Cause No. D-1-GN-20-004465

Plaintiffs MELISSA BEAM, individually and as next friend of HUNTER BEAM, a minor; JILL BRADSHAW, individually and as next friend of ELISE BRADSHAW, a minor; SUSAN BUREK, individually and as next friend of PRIYA NANDITA RANA; CAROLINE CHEEVERS, individually and as next friend of TYLER AND JUSTIN CHEEVERS, minors; TERRI ERWIN, individually and as next friend of CAYHEN ERWIN, a minor; BRANDI FLYNN, individually and as next friend of BRYLIE FLYNN, a minor; REBECCA GALINSKY, individually and as next friend of SAMUEL GALINSKY, a minor; ANA GARCIA, individually and as next friend of ALISSA SANDOVAL, a minor; SHELBY JONES, individually and as next friend of JEAN JONES, a minor; SHONDA KINCAID, individually and as next friend of KOEN KINCAID, a minor; AMY KRELLER-KOCHIS, individually and as next friend of ALINA, MALACHI, JACOB, AND BENJAMIN KOCHIS, minors; SHANNA MARTIN, individually and as next friend of DYLAN MARTIN, a minor; CAYSI MCDONALD, individually and as next friend of MCKINELY MCDONALD, a minor; MARY OCAMPO, individually and as next friend of ANGELICA OCAMPO, a minor; ARLENE PHILLIPS, individually and as next friend of LAURYL PHILLIPS, a minor; MONETTE SMITH, individually and as next friend of CHRISTIAN SMITH; and other Medicaid recipients with complex medical needs who have an established relationship with a specialty provider,	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	**TRAVIS COUNTY, TEXAS**
v.	§	
CECILE ERWIN YOUNG, in her Official Capacity as the Commissioner of the Texas Health and Human Services Commission;	§	

TEXAS HEALTH AND HUMAN SERVICES COMMISSION; AETNA BETTER HEALTH OF TEXAS, INC.; AMERIGROUP; BLUECROSS & BLUESHIELD OF TEXAS LLC; CHILDREN'S MEDICAL CENTER HEALTH PLAN; COOK CHILDREN'S HEALTH PLAN; DRISCOLL CHILDREN'S HEALTH PLAN; SUPERIOR HEALTH PLAN; and TEXAS CHILDREN'S HEALTH PLAN, INC.	§	
Defendants,	§	459TH **JUDICIAL DISTRICT**

PLAINTIFFS' ORIGINAL PETITION, AND *VERIFIED* APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs and other Medicaid recipients with complex medical needs who have an established relationship with a specialty provider file this Original Petition, and *Verified* Application for a Temporary Restraining Order, Temporary Injunction, and Permanent Injunction complaining of Defendants Aetna Better Health of Texas, Inc.; Amerigroup; BlueCross & BlueShield of Texas LLC; Children's Medical Center Health Plan; Cook Children's Health Plan; Driscoll Children's Health Plan; Superior Health Plan; and Texas Children's Health Plan, Inc.

For cause of action, Plaintiffs respectfully would show the following:

I. INTRODUCTION

1. Senate Bill 1207, codified as Tex. Gov't Code § 533.038(g), was signed by Governor Abbott on June 10, 2019 and went into effect September 1, 2019. It provides that the Texas Health & Human Services Commission ("THHSC") "*shall* develop a clear and easy process … that allows a recipient with complex medical needs who has established a relationship with a specialty provider to continue receiving care from that provider." Tex. Gov't Code § 533.038(g)

(emphasis added). In other words, the Legislature *guaranteed* the right of Texas Medicaid recipients with complex medical needs to have *continuity of care with their established specialty providers*, regardless of whether such providers are in-network or out-of-network with the recipient's Medicaid managed care organization ("MCO").

2. Research has shown that continuity of care generally leads to better health outcomes, higher satisfaction rates, and better cost-effectiveness. More than that, continuity of care is *essential* for Medicaid recipients with complex medical needs. Such patients often have lengthy medical histories and unique medical requirements, making it difficult for an unfamiliar provider to quickly get up to speed on their care or for the unfamiliar provider to integrate his or her care with that of the patient's other specialty providers (which are often numerous and often work together in teams). Many such patients have rare conditions requiring super-specialized care or live in rural areas far from a center of excellence or even a major medical center. This can make it impossible for them to find adequate providers who are close to home, in-network with their MCO, *and* experienced in the right specialty or with their unique condition. Once an individual with complex medical needs establishes a relationship with a specialty provider that they know and trust, that relationship becomes irreplaceable and often last years (unless interrupted because of a bureaucratic MCO provider network dilemma).

3. The Legislature charged THHSC with developing a "clear and easy process" to allow for such continuity of care for those who fall within the protections of section 533.038(g). Yet, more than *fourteen months* since Governor Abbott signed the bill into law and *almost a full year* since the law became effective, THHSC *still* has not developed such a process, or even issued any guidance to the MCOs regarding the law's continuity of care requirement. As a result, many of the MCOs around the State of Texas, including the MCO Defendants named in this action, are

blatantly refusing to approve, or threatening not to approve, their members' out-of-network care by specialty providers with whom the members have an established relationship. This contravenes the clear intent of section 533.038(g) to establish an *absolute right* to continuity of care for Medicaid recipients with complex medical needs.

4. This action is filed on behalf of 19 medically-fragile Medicaid recipients—all children except for one—whose established relationships with their specialty providers are being threatened or were recently terminated by their MCO, and other Medicaid recipients with complex medical needs who have an established relationship with a specialty provider. Plaintiffs seek injunctive relief, including a mandatory temporary restraining order, protecting their right to continuity of care with their established specialty providers pursuant to section 533.038(g). Plaintiffs further seek a declaration of their rights under section 533.038(g), and the rights of all Medicaid recipients with complex medical needs who have an established relationship with a specialty provider.

II.
DISCOVERY CONTROL PLAN

5. Plaintiffs intend to conduct discovery pursuant to Level 3 of Rule 190.3 of the Texas Rules of Civil Procedure. Plaintiffs therefore request that the Court enter an appropriate Docket Control Order.

III.
PARTIES

6. Plaintiff Melissa Beam is the mother and legal guardian of minor Plaintiff Hunter Beam. The Beam Family resides in Anna, Texas.

7. Plaintiff Jill Bradshaw is the mother and legal guardian of minor Plaintiff Elise Bradshaw. The Bradshaw Family resides in Austin, Texas.

8. Plaintiff Susan Burek is the mother and legal guardian of Plaintiff Priya Nandita Rana. The Burek Family resides in Austin, Texas.

9. Plaintiff Caroline Cheevers is the mother and legal guardian of minor Plaintiffs Tyler and Justin Cheevers. The Cheevers Family resides in Houston, Texas.

10. Plaintiff Terri Erwin is the mother and legal guardian of minor Plaintiff Cayhen Erwin. The Erwin Family resides in Carrollton, Texas.

11. Plaintiff Brandi Flynn is the mother and legal guardian of minor Plaintiff Brylie Flynn. The Flynn Family resides in Howe, Texas.

12. Plaintiff Rebecca Galinsky is the mother and legal guardian of minor Plaintiff Samuel Galinsky. The Galinsky Family resides in Arlington, Texas.

13. Plaintiff Ana Garcia is the mother and legal guardian of minor Plaintiff Alissa Sandoval. Alissa lives with her mother in Edinburgh, Texas.

14. Plaintiff Shelby Jones is the mother and legal guardian of minor Plaintiff Jean Jones. The Jones Family resides in Gilmer, Texas.

15. Plaintiff Shonda Kincaid is the mother and legal guardian of minor Plaintiff Koen Kincaid. The Kincaid Family resides in Kilgore, Texas.

16. Plaintiff Amy Kreller-Kochis is the mother and legal guardian of minor Plaintiffs Alina, Malachi, Jacob, and Benjamin Kochis. The Kochis Family resides in Lubbock, Texas.

17. Plaintiff Shanna Martin is the mother and legal guardian of minor Plaintiff Dylan Martin. The Martin Family resides in Cado Mills, Texas.

18. Plaintiff Caysi McDonald is the mother and legal guardian of minor Plaintiff McKinely McDonald. The McDonald Family resides in Whitehouse, Texas.

