

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY DAVIS; RITA-MARIE GEARY;
PATTY POOLE; and ROBERTA
WALLACH, on behalf of themselves and all
others similarly situated,

Plaintiffs,

-vs-

RULE 56 STATEMENT

12-CV-6134 CJS

NIRAV SHAH, individually and in his official
capacity as Commissioner of the
New York State Department of Health,

Defendant.

Defendant COMMISSIONER NIRAV SHAH, by his attorney, Eric T.

Schneiderman, Attorney General of the State of New York, J. Richard Benitez, Assistant
Attorney General, of counsel, as and for a rule 56 statement and response to plaintiffs'
statement of of undisputed facts, herein submit the following:

1. The State of New York has elected to participate in the Medicaid program and
has designated the New York State Department of Health as the single state Medicaid
agency. N.Y. Soc. Serv. Law § 363-a(1).

Defendant defers to the language of the statute for best evidence.

2. New York's Medicaid statute requires coverage of prescribed, medically
necessary durable medical equipment. N.Y. Soc. Serv. L. § 365-a(2).

Defendant defers to the language of the statute for best evidence.

3. During the 2011 Legislative Session, the statute was amended to eliminate
coverage of medically necessary compression stockings and orthopedic footwear for all
but a few Medicaid beneficiaries. N.Y. Soc. Serv. L. § 365-a(2)(g)(iii) and (iv); Hale

Declaration in Support of Preliminary Injunction, (Dkt. # 3-2), (hereinafter "Hale Decl.") ¶

4.

Uncontested.

4. Orthopedic footwear is only covered for children under the age of 21 to address growth and development problems; as part of a comprehensive treatment of people with diabetes for peripheral neuropathy; or as an integral part of a lower limb orthotic brace.

N.Y. Soc. Serv. Law § 365-1(2)(g)(iii); Hale Decl. ¶ 5.

Defendant defers to the language of the statute for best evidence. See also Bick Affidavit, ¶¶ 60 - 77.

5. Compression stockings are only covered for pregnant women and people with venous stasis ulcers. N.Y. Soc. Serv. Law § 365-1(2)(g)(iv); Hale Decl. ¶ 6.

Defendant defers to the language of the statute for best evidence. See also Bick Affidavit, ¶¶ 60 - 77.

6. Defendant Shah implemented these new restrictions by promulgating amendments to 18N.Y.C.R.R. § 505.5. Hale Decl. ¶ 7.

Defendant defers to the language of the regulation for best evidence. See also Bick Affidavit, ¶¶ 60 - 77.

7. The regulation explicitly mandates that: "The department shall not allow exceptions to defined benefit limitations." 18 N.Y.C.R.R. § 505.5(g); Hale Decl. ¶ 8

Defendant defers to the language of the regulation for best evidence. See also Bick Affidavit, ¶¶ 60 - 77.

8. Under the new regulation, compression stockings are only available to treat venous stasis ulcers and during pregnancy. 18 N.Y.C.R.R. § 505.5(g)(1); Hale Decl. ¶ 7

Defendant defers to the language of the regulation for best evidence. See also Bick Affidavit, ¶¶ 60 - 77.

9. The regulation limits coverage of orthopedic footwear to “treatment of children to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace.” 18 N.Y.C.R.R. § 505.5 (g)(2); Hale Decl. ¶ 7.

Defendant defers to the language of the regulation for best evidence. See also Bick Affidavit, ¶¶ 60 - 77.

10. Defendant recognizes both compression stockings and orthopedic footwear as durable medical equipment. *New York State Medicaid Program, Durable Medical Equipment Manual, Policy Guidelines*:
https://www.emedny.org/ProviderManuals/DME/PDFS/DME_Policy_Section.pdf.

Contested. See McCloskey Declaration, ¶¶ 22-37 and 44-57; Bick Affidavit, ¶¶ 29 and 39.

11. Immediately after promulgating the new regulation, Defendant Shah worked to communicate the new restrictions directly to providers and suppliers but did not inform Medicaid beneficiaries of the new restrictions. Hale Decl. ¶¶ 9, 10.

