require, or even purport to require, specific conduct by CMHPSM or WCCMH" (WCCMH Br. 1). Local Defendants are mentioned ***by name*** in the minimum fee schedule provision (ECF#300-1 § C(2)(b)) and in four policy provisions (*id*. §§ C(7), C(9)(e), (f), (g)). To be sure, those provisions will operate by contract, but all but one of them will be ***implemented as Policy*** if the § D(2) contingencies are not timely met, either expressly under the clauses themselves (§§ C(7), C(9)(f), (g)) or through adoption of Attachment C if the minimum fee schedule is not adopted. One way or the other, therefore, the Agreement specifically addresses the future conduct of the Local Defendants.

Moreover, additional policies and procedures that do not reference CMHPSM or WCCMH by name but govern the conduct of all PIHPs and CMHSPs, including Local Defendants, prevent the recurrence of specific historical incidents of misconduct by Local Defendants:

Agreement Provision	Historical Misconduct
C(9)(d) (termination of self-determination)	Retaliatory threats (ECF#316 PageID9428-9429)

Agreement Provision	Historical Misconduct
C(9)(b), (c) (regulating person-centered planning)	Abuses of person-centered planning (*id*. PageID9421-9428)
Attachments A and B (clarification of CLS and scope of medical necessity)	Limiting CLS medical necessity to hours only, not what staff is to do (*id*. PageID 9426-9427)
C(8) (Fair Hearing Procedures)	Refusal to implement ALJ *Wiesner* decision (*id*. PageID 9431-9432)

Indeed, if the $31 Minimum Fee Schedule is not implemented, Attachment C effects the return (with improvements, of course) of the pre-2015 budgeting procedure that Plaintiffs have sought from Local Defendants since the beginning of this case.

(b) The Terms of the Agreement Are Specific and Unambiguous

The policies and procedures embodied in the Agreement are highly specific and detailed. None of them is vague or ambiguous, as was the case in *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 362–65 (6th Cir. 2022), and Local Defendants have not suggested otherwise. Indeed, Plaintiffs and MDHHS took care to spell out Local Defendants' obligations in great detail *in the Agreement itself*. Accordingly, there is no "incorporation by reference" issue, and this Agreement is therefore nothing like the injunctions at issue in *Trans Union Credit Info. Co. v. Associated Credit Servs.*, Inc., 805 F.2d 188, 193-94 (6th Cir. 1986) (directing compliance with a separate service agreement), or *Int'l Longshoremen's Ass'n, Loc. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 74–76 (1967) (directing compliance with arbitration

award that nobody understood). Nor does the Agreement incorporate the terms of an outside document whose application is hotly disputed, as in *James B. Oswald Co. v. Neate*, 98 F.4th 666, 678-79 (6th Cir. 2024). The Agreement's specific and definite policies and procedures are not a mere "obey the law" injunction like those at issue in *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 576 (6th Cir. 1984), or *Perez v. Ohio Bell Tel. Co.*, 655 F.App'x 404, 410–12 (6th Cir. 2016); *cf. Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (defendants "simply told not to enforce 'the present Wisconsin scheme' against those in the appellee's class").

Local Defendants' attempt to raise vague concerns about the circumstances under which someone could enforce the Agreement (WCCMH Br. 12, CMHPSM Br. 11) is baseless. If MDHHS were to breach the Agreement by, say, choosing not to implement a particular policy provision, then only MDHHS would be answerable for that breach. Once the Agreement's policies and procedures come into effect, however, Local Defendants will be answerable for their failure to abide by those policies and procedures, but *only Plaintiffs* will have the right *under the Agreement* and its implementing decree to seek redress if Local Defendants fail to do so. Other HSW CLS SD beneficiaries across Michigan, who are not parties to the Agreement, will not have such rights. It goes both ways: because Plaintiffs receive their services only through Local Defendants, only Local Defendants, as opposed to other PIHPs

and CMHSPs, could be held responsible *by these Plaintiffs* for their failure to comply with the Agreement and decree.

3. There Is No Parallel State Court Action, and There is No Better or More Effective Remedy

The remaining factors strongly favor declaratory relief. Factors (3) and (4) of the *Grand Trunk* and *Scottsdale* formulation are inapplicable because there is no pending, parallel state court action (ECF#316 PageID9419). Concerning the final factor, Local Defendants say that an alternative remedy exists because Plaintiffs could continue to litigate their claims against them to obtain the same relief that a declaratory judgment would afford. The inquiry, however, is not whether an alternative exists, but whether that alternative would be "better or more effective." *Grand Trunk*, 746 F.2d at 326. Here it plainly would not.