19. Plaintiff Mary Ocampo is the mother and legal guardian of minor Plaintiff Angelica Ocampo. The Ocampo family resides in Flower Mound, Texas.

20. Plaintiff Arlene Phillips is the grandmother and legal guardian of minor Plaintiff Lauryl Phillips. The Phillips Family resides in Texas.

21. Plaintiff Monette Smith is the mother and legal guardian of Plaintiff Christian Smith. The Smith Family resides in Round Rock, Texas.

22. Defendant Cecile Erwin Young is the Commissioner of the Texas Health and Human Services Commission. She is being sued in her official capacity only. Ms. Young may be served at 4900 N. Lamar Boulevard, Austin, Texas 78751.

23. Defendant Texas Health and Human Services Commission is an agency within the government of the State of Texas. It may be served through its Commissioner, Cecile Erwin Young, at its headquarters located at 4900 N. Lamar Boulevard, Austin, Texas 78751.

24. Defendant Aetna Better Health of Texas, Inc. ("Aetna") is a Medicaid MCO and a domestic for-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

25. Defendant Amerigroup Texas, Inc. ("Amerigroup") is a Medicaid MCO and a domestic for-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

26. Defendant BlueCross & BlueShield of Texas LLC ("BCBS") is a Medicaid MCO and a domestic limited liability company that is contracted with THHSC to administer healthcare

for Texas Medicaid plans. It may be served by serving its registered agent for service of process, Legalinc Corporate Services Inc., 10601 Clarence Drive, Suite 250, Frisco, Texas 75033.

27. Defendant Children's Medical Center Health Plan ("Children's Health Plan") is a Medicaid MCO and a domestic non-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

28. Defendant Cook Children's Health Plan ("Cook Children's") is a Medicaid MCO and a domestic non-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, Rick W. Merrill, 901 Seventh Avenue, Fort Worth, Texas 76104.

29. Defendant Driscoll Children's Health Plan ("Driscoll") is a Medicaid MCO and a domestic non-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, Mary D. Peterson, 615 N. Upper Broadway Street, Suite 1621, Corpus Christi, Texas 78401-0764.

30. Defendant Superior Health Plan, Inc. ("Superior") is a Medicaid MCO and a domestic for-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

31. Defendant Texas Children's Health Plan, Inc. ("TCHP") is a Medicaid MCO and a domestic non-profit corporation that is contracted with THHSC to administer healthcare for Texas Medicaid plans. It may be served by serving its registered agent for service of process, Lance A. Lightfoot, 6641 Main Street, Suite E520, Houston, Texas 77030.

IV.
JURISDICTION & VENUE

32. This Court has jurisdiction over this matter because the damages are within the jurisdictional limits of this Court. Pursuant to Texas Rule of Civil Procedure 47(c)(1), Plaintiffs seek monetary relief of $100,000 or less and non-monetary relief.

33. Venue is proper in Travis County under Texas Civil Practice and Remedies Code section 15.001 *et seq.* because it is the county in which all or a substantial part of the events giving rise to the claim occurred and because THHSC is headquartered there.

34. This Court has jurisdiction over each of the Defendants because Defendants purposefully availed themselves of the benefits of conducting business in Texas and Plaintiffs' claims arise from Defendants' purposeful acts or omissions in this State. Moreover, each of the Defendants is a Texas resident and/or essentially at home in Texas.

35. This Court has jurisdiction over THHSC to hear this action as declaratory judgment actions do not implicate the doctrine of sovereign immunity in these circumstances. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *see also Sweeney v. Jefferson*, 212 S.W.3d 556 (Tex. App.—Austin July 28, 2006, no pet.) (opinion). "Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority." *IT-Davy*, 74 S.W.3d at 855. A court has jurisdiction to hear a declaratory judgment action to determine whether an agency exceeded its statutory authority, to obtain a declaration of a party's rights under a statute, and to determine whether an agency's action was unconstitutional. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 100 S.W.3d 510, 515-16 (Tex. App.—Austin 2003, pet. denied). "This is because suits to compel state officers to act within their official capacity do not attempt to subject the State to liability" and are, therefore, "not 'suits against the State'." *Id.; see also Rylander v. Caldwell*, 23 S.W.3d 132, 135-37 (Tex. App.—Austin 2000, no

pet.). In *Hawkins v. El Paso First Health Plans, Inc.*, the Austin Court of Appeals held that the plaintiffs had standing to pursue declarations regarding THHSC's duties pursuant to an applicable statute. 214 S.W.3d 709, 716-18 (Tex. App.—Austin 2007) (finding that the declaratory judgment action "is not a suit to impose liability against the State.").

V.
BACKGROUND

A. Texas Medicaid Statutory and Regulatory Framework

36. Medicaid is a cooperative federal-state program that provides health care to needy individuals. *See generally* 42 U.S.C. §§ 1396-1396w (Grants to States for Medical Assistance Programs). While federal law establishes Medicaid's basic parameters, each state decides the nature and scope of its Medicaid program and submits a State plan describing its program to the federal Center for Medicare and Medicaid Services, which must approve the plan and any amendments. *See* 42 U.S.C. §1396a(a), (b); 42 C.F.R. § 430.10. The federal government agrees to pay a specified percentage of a state's expenditures for covered services provided by the state under an approved State plan. *See* 42 U.S.C. §§ 1396b(a), 1396c, 1396d(b). In Texas, THHSC is the agency designated to administer federal medical assistance programs, including Medicaid. *See* Tex. Hum. Res. Code § 32.021(a); Tex. Gov't Code § 531.021(a).

37. Similar to private health insurance, the Texas Medicaid program compensates healthcare providers—*e.g.*, doctors, nurses, dentists, hospitals, nursing homes, and durable medical equipment and supplies companies—for services and supplies they provide to Medicaid recipients. In its inception, the Texas Medicaid program compensated providers under a fee-for-services system under which providers were paid a sum for each unit of service they provided to Medicaid recipients. Since 1991, however, the Legislature and THHSC have moved increasingly to a "managed care" model for delivering services and compensating providers. *See* Act of Aug.

9, 1991, 72d Leg., 1st C.S., ch. 15, § 5.02, 1991 Tex. Gen. Laws 281 (creating a managed-care pilot program). Under Medicaid managed care, simply described, THHSC contracts with third parties, known as MCOs, to administer a "managed care plan" whereby recipients can obtain services from a "network" of healthcare providers who have contracted with the MCO or its agents to provide services to them. An MCO is an organization authorized to arrange for or provide a managed care plan. Tex. Gov't Code § 533.001(4). A managed care plan, in turn, is a plan that provides, arranges for, pays for, or reimburses the cost of healthcare services. *Id.* § 533.001(5). THHSC pays MCOs capped or capitated rates based on the number of recipients who have enrolled in the "plan." The MCOs or their agents, in turn, contract with healthcare providers to serve patients enrolled in the plan, and exercise a degree of control over the nature and extent of utilization and compensation of services.

B. Senate Bill 1207, Codified as Texas Gov't Code § 533.038(g), Mandates that Texas Medicaid Recipients with Complex Medical Needs Have a Right to Continuity of Care with Their Established Specialty Providers.

38. Texas Government Code § 533.038(g) provides that THHSC "shall develop a clear and easy process, to be implemented through a contract, that allows a recipient with complex medical needs who has established a relationship with a specialty provider to continue receiving care from that provider." Tex. Gov't Code § 533.038(g). This provision was enacted into law under Senate Bill 1207, which Governor Abbott signed effective September 1, 2019.

39. Put simply, section 533.038(g) requires THHSC, and the Medicaid MCO with which a Medicaid recipient with complex medical needs is enrolled, to allow the recipient to continue receiving care from a specialty provider with whom they have an established relationship—period. Senator Charles Perry, District 28, the primary author of Senate Bill 1207, confirmed in a letter he wrote to the former Commissioner of THHSC, Courtney Phillips, on

December 11, 2019 that section 533.038(g) is written in "clear and unambiguous terms." Exhibit A, Senator Perry Letter.