12. On April 5, 2011, Defendant Shah issued a *Provider Update for Pharmacy and DME Providers* describing the new limits in prescription footwear coverage.
https://www.emedny.org/providermanuals/communications/Prescription%20_Footwear_Benefit%20_Update_20110405.pdf. Hale Decl. ¶ 9.

Uncontested.

13. On May 25, 2011, Defendant Shah issued another *Provider Update for Pharmacy and DME Providers* advising providers and suppliers of the coverage codes for compression stockings available “**only** when used in the treatment of open venous stasis ulcers” and “**only** for treatment of severe varicosities and edema **during pregnancy.**” The stockings are not covered “**for any other conditions, including** the prevention of ulcers, prevention of the recurrence of ulcers, treatment of lymphedema without ulcers, varicose veins, or circulation disorders.”

https://www.emedny.org/providermanuals/communications/Compression_Stockings_No_tice_revised_20110520.pdf. (Emphasis in the original.) Hale Decl. ¶ 9.

Defendant defers to the language of the publication for best evidence.

14. Defendant Shah communicated the new limits on the coverage of compression stockings and prescription footwear to providers in the May 2011 New York State Department of Health Medicaid Updates. *The New York State Medicaid Update*, vol. 27, no. 6 (May 2011).

http://www.health.ny.gov/health_care/medicaid/program/update/2011/may2011mu.pdf;
Hale Decl. ¶ 9.

Defendant defers to the language of the publication for best evidence.

15. Defendant Shah took no action to communicate the new restrictions to Medicaid beneficiaries, not even to those whose compression stockings and orthopedic footwear had been covered for years. Hale Decl. ¶ 10.

Contested, See Bick Affidavit ¶¶ 47-54 (public notice).

16. Defendant Shah provides no notices of denials when determinations are made not to cover medically necessary orthopedic footwear or compression stockings. Hale Decl. ¶ 10.

Contested, See Bick Affidavit ¶¶ 47-54 (public notice), also McCloskey Declaration ¶ 67.

17. Because Defendant Shah does not provide beneficiaries with notices of the denials of coverage, he fails to inform beneficiaries of the reasons for the denials and of their right to request a fair hearing and challenge Defendant's action. Hale ¶ 11.

Contested, See Bick Affidavit ¶¶ 47-54 (public notice), also McCloskey Declaration ¶ 67.

The Impact of Defendant Shah's Policy

18. Compression stockings increase blood circulation in the lower extremities by providing graduated pressure on the leg and foot to alleviate circulatory problems associated with edema, phlebitis, and thrombosis. Declaration of Jerry Svoboda, M.D., (Dkt. # 3-3, pp. 22-23), (hereinafter "Svoboda Decl.") ¶ 6.

Uncontested.

19. Compression stockings are known to prevent dangerous health conditions from developing and offer an effective, inexpensive remedy for excess swelling caused by CVI. Svoboda Decl. ¶ 10, 11.

Uncontested.

20. People need compression stockings for a variety of reasons, including, but not limited to, chronic venous insufficiency, lymphedema, congenital blood vessel malformation, and paralysis of the lower extremities. Svoboda Decl. ¶ 7, 12.

Uncontested.

21. The vast majority of those requiring compression stockings need them to treat chronic venous insufficiency (CVI). Svoboda Decl. ¶ 7.

Contested, See Bick Affidavit ¶¶ 70-72.

22. CVI causes chronic swelling of the legs that can often weep directly through the skin. Left untreated, such excess swelling can cause life-threatening infection. Svoboda Decl. ¶ 7.

Uncontested.

23. The longer CVI persists untreated, the more dangerous the harms that can result. Delaying treatment will only increase its severity. Svoboda Decl. ¶ 8.

Uncontested.

24. If CVI is not treated, the pressure and the swelling will increase, causing the capillaries in the legs to burst. When this happens, the skin covering the leg becomes vulnerable to harm, and is likely to break when bumped or scratched. Burst capillaries result in a number of conditions ranging from local tissue inflammation to open venous stasis ulcers. Svoboda Decl. ¶ 9.

Uncontested.

25. Venous stasis ulcers are difficult to treat and often become infected. If the infection is not treated, it can spread to other tissues in a condition called cellulitis. Svoboda Decl. ¶ 9.

Uncontested.