Litigating Plaintiffs' claims through trial in order to obtain exactly the same relief that declaratory relief would provide now would, of course, be significantly *less* effective than the declaratory relief and would entail an enormous and unnecessary expenditure of resources from the parties and the Court. But the matter is even simpler than that: Under *Grier* and the legal principles on which it stands, Local Defendants do not have the right to continue litigating simply because they feel like it. *See also Shipman*, 716 F.3d 107. MDHHS, the single state agency with the authority to make policy decisions that bind Local Defendants, chose to end this litigation by agreeing with Plaintiffs to settlement terms that regulate Local

Defendants' conduct. Even if Local Defendants were to prevail for one of the reasons they posit,[16] they would still be required to abide by the policies and procedures required by the Agreement. *Finis.*

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[16] Of course they cannot. Local Defendants' 2-3-page mini-motions for summary judgment (WCCMH Br. 23-25, CMHPSM Br. 15-17)—in this eight-year-old case!!—misstate the law and ignore the standards for summary judgment. To take but two examples:

1. WCCMH's argument that the only reason it changed the budgeting methodology in 2015 was "because the previous methodology violated the Medicaid regulations and constituted impermissible double-billing" (WCCMH Br. at 23-24) was conclusively sunk long ago, not merely by MDHHS's repeated assertions that the 2012 methodology was proper (Exs. 1-2), but also by Local Defendants' own witnesses' agreement that the prior methodology—as a methodology and without regard to the particular staff wage component figure used—is proper (Exs. 3-5). Nobody alive today knows what staff rate was intended to be used, and all this is entirely apart from the massive factual record that the reason for the budget change was that WCCMH was losing money, not some epiphany that its previous method was wrong.

2. Local Defendants' assertion that agency providers have always been available and ready to serve the Plaintiffs is likewise nonsense. If the 2,500,000 pages of discovery, thirty subpoenas (including many directed to agency providers), and twenty depositions taken in this action have pointed to one clear conclusion, it is that the availability and suitability of agency providers is, ***at best***, hotly disputed and inappropriate for summary judgment. Indeed, Plaintiffs Ernst and Schneider have tried unsuccessfully to use agencies, and all Plaintiffs have explained in interrogatory responses why agencies, even if they were available, would not be suitable to provide the care they need.

C.B. v. LCCMH, 2023 WL 8482984, -- Mich. App. -- (2023), cited by WCCMH in its approval opposition (p 32), is an excellent example of Local Defendants' talking out of both sides of their mouths. Local Defendants say that they win on summary judgment because agency providers are available, but the plaintiff in *C.B.*, who receives services in Defendant CMHPSM's service region, went over ***two years*** without receiving a single hour of authorized CLS services because no agency providers were available. Indeed, one of the

4. The Court's Jurisdiction Is Not in Question, and the Request for Declaratory Relief Is Properly Before the Court

Local Defendants emphasize that the Declaratory Judgment Act does not independently confer jurisdiction (WCCMH Br. 20-21), but nobody has asserted that it does. Unlike in *Davis v. U.S.*, 499 F.3d 590 (6th Cir. 2007), where the court lacked federal question jurisdiction and there was no other basis to exercise jurisdiction,[17] there are half a dozen federal claims in this action, and the Court's jurisdiction under 28 U.S.C. §§1331, 1367 is not and never has been in question. *See Esurance Prop. & Cas. Ins. Co.*, 2022 WL 7454219, at *4 (Declaratory Judgment Act "provides courts with discretion to fashion a remedy in cases where federal jurisdiction already exists") (quoting *Heydon v. MediaOne of Southeast Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003)); *Lessard v. City of Allen Park*, 247 F.Supp.2d 843, 860 (E.D. Mich.

CMH's proposed solutions was for C.B. to try self-determination instead. An ALJ ordered the CMH to provide the services, and the CMH still refused to provide them, forcing C.B. to file a mandamus action to enforce the judge's decision. Two years and a $100,000 settlement later, C.B. finally received his CLS services through agency providers, only for the CMH to begin failing to provide them within weeks of dropping off the settlement check because it did "not have provider capacity to provide the service" (Ex. 6).