40. Thus, it should not matter whether the recipient's established specialty provider is not or later ceases to be in the recipient's MCO's provider network; recipients with complex medical needs who fall within the protections of the statute have a right to continuity of care with that provider. It is up to THHSC and the recipient's MCO to figure out how to allow that to occur. Representative Matt Krause, District 93, made this point very clearly in a letter he wrote to the current Commissioner of THHSC, Cecile Erwin Young, on July 29, 2020:

> The intent of this subsection is to ensure that patients and their families have an *absolute right to stay with the provider of their choice* and HHSC must promulgate rules to protect this important right.

Exhibit B, Representative Krause Letter (emphasis added).

41. Senator Perry further explained that the "overall intent" of Senate Bill 1207 "was to ensure continuity of care and services for medically fragile children whose cases are highly complex and specialized. We sought to achieve this important goal … ensuring that the network of service and equipment providers was always adequate to meet the needs of the medically fragile Medicaid eligible population of children in Texas." Exhibit A. Referencing section 533.038(g) specifically, Senator Perry urged that "it is so important that the Health and Human Services Commission quickly" develop the mandated process to "ensure that none of these children experience a gap in the receipt of their services or equipment from a provider they know and trust based on their existing relationship." *Id.*

42. Representative Tan Parker, District 63, one of Senate Bill 1207's primary sponsors, wrote a similar letter to former Commissioner Phillips on December 18, 2019. *See* Exhibit C, Representative Parker Letter. He described Senate Bill 1207 as "an important public policy

measure to ensure the continuity of care and services for Medicaid eligible medically fragile children in our state." *Id.* Representative Parker explained that "[d]ue to their highly complex and specialized needs, it was paramount that the Texas Legislature take decisive action to make certain that the network of services and equipment providers is sufficient to preserve their lives." *Id.* As Representative Parker noted:

> It is critical that none of these families have to face unnecessary hardships and risk their care by having a gap in services or equipment from a provider that they have an existing relationship with and trust to care for their child.

Id.

C. THHSC and the Texas Medicaid MCOs Are Not Following the Legislature's Clear Mandate.

43. Despite the Legislature's clear, unambiguous mandate in section 533.038(g) that THHSC "*shall develop* a clear and easy process … that allows a recipient with complex medical needs who has established a relationship with a specialty provider to continue receiving care from that provider," THHSC still has not developed such a process. The statute was signed by Governor Abbott more than *fourteen months ago* and enacted into law *almost a full year ago*. THHSC's lack of action is inexcusable.

44. Although the language of the bill expressly permits Medicaid recipients with complex medical needs, like Plaintiffs, to have continuity of care with their established specialty providers, several of the MCOs have taken the position that they cannot implement section 533.038(g) until THHSC provides guidance. In other words, the MCOs are wrongfully capitalizing on the delay in THHSC's guidance, at the expense of the Medicaid recipients with complex medical needs that they are entrusted to serve.

D. THHSC's Lack of Guidance and the Medicaid MCOs' Refusal To Follow the Law Are Unfairly Punishing Texas Medicaid Recipients with Complex Medical Needs Who Are Supposed To Be Protected.

45. Plaintiffs are a group of Medicaid recipients with complex medical needs who have an established relationship with a specialty provider that was terminated or that is being threatened due to their MCO's refusal to pay for such care. For Medicaid recipients, like Plaintiffs, who have complex medical needs requiring regular, high-acuity care, maintaining a relationship with a trusted provider who is familiar with their condition and individual needs is *critically important* to ensuring that they receive the best possible care.

Alissa Sandoval, Age 6

46. Alissa Sandoval underwent a heart transplant at Children's Medical Center of Dallas ("Dallas Children's") at only five months of age. Exhibit D, Declaration of Ana Garcia. She requires regular follow-up care with her transplant team at Dallas Children's, at least once every three months. *Id.* She also sees an ear, nose, and throat ("ENT") specialist affiliated with Dallas Children's due to her complex respiratory problems. *Id.*

47. On March 2nd, Alissa and her mother moved back to Edinburgh, in far south Texas, where Alissa was born. *Id.* When this happened, Alissa was required to switch MCOs from Amerigroup to Driscoll. *Id.* Alissa's transplant team and ENT at Dallas Children's are no longer in-network with her MCO. *Id.* Alissa's new MCO, Driscoll, has repeatedly refused Alissa's requests to have her ongoing care with the Dallas Children's heart transplant team and ENT covered. *Id.* As a result, Alissa is months overdue to see her specialty providers. *Id.* *This is precisely the scenario that section 533.038(g) was designed to prevent.*

48. The only other two pediatric transplant teams in the *entire State of Texas* that accept Medicaid patients are located at Dell Children's Medical Center of Central Texas ("Dell

Children's") in Austin and at Texas Children's Hospital ("TCH") in Houston. *Id.* The Dell Children's team is not in-network with Driscoll either. *Id.* The TCH team is in-network. *Id.* However, Alissa's mother wants her daughter to be able to continue seeing her transplant team at Dallas Children's, with whom she has an established relationship spanning almost *six years*, because that is what she believes is best for her daughter's care.[1] *Id.*

Hunter Beam, Age 4

49. Hunter Beam was born with a cancerous tumor in his neck, which damaged his trachea. Exhibit E, Declaration of Melissa Beam. As a result, he depends on a ventilator to deliver oxygen to his lungs through a tracheostomy tube. *Id.* He receives enteral nutrition through a gastrostomy tube. *Id.* Hunter is also autistic with high anxiety, and he has an immune deficiency and reflux that causes micro aspirations into his lungs. *Id.*

50. Hunter sees approximately seven or eight different specialists for his various conditions. *Id.* Most of the specialists are affiliated with the Children's Health Care Network in Dallas. *Id.* Hunter has seen many of these specialists since he was born. *Id.*

[1] Moreover, Alissa's mother has a good reason not to want to take her daughter to TCH for treatment. *Id.* When Alissa was born in Edinburgh, she was immediately flown on a Life Flight helicopter to TCH due to severe congenital heart defects, GI issues, and other complications. *Id.* The providers at TCH refused Alissa treatment, contending that they could not do anything to help her. *Id.* They recommended that Alissa's family remove her from life support. *Id.* Alissa's family refused. *Id.* Eventually, TCH's "ethics" committee gave Alissa's family ten days to consent to having her life support removed or they threatened to obtain a court order to do so forcibly. *Id.* Alissa's family successfully obtained a temporary restraining order against TCH to prevent this from happening. *Id.* Alissa's family also had to file a complaint against a TCH heart surgeon who they believed treated them unprofessionally and threatened them. *Id.* Thankfully, while the TRO was pending, Alissa was accepted for treatment at Dallas Children's. *Id.* The surgeons there saved Alissa's life. *Id.* She is now six years old and living a meaningful life. *Id.*

51. Until February, Hunter lived in Grayson County with his family. *Id.* Hunter was enrolled with the UHCCP MCO. *Id.* Hunter's specialists with the Children's Health Care Network were in-network with UHCCP. *Id.*

52. Several months ago, however, Hunter's mother received a call from a UHCCP representative informing her that the entire Children's Health Care Network would no longer be in-network with UHCCP. *Id.* As a result, UHCCP would no longer cover Hunter's care with his specialists, even though he has an established relationship with each provider spanning several years. *Id.* Hunter's mother was told that she had no choice but to transition Hunter to all new specialists in UHCCP's network. *Id.* This was no easy task. *Id.*

53. After performing hours of research regarding specialists in UHCCP's network, Hunter's parents began transitioning Hunter's care to providers affiliated with Cook Children's in Fort Worth, which is in-network with UHCCP. *Id.* However, several of the specialists, including a pediatrician and a GI doctor, refused to accept Hunter as a patient due to his lengthy, complex medical history with which they were unfamiliar. *Id.* Eventually, Hunter's parents realized that it was going to be impossible to find adequate replacement specialists that were both in-network with UHCCP and willing to accept Hunter as a patient. *Id.*

54. Hunter qualifies for 24/7 home nursing care. *Id.* While Hunter's family lived in Grayson County, however, the in-network home health agency they were using did not have enough nurses in their area to provide Hunter with 24/7 nursing care. *Id.* Hunter's family typically only received about 40% of the home nursing care for which Hunter qualifies. *Id.* Hunter's mother personally called every home health agency in UHCCP's provider network, and all of them told her that there would be similar staffing issues if she were to switch Hunter's care to them. *Id.* After much research, Hunter's mother found an out-of-network home health agency that had the capacity

to provide full 24/7 home nursing care to Hunter. *Id.* However, UHCCP would not approve Hunter's care with that agency because it was out-of-network. *Id.*