26. Compression stockings are best used to prevent such ulcers from developing in the first place. Svoboda Decl. ¶ 5.

Uncontested.

27. Treating these infections is far more difficult than treating the underlying CVI. The infections from uncontrolled swelling in the lower extremities often require hospitalization and treatment through I.V. antibiotics. Such infections are always hazardous for the patient. Svoboda Decl. ¶ 10.

Uncontested.

28. Compression stockings offer a cost-effective way to prevent far more complicated and expensive treatments and hospitalizations. When a patient is hospitalized for treatment, *costs quickly escalate into the thousands and tens of thousands of dollars*. Inexpensive compression stockings can avoid such unnecessary expenditures. Svoboda Decl. ¶ 11 (emphasis in the original).

Uncontested.

29. The state's policy of covering compression stockings only for those who have already developed venous stasis ulcers or who are pregnant will miss the vast majority of patients who require compression stockings, such as those with CVI. Svoboda Decl. ¶ 4, 7.

Contested, See Bick Affidavit ¶¶ 70-72.

30. Orthopedic footwear is necessary to treat a number of different conditions, including, but not limited to, transmetatarsal amputation, peripheral neuropathy, and neuropathic ulcers on the bottoms of the feet. Svoboda Decl. ¶ 14, 15, and 16.

Uncontested.

31. Prosthetics are almost never possible as a remedy where most of the foot has been removed in a transmetatarsal amputation. But molded footwear can and does provide an effective remedy in such situations. Svoboda Decl. ¶ 14.

Contested, See Bick Affidavit ¶¶ 9-11; also McCloskey Declaration ¶¶ 22-49.

32. Where most of the foot has been removed, prescription footwear is necessary to protect what remains of the foot and permit safe ambulation.

Uncontested.

33. The state's policy of covering orthopedic footwear as part of a comprehensive treatment for diabetes will miss all those who have peripheral neuropathy as the result any other condition, and will miss all those with other non-diabetic conditions who nevertheless require on-going use of special shoes. Svoboda Decl. ¶ 15.

Contested, See Bick Affidavit ¶¶ 70-72.

Plaintiff Harry Davis

For purpose of expediency and economy, none of the alleged facts relating to the individual plaintiffs are contested (referring to ¶¶ 34-109).

34. Harry Davis is 60 years old and lives in Monroe County, New York. Declaration of Harry Davis, (Dkt. # 3-3, pp. 1-4), (hereinafter "Davis Decl.") ¶¶ 1, 2.

35. On March 15, 2001, Mr. Davis was admitted to Strong Memorial Hospital and diagnosed with bacterial meningitis. His illness was complicated by congestive heart failure, acute respiratory distress syndrome, toe necrosis, feet and hand ulceration, fever and rash. Davis Decl. ¶¶ 4, 5.

36. He underwent bilateral transmetatarsal amputation of the feet, close to the heel, on May 8, 2001, leaving him with stumps where he once had feet. Davis Decl. ¶ 5.

37. On June 8, 2001, Mr. Davis was transferred to Monroe Community Hospital for skilled nursing facility rehabilitation. He remained in the hospital until March 8, 2002, a full year after he was initially admitted for meningitis. Davis Decl. ¶¶ 6, 7.

38. While he was in the hospital, Mr. Davis was confined to a bed or had to use a wheelchair, and was unable to walk. Davis Decl. ¶ 11.

39. Mr. Davis first became eligible for SSDI and SSI while he was in the hospital for his meningitis. He became eligible for New York State Medicaid on the basis of his disability at the same time. Davis Decl. ¶ 9.

40. Mr. Davis remained in the hospital and in rehabilitation for a full year following the amputations of his feet. Davis Decl. ¶ 7.

41. Medicaid covered his hospitalization, operation, and rehabilitation. Davis Decl. ¶ 10.

42. Medicaid paid for the molded shoes Mr. Davis would need in order to walk. Davis Decl. ¶ 19.

43. Mr. Davis has been seen by Dr. Carlos M. Swanger, M.D., his primary care physician, since he was released from the hospital in 2002. Declaration of Carlos M. Swanger, M.D., (Dkt. # 3-3, pp. 13-14), (hereinafter "Swanger Decl.") ¶ 3.