[17] CMHPSM cites *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984), for the proposition that "[t]he Sixth Circuit recognizes a declaratory judgment as a procedural device used to vindicate substantive rights, such that its viability hinges on the viability of substantive claims" (CMHPSM Br. 14-15), but *Lowe* (*not* a Sixth Circuit case) likewise had nothing to do with the merits but held only that the Declaratory Judgment Act does not independently confer subject matter jurisdiction that is otherwise lacking.

2003) (court had jurisdiction to entertain motions for declaratory judgment where jurisdiction founded not in the Declaratory Judgment Act but in a consent decree).

Plaintiffs' request for declaratory relief is not "untethered" to their claims (WCCMH Br. 2, 23). The "request for a declaratory judgment . . . need not be 'tethered' to any other claim to be viable," *In re Murray Energy Holdings, Inc.*, 634 B.R. 951, 976 (Bankr.S.D.Ohio 2021), and, in any event, the Agreement's policies and procedures sought to be declared enforceable against Local Defendants directly track the claims and relief that Plaintiffs have sought all along (ECF#316 PageID9419-9420). Attachment C, for instance, implements the "costing out" requirements of the HSW that Plaintiffs sought to enforce via their third-party beneficiary contract claim (ECF#146 PageID3796-3797).

The declaratory relief sought here clearly falls within the purview of the Amended Complaint's request for "such other relief as is just and proper" (ECF#146 PageID3807). *See Shaheen v. HSBC Bank*, 283 F.R.D. 344, 351-52 (E.D. Mich. 2012); *Galli v. Morelli*, 277 F.Supp.2d 844, 861 (S.D.Ohio 2003); *Pension Ben. Guar. Corp. v. East Dayton Tool & Die Co.*, 14 F.3d 1122, 1127-28 (6th Cir. 1994). The Amended Complaint alleges that MDHHS is the single state entity responsible for administering Medicaid in Michigan, that it cannot delegate its administration to its managed care agents, and that it must ensure oversight and accountability over any delegated functions (ECF#146 ¶¶ 17, 27-29, 457-458). It further alleges that

Local Defendants ignore MDHHS's directives to the detriment of Plaintiffs (*id*. ¶¶ 140-141, 154, 161-167) and that MDHHS's failure to correct Local Defendants' conduct violates MDHHS's single state agency obligations under the Medicaid Act (*id*. ¶¶ 443-446, 451-453). Plaintiffs sought declaratory and injunctive relief against *all* Defendants; because only Local Defendants *carry out* Medicaid policies in managed care, it is inherent in that request that any injunctive relief against MDHHS concerning those policies must also apply against Local Defendants. The injunctive relief in the consent decree to be entered pursuant to the Agreement tracks the relief sought in the Amended Complaint against MDHHS and its agents, and the declaratory relief sought here simply clarifies the scope of that relief.

It is of no significance that Plaintiffs did not (and could not) include a claim in their Amended Complaint specifically seeking a declaration that Local Defendants would be bound to carry out the policies and procedures in a settlement agreement that Plaintiffs would enter into with MDHHS five-and-a-half years later. Every final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed.R.Civ.P. 54(c); *Cole v. Cardoza*, 441 F.2d 1337, 1342-44 (6th Cir. 1971) (directing entry of declaratory judgment under Rule 54(c) notwithstanding absence of a pleaded request for one). Rule 54(c) applies unless the defendant would suffer substantial and improper prejudice, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975), and the declara-

tory relief sought here could not prejudice Local Defendants, who agreed to be bound by policies and procedures like those in the Agreement when they signed up to be MDHHS's contractual agents.

CONCLUSION

The Court should declare that the Agreement, and the Consent Decree to be entered pursuant to the Agreement, (1) are for the benefit of Plaintiffs, (2) bind the Local Defendants, and (3) are enforceable by Plaintiffs against the Local Defendants.

Respectfully submitted,

/s/ Nicholas A. Gable (P79069) /s/ Edward P. Krugman

July 15, 2024

CERTIFICATE OF SERVICE

This 15th day of July, 2024, I filed the foregoing in the Court's electronic filing system, which will effect service on all counsel of record in this action.

Dated: July 15, 2024

/s/ Nicholas A. Gable
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Disability Rights Michigan
Attorney for Plaintiffs