55. As a result of all of the issues faced with UHCCP, Hunter's parents finally decided to move to neighboring Collin County, just so Hunter could enroll with the Amerigroup managed care organization (which does not cover residents of Grayson County). *Id.* They moved in February. *Id.* To do so, Hunter's family had to terminate their lease without proper notice. *Id.* Hunter's specialists with the Children's Health Care Network are in-network with Amerigroup, as is the home health agency that UHCCP refused to approve. *Id.*

56. Once Hunter's parents switched him to Amerigroup, however, the home infusions that Hunter was receiving for his immune deficiency from Diplomat Pharmacy ("Diplomat") were no longer covered by his managed care organization because Diplomat is not in-network with Amerigroup. *Id.* Amerigroup refused to cover Hunter's infusions from Diplomat, even though Hunter has been a Diplomat patient for the past three years, and the pharmacists there are familiar with Hunter's condition. *Id.* Amerigroup forced Hunter's mother to move Hunter to IngenioRx Pharmacy, an in-network pharmacy. *Id.* Because of the bureaucracy involved in making this transition, Hunter missed one of his regular infusions. *Id.*

57. Just recently, Hunter's mother has heard from Hunter's case workers at Children's Health Care Network and from other moms of kids with complex medical needs that Children's Heath Care Network may be leaving the Amerigroup provider network soon. *Id.* If this happen, they will be forced to try to transition Hunter's care to new specialists or move *again*—unless, of course, section 533.038(g) is enforced as intended, allowing Hunter to continue seeing his specialty providers with whom he has an established relationship. *Id.* Disrupting Hunter's routine

by changing schools, therapists, etc. in February caused Hunter sever anxiety, due to his autism. *Id.*

58. Forcing the family of a Medicaid recipient with complex medical needs to *move* just so they can maintain an established relationship with a specialty provider is wrong. Section 533.038(g) was specifically aimed at protecting such families from having to take such drastic measures to get the care they so badly need and deserve.

Jacob and Benjamin Kochis, Age 5; Alina Kochis, Age 8; and Malachi Kochis, Age 7

59. Jacob and Benjamin Kochis are twin boys who were fostered and adopted by Amy Kreller-Kochis and her husband from the time the boys left the NICU after being born prematurely with complex medical needs. Exhibit F, Declaration of Amy Kreller-Kochis. After repeated denials of medically necessary home nursing and DMEPOS supplies by their former MCO, Superior, the twins' mother recently made the decision to switch them to Amerigroup, the only other STAR Kids MCO option in Lubbock. *Id.*

60. Once Jacob and Benjamin are on Amerigroup effective September 1st, however, their developmental pediatrician with whom they have had an established relationship since they were 23 months old will no longer be in-network with their MCO. *Id.* Amerigroup has already indicated that it will not cover the twins' visits to the developmental pediatrician. *Id.*

61. The Kochises' other kids, Alina Kochis, 8, and Malachi Kochis, 7, were also fostered and adopted by the Kochises. *Id.* Alina and Malachi have been seeing the same developmental pediatrician as Jacob and Benjamin for the past two and a half years. *Id.* Alina and Malachi are already with Amerigroup, which does not pay for their developmental pediatrician visits, necessitating that their mother pay out-of-pocket for such visits. *Id.*

62. Pursuant to section 533.038(g), the Kochis children have a right to continuity of care with their developmental pediatrician, and with all of their other specialty providers with whom they have established a relationship.

Elise Bradshaw, Age 7

63. Elise Bradshaw has CHARGE syndrome, a rare condition caused by a genetic disorder that has caused Elise severe hearing, vision, kidney, and heart issues. Exhibit G, Declaration of Robin Bradshaw. Elise must regularly see her pediatrician and also requires several types of specialty medical care providers, including a pediatric neurologist. *Id.* When Elise's parents selected Superior as their MCO, they were told that their current regular pediatrician would be in-network. *Id.* Once Elise was enrolled, however, Superior informed Elise's parents that their pediatrician was actually not in-network. *Id.*

64. Elise's parents switched Elise's MCO *again* to BlueCross and BlueShield of Texas. *Id.* Elise's parents have received several letters from their pediatric neurologist and other providers of care to Elise stating that their services may soon be taken out-of-network, causing additional stress, given that Elise relies on these services for life-sustaining care. *Id.*

Tyler Cheevers, Age 12, and Justin Cheevers, Age 10

65. Tyler and Justin, both adopted, are enrolled with the UHCCP MCO. Exhibit H, Declaration of Caroline Cheevers.

66. Tyler has a slew of complex medical needs. *Id.* Among other things, he is a survivor of shaken baby syndrome. *Id.* He has Lennox-Gastaut syndrome ("LGS"), a complex, rare, and severe childhood-onset epilepsy. *Id.* It is characterized by multiple and concurrent seizure types and cognitive dysfunction. *Id.* He requires IV anti-seizure medication and IV nutrition, both of

which he receives through a central line. *Id.* Tyler is also tracheostomy- and ventilator-dependent. *Id.*

67. For more than five and a half years, Coram Infusion Pharmacy ("Coram"), a specialty pharmacy, has supplied Tyler's IV medications and nutrition. *Id.* Tyler and his parents have a great relationship with Coram, and they know and trust the providers there. *Id.* Likewise, the providers at Coram know Tyler, and understand his unique medical history and needs. *Id.*

68. When the managed care system was implemented in Texas, UHCCP did not contract with Coram. *Id.* As a result, Tyler's family was told that Tyler could no longer have his prescriptions filled at Coram. *Id.* Tyler's mother applied for a single case agreement to allow Tyler to continue having his prescriptions filled at Coram, but that application initially was denied by UHCCP. *Id.* There was no in-network pharmacy that could supply all of Tyler's medications and nutrition, so Tyler's family was forced to work with three different in-network pharmacies. *Id.* This added unnecessary complications and inconvenience to Tyler's already-complicated care. *Id.*

69. In June 2018 Tyler's mother was asked to testify before a Texas Senate committee regarding her experiences with the Texas Medicaid managed care system. *Id.* Ironically, the same day that she testified in Austin, Tyler's single case agreement was approved. *Id.* Since July of 2018, Tyler's prescriptions filled by Coram have been covered by UHCCP pursuant to the single case agreement. *Id.*

70. However, twice this year, UHCCP denied coverage of Tyler's prescriptions from Coram, and attempted to cancel the single case agreement without notifying Tyler's mother. *Id.* The last time this happened was in June when Tyler was about to be discharged from the hospital following a lengthy admission. *Id.* UHCCP's actions delayed Tyler's discharge from the hospital,

because it was not safe for him to leave the hospital without having the IV medications and nutrition that he requires. *Id.*

71. Justin Cheevers has a sleep disorder. *Id.* He used to regularly visit the same dual-certified pulmonology and sleep medicine specialist, who, until last September, was in-network with UHCCP. *Id.* In September, Justin's specialist was unable to renegotiate his provider agreement with UHCCP, and thus was forced to leave UHCCP's provider network. *Id.* As a result, Justin's mother was told by a UHCCP representative that Justin could no longer see his specialist, even though Justin had an established relationship with that provider spanning more than three years. *Id.* Justin's mother applied for a single case agreement to allow Justin to continue seeing his established specialty provider, but the application was denied by UHCCP. *Id.*

72. The Cheevers Family should not have to jump through so many hoops just so their sons can continue seeing their specialty providers with whom they have established relationships. Section 533.038(g) must be enforced to protect Tyler and Justin's right to continuity of care.

Lauryl Phillips, Age 10

73. Lauryl Phillips was born with cerebral palsy, a seizure disorder, macrocephaly, failure to thrive, and blindness, among other ailments. Lauryl's extremely complicated conditions require significant attention from a team of specialty care providers including a neurologist, ENT specialist, and gastroenterologist, among others.