44. Mr. Davis's orthopedic shoes allow him to walk, to move about in his home, to care for himself, and to maintain active engagement in his community. They also enable him to ride a bicycle, his primary means of transportation. Davis Decl. ¶ 21; Swanger Decl. ¶ 5.

45. Until 2011, Medicaid covered one pair of shoes a year for Mr. Davis. This is the only pair of shoes Mr. Davis owns, and he must wear them every day of the year. Davis Decl. ¶ 20.

46. Even with the molded shoes, Mr. Davis requires assistance to remain in his home in the community. A personal care aide comes to his home twice a week. Davis Decl. ¶ 22.

47. Prior to the challenged elimination of coverage for orthopedic shoes, Mr. Davis's shoes were last replaced in December 2010. Davis Decl. ¶ 24.

48. In December of 2011, when Mr. Davis went to have his shoes replaced, he was told by the supplier, Dr. John Jacobs of Feet First in Rochester, New York, that Medicaid no longer covered the shoes. Davis Decl. ¶ 26.

49. Mr. Davis received no notice from Defendant Shah denying coverage for his shoes. Davis Decl. ¶ 27.

50. Because Defendant Shah did not provide Mr. Davis with any notice of his denial, Mr. Davis was also not properly informed of the reason for the denial or the availability of exceptions under the new law and regulation. Defendant Shah also failed to inform Mr. Davis of his right to a fair hearing to challenge the denial. Davis Decl. ¶ 27.

51. After more than a year of use, the shoes were completely worn out. His amputated stumps had completely worn through the inner padding of his shoes and were wearing through the hard rubber sole from the inside. Davis Decl. ¶ 29.

52. The deterioration of his shoes has left him in such unbearable pain that he was no longer able to actively engage in the community and was forced to remain at home most of the time. Davis Dec. ¶¶ 29, 30.

53. Without the shoes, Mr. Davis would be required to use a wheelchair and would no longer be able to use the stairs to his apartment. He would also be unable to attend to activities of daily living in his own home as he does now. Mr. Davis would likely be forced to move out of his home and would require additional aide services. Davis Decl. ¶ 31; Swanger Decl. ¶ 13.

54. According to Dr. Swanger, Mr. Davis will face additional medical complications – as well as changes in his ability to remain in the community – if the shoes are not

replaced. Mr. Davis risks developing skin ruptures and additional infections. In his case, such complications would likely result in further amputations and possible institutionalization. Swanger Decl. ¶¶ 7-13.

Plaintiff Rita-Marie Geary

55. Plaintiff Rita-Marie Geary is 54 years old and lives in Monroe County. Declaration of Rita-Marie Geary, (Dkt. # 3-3, pp. 5-7), (hereinafter “Geary Decl.”) ¶ 1.

56. Ms. Geary is disabled and suffers from numerous health conditions: ankylosing spondylitis, psoriatic arthritis, TMJ, osteoarthritis, scoliosis, Raynaud’s syndrome, osteoporosis, fibromyalgia, Sjören’s syndrome, patellofemoral stress syndrome, and peripheral neuropathy. Geary Decl. ¶ 4; Declaration of David E. High, D.P.M., (Dkt. # 3-3, pp. 15-16), (hereinafter “High Decl.”) ¶ 3.

57. Ms. Geary is disabled and unable to work. Until recently, Ms. Geary received a combination of SSDI and SSI benefits. Her SSDI benefit has now risen above the SSI level so that she only receives SSDI in the amount of \$896 per month. Ms. Geary also receives Medicaid benefits based on her disability, and Medicare through her Social Security benefits. Geary Decl. ¶ 2, 3.

58. Ms. Geary suffers from peripheral neurophathy of unknown origin in her feet. High Decl. ¶ 3.

59. Her peripheral neuropathy impairs the proper functioning of her sensory and motor nerves and affects her ability to balance. High Decl. ¶ 4.

60. Because of her peripheral neuropathy, Ms. Geary needs specially prescribed open-toed shoes. According to her podiatrist, Dr. David E. High, P.D.M., without the

shoes, Ms. Geary risks further nerve damage in her feet, increased injury from falling, increased ulceration, and infection. High Decl. ¶ 5.