74. Lauryl's MCO is currently Children's Health Plan, though she will be automatically enrolled with Aetna on September 1, 2020. Lauryl is not covered by any private insurance and relies solely on Medicaid.

75. All of Lauryl's specialty care providers are located in Fort Worth, and she has seen them for years. Though Children's Health Plan has thus far considered Lauryl's specialists in Fort

Worth "in-network," Lauryl's MCO, Aetna, has not indicated that Lauryl will be able to continue to see her specialists in Fort Worth or whether she will have to seek an entirely new set of specialists in her service area. Lauryl's current doctors are very familiar with her needs, and her family fears that they will be forced to seek out an entirely new team of specialists, harming the quality of Lauryl's care.

Dylan Martin, Age 12

76. Dylan Martin was adopted by his mother when he was one year old. Exhibit I, Declaration of Shanna Martin. Dylan was born at only 27 weeks gestation, crack-addicted. *Id.* Soon after being born, he suffered a stroke. *Id.* He receives 100% of his nutrition via a g-button (nothing via mouth). *Id.* He suffers from seizures, visual impairment, hearing impairment, incontinence, and respiratory issues. *Id.*

77. Neurosurgeon David Sacco, M.D. performed a shunt procedure on Dylan's brain at Medical City of Dallas. *Id.* After that, Dylan's condition, including his balance, sight, hearing, and gagging reflex, improved greatly, almost immediately. *Id.* This allowed Dylan to wean off of many of his regular medications, including daily hydrocodone that he was prescribed for frequent migraines. *Id.* Dylan saw Dr. Sacco several times for follow-up care and shunt revisions. *Id.*

78. Dr. Sacco is no longer in-network with Dylan's MCO, Children's Health Plan. *Id.* As a result, he is no longer able to see Dr. Sacco for follow-up care related to his shunt. *Id.*

79. Recently, Dylan's shunt needed to be adjusted. *Id.* However, his mother had a very difficult time getting Children's Health Plan to approve this care for Dylan. *Id.* Eventually, she had to take Dylan to the emergency room just to get a referral to a specialist who could see him. *Id.* Even after receiving the referral, it still took another month and a half before the procedure was performed. *Id.* During this lengthy delay in care, Dylan's condition regressed. *Id.*

80. Dylan had an established relationship with Dr. Sacco, who he and his mother know and trust. *Id.* Dr. Sacco always accommodated Dylan in a timely fashion and provided excellent care. *Id.* Dylan's mother would very much like for Dylan to continue seeing Dr. Sacco for his neurosurgical needs. *Id.*

Christian Smith, Age 20

81. Christian Smith lives in Round Rock with his mother. Exhibit J, Declaration of Monette Smith. He has the most severe form of Nemaline Myopathy, a rare neuromuscular condition that affects the filament proteins required for muscle tone and contraction. *Id.* As a result, Christian is wheelchair-bound and unable to move. *Id.* He requires a ventilator because his muscles required to breathe do not expand and contract on their own. *Id.* Christian's mother believes that he is the oldest living person with his condition. *Id.*

82. At just ten months of age, one of Christian's lungs collapsed and he almost died. *Id.* Doctors in Round Rock diagnosed Christian improperly because they were not familiar with his rare condition. *Id.* Christian's mother researched the diagnosis that Christian was given and realized that his symptoms did not align with that condition. *Id.* Christian's mother decided to take him to a world-renowned neuromuscular disease specialist in Dallas, who definitively diagnosed him with Nemaline Myopathy in 2000. *Id.* At that time, the MCO system did not exist in Texas, so it did not matter that the neurologist was located in Dallas, nor did Christian's mother have to worry about whether the specialist was in-network or out-of-network with her son's MCO. *Id.* Christian regularly visited his neurologist in Dallas for years until the MCO system was implemented in Texas. *Id.* Since enrolling with the Superior MCO, Christian has been unable to see the neurologist in Dallas who is familiar with his condition, or a pulmonologist who worked in tandem with the neurologist. *Id.* His MCO requires him to see only in-network neurologists and

pulmonologists in the Travis service area. *Id.* However, none of those doctors have any experience treating someone with Christian's rare condition, nor are they FDA-approved to participate in clinic trials that could benefit Christian. *Id.*

Angelica Ocampo, Age 4

83. Angelica Ocampo has semi-lobar holoprosencephaly, which occurs when the left side of the brain is fused to the right side in the areas of the brain known as the frontal and parietal lobes. Exhibit K, Declaration of Mary Ocampo. As a result, certain parts of her body do not function correctly. *Id.* For example, Angelica's body does not regulate temperature well. *Id.* Long rides in the car, even with air conditioning, can cause dangerous spikes in her body temperature. *Id.* Angelica requires 24/7 oxygen, which means that even routine errands or doctor appointments require advanced planning and backup oxygen. *Id.*

84. Angelica is enrolled with the Cook Children's MCO. *Id.* She currently sees about six specialists in Dallas and Plano who are affiliated with Children's Medical Center Dallas and UT Southwestern Medical School. *Id.* Visits to those providers must be pre-authorized by Cook Children's because the providers are not in the MCO's provider network. *Id.*

85. Angelica's family has been told by their care coordinator with Cook Children's that eventually such pre-authorizations will no longer be approved, necessitating that they transition Angelica's care to in-network specialists. *Id.* This would be devastating to Angelica's care, given that Angelica has long-term, established relationships with her providers. *Id.* The providers are familiar with Angelica's lengthy and complex medical history and her individual needs. *Id.* Angelica's family knows and trusts the providers. *Id.*

86. Angelica has lost established relationships with her specialty providers in the past due to bureaucratic provider network issues. *Id.* For example, for about two years, Angelica

regularly visited the Children's Medical Center of Dallas complex care clinic, until the clinic was unable to renegotiate its contract with Cook Children's MCO. *Id.* At that point, Angelica's family was told by Cook Children's that they could not continue to visit the complex care clinic because it was no longer an in-network provider. *Id.* Losing access to the complex care clinic was devastating because many of the providers that Angelica sees now are unfamiliar with the coordination of care necessary to properly care for a child with complex medical needs who sees multiple specialists. *Id.*

87. Angelica's family has been told by their care coordinator with Cook Children's that eventually such pre-authorizations will no longer be approved, necessitating that they transition Angelica's care to in-network specialists. *Id.* This would be devastating to Angelica's care, given that Angelica has long-term, established relationships with her providers. *Id.* The providers are familiar with Angelica's lengthy and complex medical history and her individual needs. *Id.* Angelica's family knows and trusts the providers. *Id.*

Samuel Galinsky, Age 11

88. Samuel Galinsky suffers from Larsen's syndrome, a very rare connective tissue disorder which required him to undergo multiple cervical spinal fusion surgeries within the first few years of his life. Exhibit L, Declaration of Rebecca Galinsky. Samuel's family had to travel to Philadelphia for the second fusion surgery, as no surgeons in Texas would treat him after the first surgery failed. *Id.* Samuel has since undergone approximately fourteen surgeries and continues to require constant high-level care from various specialty medical care providers. *Id.* Unfortunately, Samuel and his family have at times struggled to find Samuel the care he needs because of difficulty finding health care providers that are willing to work with his managed care organization, Cook Children's. *Id.*

89. For instance, in late 2016, Samuel had to delay both urgent MRI/BAHA implant procedures and a spinal surgical procedure in part because Cook Children's did not cover a certain portion of these procedures; Cook Children's Hospital, where the MRI/BAHA procedures were to be performed, was concerned it would be stuck paying for whatever private insurance did not cover, and the situation took weeks to resolve. *Id.* In other words, Cook Children's Hospital was concerned about whether Cook Children's, the MCO, would actually pay for Samuel's procedures. *Id.*

90. Similarly, in late 2019, Samuel needed to receive both sinus surgery and oral surgery within the span of a month. *Id.* Samuel's family could not locate a single oral surgeon within the MCO network that was also in network with their private insurer, and they eventually decided that the family would cover any costs of the oral surgery not covered by the private insurance themselves. *Id.* Fortunately, the oral surgeon wrote off rest of fee and the family ended up paying only a nominal amount. *Id.* But again, Samuel's health was put at risk because of difficulties finding a specialist in-network with his MCO. *Id.*

Priya Nandita Rana, Age 26

91. Priya Nandita Rana has congenital myopathy among other overlapping disorders, causing very complex medical needs. Exhibit M, Declaration of Susan Burek. Most of Priya's doctors are in Austin, but she also sees four specialists in Houston and relies on the Medicaid transportation program. *Id.* Priya was finally able to enroll in Traditional Medicaid on January 1, 2020, but from May 1, 2015 through December 31, 2019 she was enrolled in either STAR+PLUS with UnitedHealthcare Community Plan ("UHCCP") or STAR+PLUS with Amerigroup. *Id.*

92. Before enrolling in STAR+PLUS, Priya had seen the same primary care physician for years who was very familiar with her needs. *Id.* That PCP was out-of-network when Priya

switched to STAR+PLUS, and Priya's family struggled to find an in-network PCP who could provide the same care. *Id.* At one point, a PCP that was in-network even wrote a letter in support of Priya's family's request for a single case agreement allowing her to return to the out-of-network PCP. *Id.* That request was denied. *Id.*

93. Priya also relies on many specialists within her primary group insurance network, but because they are also out-of-network with STAR+PLUS, her family has been forced to shoulder significant out-of-pocket expenses for coordination of beneift-related costs. *Id.* Priya's struggles with finding or continuing to receive adequate care exemplify the issues that section 533.038(g) was intended to address. *Id.*

Cayhen Erwin, 18

94. Cayhen Erwin has pulmonary arterial hypertension and he has Trisomy 21 (Down's Syndrome). He is medically fragile, wheel-chair bound and requires oxygen treatment. He can eat mechanical soft foods by mouth and the remaining nutrition is provided through his gastrostomy tube. He sees a variety of specialty providers regularly including a cardiologist, an endocrinologist, a pulmonologist, an ophthalmologist, and an otolaryngologist, among others.

95. Cayhen's primary care provider ("PCP") is a pediatrician – she has been with him since birth. She is out-of-network with Cayhen's current MCO, Cook Children's. Through Cayhen's mother's employer, the cost of her care is covered, mostly. However, Cayhen also sees a pulmonologist in Houston who specializes in Cayhen's type of pulmonary hypertension, only one of two or so in the region. Houston is a four-plus hour drive from where Cayhen's family lives. The Houston pulmonologist is in-network with Cook Children's, but the cost of expensive Houston travel and lodging is not covered.

96. LogistiCare partners with MCOs like Cook Children's to assist with travel costs for STAR Kids patients. However, because Cayhen's PCP is not in-network with Cook Children's, he is not eligible for the LogistiCare travel assistance – even though his Houston pulmonologist (the reason for the travel) is in-network. This makes no sense. Cayhen's family would certainly appreciate the travel assistance.

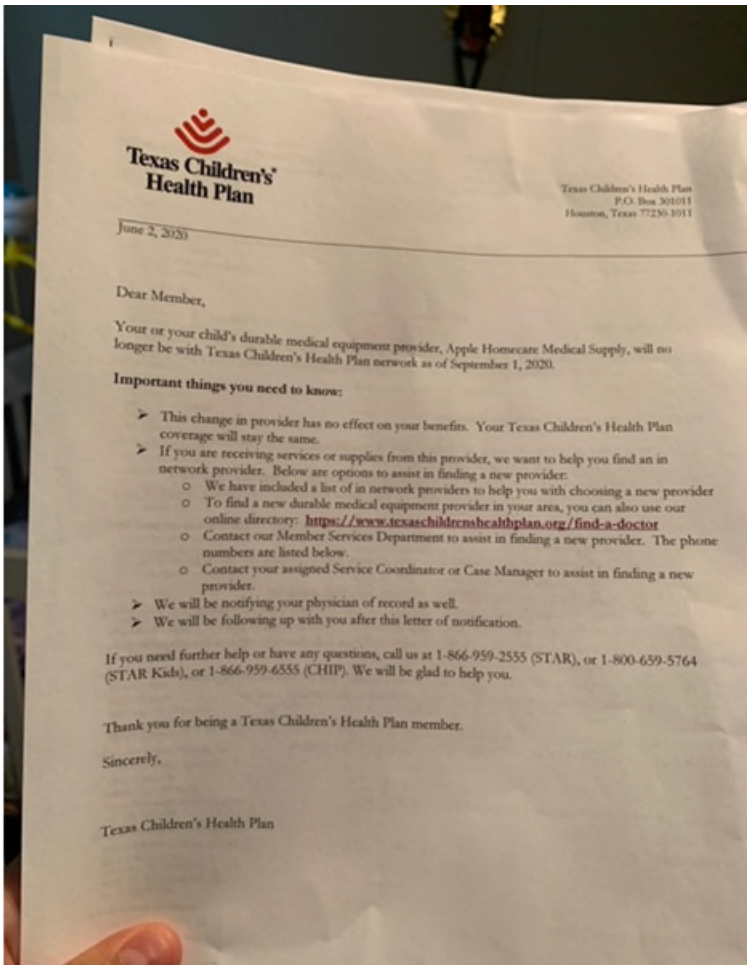
E. TCHP's Termination of Specialty Provider, Apple Homecare Medical Supply, Inc., Effective September 1st Leads to Unique Harm to Its Patients.

97. TCHP unilaterally decided to terminate its provider agreement with Apple Homecare Medical Supply, Inc. ("Apple HMS") effective September 1, 2020. This has caused and will cause further unique, irreparable harm to Apple HMS's approximately *250* medically-complex, high-acuity pediatric patients who are enrolled with TCHP.

98. Apple HMS is a statewide, family-owned durable medical equipment, supplies, and services ("DME") company specializing in servicing pediatric Medicaid patients with complex and high-acuity healthcare needs. Apple HMS also offers hospital and in-home training for caregivers and family members to ensure they have the knowledge they need to properly use the medical equipment and supplies that it provides.

99. Apple HMS does much more than simply drop ship supplies to patients' homes like some DME companies. For example, it is the single largest provider of pediatric home ventilator services in the State of Texas. *It has approximately 45 high-acuity ventilator-dependent patients with TCHP alone*. It also provides home oxygen, BiPAP, enteral nutrition, cough assist, suction, and gastrostomy tube equipment, supplies, and services to its patients, among many other services. Apple HMS has about 100 high-acuity enteral feeding patients and about 100 high-acuity respiratory/oxygen-dependent patients who are enrolled with TCHP.

100. A letter that TCHP recently sent to all of its members who use Apple HMS states that, effective September 1, 2020, "your child's durable medical equipment provider Apple [HMS] will no longer be with" TCHP:



Texas Children's Health Plan

Texas Children's Health Plan
P.O. Box 301011
Houston, Texas 77230-1011

June 2, 2020

Dear Member,

Your or your child's durable medical equipment provider, Apple Homecare Medical Supply, will no longer be with Texas Children's Health Plan network as of September 1, 2020.

Important things you need to know:

- This change in provider has no effect on your benefits. Your Texas Children's Health Plan coverage will stay the same.
- If you are receiving services or supplies from this provider, we want to help you find an in network provider. Below are options to assist in finding a new provider:
  - We have included a list of in network providers to help you with choosing a new provider
  - To find a new durable medical equipment provider in your area, you can also use our online directory: https://www.texaschildrenshealthplan.org/find-a-doctor
  - Contact our Member Services Department to assist in finding a new provider. The phone numbers are listed below.
  - Contact your assigned Service Coordinator or Case Manager to assist in finding a new provider.
- We will be notifying your physician of record as well.
- We will be following up with you after this letter of notification.

If you need further help or have any questions, call us at 1-866-959-2555 (STAR), or 1-800-659-5764 (STAR Kids), or 1-866-959-6555 (CHIP). We will be glad to help you.

Thank you for being a Texas Children's Health Plan member.

Sincerely,

Texas Children's Health Plan

101. Without even providing an alternate DME provider, the letter states "[t]his change in provider has no effect on your benefits." Whether the plan members wish to retain the services of Apple HMS is not considered. Further, the letter does not advise the plan members of their right to continue receiving services from Apple HMS, a specialty provider[2] with whom they have an established relationship, pursuant to section 533.038(g).