61. Medicaid has covered Ms. Geary's shoes since the late 1990s. Geary Decl. ¶ 6.

62. On December 27, 2011, Dr. High issued a new prescription for Ms. Geary's shoes. Geary Decl. ¶ 9.

63. Ms. Geary attempted to fill the prescription on January 3, 2012, at Foot Performance Center in Rochester, New York. Geary Decl. ¶ 10.

64. Foot Performance Center declined to fill the prescription, telling Ms. Geary that Medicaid no longer covered the cost of the shoes. Geary Decl. ¶ 11.

65. Foot Performance Center provided Ms. Geary with a printout of the computer screen image indicating that she was not eligible for coverage of the shoes. Geary Decl. ¶ 14.

66. Medicaid provided Ms. Geary with no notice about the elimination of coverage of orthopedic footwear in general and no notice of the decision to deny this request for coverage in particular. Geary Decl. ¶ 15.

67. Medicaid also has provided Ms. Geary with no notice of the new statutory limits on coverage of prescription footwear. She has been given no notice about the existence of exceptions to the new Medicaid policy and has not been notified of her right to a fair hearing on whether or not she meets one of the available exceptions. Geary Decl. ¶ 15.

Plaintiff Patty Poole

68. Plaintiff Patty Poole is 42 years old and lives in Broome County, New York.

Declaration of Patty Poole, (Dkt. # 3-3, pp. 8-10), (hereinafter "Poole Decl.") ¶¶ 1, 2.

69. Ms. Poole suffers from lymphedema, diabetes, depression, obstructive sleep apnea, hypertension, morbid obesity, hyperthyroidism, and hyperlipidemia. Poole Decl. ¶3; Declaration of Samuel M. Pejo, M.D., F.A.C.S., (Dkt. # 3-3, pp. 17-19) (hereinafter “Pejo Decl.”) ¶ 5; Declaration of Marita A. Florini and James R. Jewell, M.D., (hereinafter “Florini Decl.”), (Dkt. # 12-1), ¶ 8.

70. Because of her condition, Ms. Poole is unable to work and receives SSI benefits of \$785 per month. Ms. Poole also receives Medicaid benefits based on her disability. Poole Decl. ¶ 4.

71. Marita Florini is a certified nurse practitioner and has been Ms. Poole’s primary care practitioner for the past eighteen years. Florini Decl. ¶¶ 1-3, 7.

72. Ms. Poole’s lymphedema has caused severe swelling in her lower extremities. Poole Decl. ¶ 5; Pejo Decl. ¶ 5; Florini Decl. ¶ 8.

73. Her lymphedema has also caused recurrent cellulitis – skin infections that, left untreated, can be life-threatening. Pejo Decl. ¶ 21; Florini Decl. ¶ 9.

74. Early in 2011, Ms. Poole developed a cellulitic infection in her right leg that rapidly grew to a mass about a foot in diameter. Poole Decl. ¶ 6; Pejo Decl. ¶ 4; Florini Decl. ¶ 9.

75. On March 24, 2011, she was admitted to the hospital for intravenous antibiotic treatment to eliminate the infection prior to surgical removal of the mass. Poole Decl. ¶ 7; Pejo Decl. ¶ 8, 9; Florini Decl. ¶ 9.

76. On April 4, 2011, Dr. Samuel Pejo removed the large mass on the back of her right knee. Poole Decl. ¶ 8; Pejo Decl. ¶ 10; Florini Decl. ¶ 9.

77. She was discharged from the hospital on April 18, 2011. Poole Decl. ¶ 9; Pejo Decl. ¶ 11; Florini Decl. ¶ 9.

78. On April 22, 2011, Dr. Pejo prescribed compression stockings to maintain reduced limb volume in accordance with the current standard of care established by the International Society of Lymphology. Poole Decl. ¶ 10; Pejo Decl. ¶ 14-16.

79. Defendant's own publications recommend being professionally fitted for compression garments to treat lymphedema. Pamphlet on the Symptoms, Causes and Treatment of Lymphedema, New York State Department of Health, 2007:

<http://www.health.ny.gov/publications/0399.pdf>.