[2] To be sure, DME providers, like Apple HMS, are considered "specialty providers" under section 533.038(g). Representative Parker specifically explained that "specialty provider" is intended to

102. Thus, before the September 1st deadline, all of TCHP's members who receive equipment, supplies, and services from Apple HMS (including 45 medically-fragile ventilator-dependent patients, 100 medically-fragile enteral feeding patients, and 100 medically-fragile respiratory care/oxygen-dependent patients) must switch to a different DME provider in TCHP's provider network (if there even is one that can supply all of their needs), switch to a different MCO that has Apple HMS in its provider network, or lose their coverage for the Medicaid-covered, life-sustaining services they receive from Apple HMS—all in the midst of the COVID-19 pandemic.

103. This is not a legitimate choice for children with complex medical needs, and it is unnecessarily dangerous to force a provider change on such patients in the middle of a pandemic. Such patients depend on numerous specialty providers besides Apple HMS. Those other specialty providers may or may not be in-network with an alternate MCO, which is precisely why the continuity of care guarantee of section 533.038(g) is so important to these children and their families. It is simply impossible for many Medicaid recipients with complex medical needs to have all of their medical needs covered by only in-network specialty providers in their geographic region.

104. Moreover, if Apple HMS's patients who are TCHP members are required to switch to a different specialty provider as of September 1st, it will unnecessarily increase the risk that many of these medically-fragile, pediatric patients (and their families and providers) will be exposed to COVID-19 when in-home equipment is switched from Apple HMS to an alternate provider. Pediatric nurse, Shirley Gordon, R.N., B.S.N., explains in her attached declaration the multi-step process and significant in-home, personal contact required for a medically-fragile child

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mean "any entity or person, *including a DME* or any other type of provider, that provides goods or services to the patient/recipient." Exhibit C, Representative Parker Letter (emphasis added).

with home respiratory or enteral nutrition equipment to change providers. Exhibit N, Declaration of Shirley Gordon, R.N., B.S.N. Nurse Gordon further explains the special dangers of COVID-19 exposure posed to medically-fragile children, like so many of those served by Apple HMS:

> As a change of DME providers for children suffering from significant respiratory issues necessarily requires the in-home visits as described above, there is an elevated risk to medically fragile children, their family and even the RT of contracting the Covid virus. The children that fall into the category as "medically fragile" are very susceptible to serious complications when contracting a virus of this nature. In the event the child contracts this virus it will likely result in the child's death. Quite frankly, I expect many families will not allow anyone (including an RT) to enter their homes during this pandemic as the risk to their children is so high.

Id.

105. Scott Wallace, the owner of Elite Medical and Mobility LLC, another Medicaid DME provider, similarly explains in his attached declaration the steps required to change DME providers and the unnecessary risks of COVID-19 exposure associated with doings so in the middle of the current global pandemic. *See* Exhibit O, Declaration of Scott Wallace. Mr. Wallace also discusses numerous other considerations especially applicable to DME providers that demonstrate the importance of continuity of care for medically-fragile patients, and highlight the irreparable harm that is likely to occur to such patients if a trusted, established provider relationship is broken:

> Changing providers does not just give rise to a Covid 19 exposure, it also causes the children and their families great anxiety. Often the relationship between the RT, the family and the children is long standing. … The RT develops a bond with the families and learns the family's dynamics. The families and the RT learn to trust and rely on one another. When the family experiences an emergency at 3:00 a.m. in the morning and reaches out to the RT, the family wants to know they are talking with their own trusted RT. … Often trips to the emergency room in the middle of the night can be avoided because the trusted RT can walk the family through the necessary steps to resolve the problem. In my opinion, replacing one DME who has a long standing relationship with the child and the family, with another who has no prior relationship, is more than likely to cause irreparable injury to the family in the way of worry and anxiety.

> ***
> Additionally, many medically fragile children not only have a physical disability but are mentally troubled. Some have been abused or abandoned. When an RT that has established a relationship of trust with the troubled child then leaves the care of that child, it can trigger a lot of emotional turmoil. This turmoil can even adversely affect the child's health.
>
> For all these reasons, mentally fragile children and their families should never be forced to change providers if change can be avoided. No doubt SB 1207 was designed to address and remedy the injury caused by a mandatory change.
>
> As someone who has dedicated most of his adult life to the care of Medicaid fragile children, I do not believe there is any justification for changing providers as long as the existing provider is providing good care. This is especially true during this Covid pandemic, when the risk of exposure and death to one or more of these children is so high and can easily be avoided.

Id.

106. Though Medicaid recipients with complex medical needs who have an established relationship with Apple HMS have an absolute right under section 533.038(g) to continuity of care with their chosen provider indefinitely, *at the very least* the patients affected by TCHP's decision to terminate its provider agreement with Apple HMS should have the right to maintain their current relationship with Apple HMS until the COVID-19 pandemic is over, when it is safer to change out their in-home equipment. Indeed, one of the basic purposes of THHSC is to "implement the Medicaid managed care program … in a manner that … improves the health of Texans by emphasizing *prevention* [and] promoting continuity of care." Tex. Gov't Code § 533.002(1)(A), (B) (emphasis added). Moreover, the STAR Kids Medicaid managed care program "*must* … improve the health outcomes of recipients … [and] reduce the incidence of … *potentially preventable events* by ensuring the availability of appropriate services and care management." *Id.* § 533.00253(b)(3), (7) (emphasis added). "Potentially preventable event" means "a potentially preventable admission, a potentially preventable ancillary service, a potentially preventable

complication, a potentially preventable emergency room visit, a potentially preventable readmission, or a combination of those events." *Id.* § 536.001(18).

107. Several of the named Plaintiffs in this action are directly affected by TCHP's decision to terminate Apple HMS from its provider network (in addition to broader specialty provider issues that fall within the protections of section 533.038(g)).

Koen Kincaid, Age 7

108. Koen Kincaid was born at a hospital in Longview at only 23 weeks gestation. At birth, he weighed only one pound. Exhibit P, Declaration of Shonda Kincaid. After five days in the NICU at the hospital in Longview, Koen was flown via helicopter to Children's Medical Center Dallas for emergency surgery to repair a suspected perforated bowel. *Id.* One centimeter of Koen's small bowel was removed during the surgery. *Id.* Koen underwent subsequent surgeries at Children's Medical Center Dallas, including patent ductus arteriosus ligation surgery. *Id.*

109. Because Koen's lungs were so underdeveloped, doctors had to perform a tracheostomy and place Koen on a ventilator for the first several months of his life. *Id.* When he finally came home from the hospital, Koen was still on a ventilator until he finally was weaned off of it. *Id.*

110. Since coming home from the hospital almost seven years ago, Koen has received all of his home and durable medical equipment and supplies from Apple HMS. *Id.* Koen currently receives his g-button supplies, nebulizer supplies, feeding equipment and formula, pulse oximeter sensors, home oxygen, and more from Apple HMS. *Id.*

111. Koen's care coordinator at TCHP recently informed his mother that Apple HMS will no longer be in-network with TCHP effective September 1st. *Id.* As a result, TCHP is requiring that she switch Koen to a different durable medical equipment and supplies company in its provider

network. *Id.* Koen's care coordinator gave Koen's mother the names of two companies based in Houston (they live in Kilgore in far east Texas) that the care coordinator "thinks" will be able to supply everything that Koen currently receives from Apple HMS. *Id.* However, Koen's family has a great, long-term relationship with Apple HMS, which has never refused any goods or services that Koen requires. *Id.* Apple HMS understands Koen's condition and medical history. *Id.* Koen's family does not want to lose Apple HMS as an established, trusted provider. *Id.*

Jean Jones, Age 4

112. Jean Jones requires 24/7 home nursing care. When she was born, Jean underwent a tracheostomy procedure and was ventilator-dependent for a period of time. She currently depends on Apple HMS to supply life-sustaining enteral nutrition, which is administered to her through a gastrostomy tube, a pulse oximeter, and home oxygen. She has been a satisfied Apple HMS patient for more than four years.