80. Following a prior authorization request, Ms. Poole received a letter from the New York State Department of Health dated June 20, 2011, denying coverage of compression stockings, citing the new law eliminating coverage of compression stockings. The letter made no mention of any exceptions, nor did it advise Ms. Poole of her right to a fair hearing. Poole Decl. ¶ 11.

81. After her surgery, Ms. Poole had to rely on alternatives to compression stockings to try to control the swelling in her legs as much as possible. She used two binders on her upper legs and wrapped her lower legs from toe to knee in bandages. The process of massaging her legs and applying her bandages took two hours every time they need to be reapplied. The binders fell off when she tried to walk. Eventually, the binders failed to remain in place when she is lying down. Poole Decl. ¶ 12; Pejo Decl. ¶ 18; Florini Decl. ¶¶ 16-18.

82. Lack of compression stockings caused the swelling in her legs to continue, and the swelling returned to pre-operation levels. Poole Decl. ¶ 13, Pejo Decl. ¶ 19; Florini Decl. ¶ 18. Lack of compression stockings also caused the lymphedema to spread to her abdomen. Florini Decl. ¶ 18.

83. The continued swelling and inadequate alternative treatments prevent Ms. Poole from engaging in virtually any activity and prevent her from effectively addressing the underlying issue of her morbid obesity. Poole Decl. ¶ 14.

84. The complications attributable to these alternate treatments and their failure to effectively treat her condition have rendered her virtually home-bound. Poole Decl. ¶¶ 14, 21.

85. In Dr. Pejo's assessment, the compression stockings are necessary to prevent a "major medical disaster." The compression stockings would prevent recurrent cellulitis, the return of the "tumor-like swelling," and ulceration of the skin due to stasis dermatitis. Pejo Decl. ¶ 21. Additionally, "Failure to treat her lymphedema with compression stockings could result in diabetic complications and poor outcomes that could include loss of an extremity." Florini Decl. ¶ 21.

86. Because of her obesity, Ms. Poole requires custom made compression stockings at a cost of roughly \$900. Poole Decl. ¶ 15.

87. Ms. Poole cannot afford to pay for the stockings out-of-pocket. Poole Decl. ¶ 16.

88. The lack of compression stockings has caused Ms. Poole physical and emotional harm. Her lymphedema has progressed for lack of adequate treatment, and her depression has worsened. Poole Decl. ¶ 21; Pejo Decl ¶ 19; Florini Decl. ¶¶ 18, 19.

89. Lack of compression stockings has also prevented her from engaging in the community; the inadequate alternate treatments have made it virtually impossible for her to leave her home. Poole Decl. ¶ 21.

90. "The costs associated with providing the compression stocking/garments necessary to control the swelling will be dwarfed by the costs of subsequent

hospitalizations and wound care treatments.” Florini Decl. ¶ 22. See also Pejo Decl. ¶ 22.

Plaintiff Roberta (Bobbi) Wallach

91. Bobbi Wallach is 51 years old and lives in Monroe County, New York.

Declaration of Roberta (Bobbi) Wallach, (Dkt. # 3-3, pp. 11-12), (hereinafter “Wallach Decl.”) ¶ 1.

92. Her primary care physician is Dr. Bahram Dowlatshahi, M.D., who has treated her for many years. Declaration of Bahram Dowlatshahi, (Dkt. # 3-3, pp. 20-21) (hereinafter “Dowlatshahi Decl.”) ¶ 4.

93. Ms. Wallach has Multiple Sclerosis with paraplegia of the legs and monoplegia of her left arm. Wallach Decl. ¶ 2; Dowlatshahi Decl. ¶¶ 5-7.

94. Because her legs are paralyzed, she suffers from edema, which causes excess fluids to collect in her lower extremities. Dr. Dowlatshahi Decl. ¶ 7; Wallach Decl. ¶ 3. Ms. Wallach is therefore prone to develop deep venous thrombophlebitis and pulmonary embolism. These conditions can be fatal. Dr. Dowlatshahi Decl. ¶ 8; Wallach Decl. ¶ 4.

95. Ms. Wallach is disabled and unable to work. She receives SSDI benefits and also receives Medicaid based on her disability. Her Social Security benefits also entitle her to Medicare. Wallach Decl. ¶ 6.

96. Ms. Wallach was first diagnosed with multiple sclerosis over thirty years ago. Her condition has gradually deteriorated over the years. In her current condition, she retains the use only of her right arm and her mouth. Wallach Decl. ¶ 2; Dowlatshahi Decl. ¶ 5.

97. Because of the severity of her condition, Ms. Wallach entered a nursing home in 2007. Wallach Decl. ¶ 7.

98. Ms. Wallach first became eligible for Medicaid when she moved into the nursing home. Wallach Decl. ¶ 8.

99. Even at that time, the paraplegia of her lower extremities necessitated the use of compression stockings to prevent the potentially fatal conditions of deep venous thrombophlebitis and pulmonary embolism. Wallach Decl. ¶ 9.

100. Medicaid has covered her compression stockings ever since Medicaid began covering Ms. Wallach's medical care in 2007. Wallach Decl. ¶ 9.

101. Ms. Wallach remained in the nursing home until April 2011, when she was able to put enough supports in place for her care that would allow her to live in the community. She moved into her own apartment on April 1, 2011, the same day Defendant's policy denying coverage of compression stockings went into effect. Wallach Decl. ¶ 10. See *Provider Update for Pharmacy and DME Providers* (May 25, 2011): https://www.emedny.org/providermanuals/communications/Compression_Stockings_No_tice_revised_20110520.pdf; and *The New York State Medicaid Update*, vol. 27, no. 6 (May 2011):

http://www.health.ny.gov/health_care/Medicaid/program/update/2011/may2011mu.pdf.

102. Ms. Wallach's compression stockings were last replaced by Medicaid prior to April 2011. Wallach Decl. ¶ 11.

103. Ms. Wallach has tried to make do with her old compression stockings as long as possible, even when they could no longer treat her condition effectively. Wallach Decl. ¶ 11.

104. Without replacements for her compression stockings, Ms. Wallach risks hospitalization or death from potentially life-threatening conditions. Such hospitalizations would also place her at risk of returning to the nursing home. Dowlatshahi Decl. ¶¶ 10, 12.

105. Dr. Dowlatshahi issued a new prescription for Ms. Wallach's compression stockings in December 2011. Wallach Decl. ¶ 12.

106. When Ms. Wallach went to order the compression stockings, she was told that Medicaid would no longer cover them, and she would have to pay for them herself. Wallach Decl. ¶ 13; Dowlatshahi Decl. ¶ 11.

107. Medicaid provided Ms. Wallach with no notice about the elimination of coverage of compression stockings in general, and no notice of the decision to deny this request for coverage in particular. She has been given no notice about the existence of exceptions to the new Medicaid policy and has not been notified of her right to a fair hearing on whether or not she meets one of the available exceptions. Wallach Decl. ¶ 14.

108. Because of the high risk of serious harm she would face without the stockings, Ms. Wallach ordered the stockings anyway. Wallach Decl. ¶ 15.

109. She purchased them herself at the end of January 2012 for a total cost of \$13.50. Wallach Decl. ¶ 15.

Dated: November 7, 2012
Rochester, New York

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Defendant Commissioner Shah

/s/ J. Richard Benitez _____

J. RICHARD BENITEZ

Assistant Attorney General, of Counsel

NYS Office of the Attorney General

144 Exchange Boulevard, Suite 200

Rochester, New York 14614

Telephone: (585) 546-7430

CERTIFICATE OF SERVICE

I certify that on November 7, 2012, I electronically filed the foregoing Rule 56 Statement, with the Clerk of the District Court using CM/ECF system, which sent notification of such filing to the following CM/ECF participant:

- Bryan D. Hetherington bhetherington@empirejustice.org, gcastro@empirejustice.org
- Jonathan Feldman jfeldman@empirejustice.org
- Geoffrey A. Hale ghale@empirejustice.org

And, I hereby certify that I have mailed, by the United States Postal Service, the document to the following non-CM/ECF participant(s):

1. N/A

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Defendant Commissioner Shah

s/J. Richard Benitez
J. RICHARD BENITEZ
Assistant Attorney General, of Counsel
NYS Office of the Attorney General
144 Exchange Boulevard, Suite 200
Rochester, New York 14614
Telephone: (585) 546-7430
Richard.Benitez@ag.ny.gov