113. Jean lives with her family in Gilmer, Texas—northeast of Tyler in far East Texas. Jean also has a number of other established, specialty providers, including a pulmonologist that she sees regularly. The pulmonologist is in-network with her MCO, TCHP, but not with the other MCOs available in Jean's service area, such as UHCCP, Superior, or Amerigroup. Thus, if she were to switch MCOs to maintain her established relationship with Apple HMS, she would risk losing her established relationships with some of her other specialty providers. This kind of catch-22 is precisely what section 533.038(g) is supposed to prevent.

Brylie Flynn, Age 11

114. Brylie Flynn was diagnosed with a rare mitochondrial disease called Mitochondrial Myopathy, Encephalopathy, Lactic Acidosis, Stroke-Like Episodes ("MELAS") when she was

four years old. She is wheelchair-dependent, home ventilator-dependent at night, and partially blind in her right eye. Brylie has high anxiety, requires six nebulizer treatments daily, and takes twelve different medications. She can eat solid foods orally, but only takes liquids, including water and Pedialyte via a gastrostomy tube. She follows with numerous specialists affiliated with Dallas Children's Hospital/UT Southwestern, including in the fields of rare diseases, critical care, pulmonology, GI, immunology, and pain management, just to name a few.

115. In August of 2017, Brylie suffered a severe stroke that required her to be hospitalized for 105 days. In October of 2017, doctors had to place a tracheostomy tube, at which point she started service with Apple HMS. Brylie's mother learned from her research that Apple HMS has the best reputation for pediatric home ventilator services in her service area. Apple HMS currently provides Brylie's home ventilator services, tracheostomy supplies, cough assist machine, nebulizer equipment, twenty-five bottles of Pedialyte per month, and incontinence supplies.

116. Before enrolling with Apple HMS, Brylie's mother contacted Joshua's Respiratory Care, the other DME provider in TCHP's network that her TCHP case worker recommended, to see if it could service Brylie's needs. Brylie's mother was informed by Joshua's that it could not provide more than half of the equipment and supplies that Brylie currently receives from Apple HMS. Brylie has a right to maintain her established relationship with Apple HMS. There is no legitimate reason for her to switch to another provider in TCHP's provider network, especially when the alternate provider recommended to her by TCHP is unable to supply much of what she needs.

McKinley McDonald, Age 8

117. McKinley McDonald has a mitochondrial disease that is so rare it does not even have a name. Exhibit Q, Declaration of Caysi McDonald. McKinley's mother's understanding

from her physicians is that McKinley is one of only five individuals *in the world* with her condition, and the oldest surviving person with the condition. *Id.* McKinley is wheelchair-bound, non-verbal, and her body control is equivalent to that of a two- to three-month-old. She is fed entirely through a gastrostomy tube. *Id.*

118. McKinley receives certain durable medical equipment and supplies from Apple HMS, including a cough assist machine and a suction machine. *Id.* McKinley has received services from Apple HMS since February. *Id.*

119. If TCHP removes Apple HMS from its provider network effective September 1st, as it has threatened to do, McKinley will lose her established relationship with Apple HMS unless a process is implemented that allows her to continue receiving services from Apple HMS after that date.

120. McKinley has experienced continuity of care issues due to TCHP's refusal to approve or cover care from some of her other established specialty providers also. For example, McKinley has seen the same speech therapy, physical therapy, and occupational therapy providers since about 2014 when she was first diagnosed with her condition. *Id.* McKinley's therapists are all part of the same group, which recently became out-of-network with TCHP for reasons that are unknown to McKinley's mother. *Id.* As a result, McKinley was recently denied coverage for her speech therapy with her established providers. *Id.* McKinley's mother expects that McKinley's physical therapy and occupational therapy will be similarly denied by TCHP after the current pre-authorization for those services expires. *Id.*

121. McKinley also sees numerous specialty providers affiliated with Cook Children's Health Care System ("Cook Children's HCS"). *Id.* McKinley's mother has heard from other mothers of children with complex medical needs that Cook Children's HCS may not remain in-

network with TCHP much longer. *Id.* If that happens, it will make it impossible for McKinley to continue to see many of her specialty providers with whom she has had an established relationship for years, unless a process is implemented that allows her to continue seeing those providers on an out-of-network basis. *Id.* McKinley's case is a great example of why section 533.038(g) so badly needs to be enforced by THHSC and followed by the MCOs.

VIII.
CAUSES OF ACTION

A. Injunctive Relief Against All Defendants To Enforce the Continuity of Care Guarantee of Texas Gov't Code § 533.038(g), and Against TCHP To Prevent It from Forcing Patients To Switch DME Providers During the COVID-19 Pandemic.

122. Plaintiffs incorporate the above-referenced paragraphs as if set forth in their entirety.

Injunctive Relief Against All Defendants Pursuant to Section 533.038(g)

123. Pursuant to section 533.038(g), Plaintiffs (and all other Medicaid recipients with complex medical needs who have an established relationship with a specialty provider) are entitled to continuity of care with their established specialty providers and to have such care covered by their Medicaid benefits. The Court should issue a temporary restraining order, temporary injunction, and permanent injunction against THHSC, the MCO Defendants, and all other MCOs in the State of Texas to:

a. Prevent THHSC and the MCOs from interfering in any way with the established relationship between a Medicaid recipient with complex medical needs and their specialty provider;

b. Require THHSC and the MCOs to immediately take steps to approve all covered services provided by a specialty provider with whom a Medicaid recipient with complex medical needs has an established relationship. This includes both *existing* specialty provider-patient relationships and those that were terminated since the effective date of section 533.038(g), September 1, 2019, because a MCO refused to approve covered services provided by the member's specialty provider;

c. Require THHSC to issue guidance to all MCOs in the State of Texas clarifying that, pursuant to section 533.038(g), Medicaid recipients with complex medical needs are absolutely entitled to continue receiving care from a specialty provider with whom they have an established relationship, regardless of whether the provider is in the recipient's MCO's provider network.

124. With regard to TCHP's termination of Apple HMS effective September 1st specifically, the Court should issue a temporary restraining order and temporary injunction against THHSC and TCHP to maintain the *status quo* until such time as THHSC has developed a "clear and easy process … that allows a recipient with complex medical needs who has established a relationship with a specialty provider to continue receiving care from that provider," as mandated by the Legislature. Specifically, THHSC and TCHP should be enjoined from:

a. Taking any action to interfere with the rights of any Medicaid recipient with complex medical needs enrolled with TCHP who has an established relationship with Apple HMS to continue receiving care from Apple HMS;

b. Denying full coverage and reimbursement for all covered services provided by Apple HMS to any Medicaid recipient with complex medical needs enrolled with TCHP who has an established relationship with Apple HMS, even if Apple HMS ceases to be part of TCHP's provider network for any reason;

c. Communicating to any Medicaid recipient with complex medical needs enrolled with TCHP who has an established relationship with Apple HMS that they must switch to a different DME provider in TCHP's provider network if they wish to continue to have their DME services covered by their Medicaid benefits.

Additional Grounds for Injunctive Relief Against TCHP

125. In addition to injunctive relief to enforce their absolute right to continuity of care with their established specialty providers under section 533.038(g), TCHP's members who receive high-acuity services from Apple HMS are entitled to injunctive relief against THHSC and TCHP to prevent them from being forced to switch to a different DME provider during the COVID-19 pandemic. At the very least, any provider switch should be indefinitely delayed until in-home ventilator, enteral food, respiratory, and other equipment can be safely switched out without

unnecessarily exposing medically-fragile children to a heightened risk of contracting COVID-19. To this end, the Court should issue a temporary restraining order and temporary injunction against THHSC and TCHP to maintain the *status quo* so long as the COVID-19 pandemic exists. Specifically, THHSC and TCHP should be enjoined from:

a. Denying full coverage and reimbursement for all covered services provided by Apple HMS to TCHP's members after September 1st; and

b. Communicating to any Apple HMS patient that they must switch to a different DME provider in TCHP's provider network if they wish to continue to have their DME services covered by their Medicaid benefits.

126. TCHP should also be ordered to inform its members who are Apple HMS patients, prior to September 1st, that: (1) TCHP will continue to cover and reimburse all covered services provided by Apple HMS after September 1st and (2) the members do *not* have to switch to a different DME provider in TCHP's provider network if they wish to continue to have their DME services covered by their Medicaid benefits.

127. Plaintiffs have provided notice to THHSC and each of the MCO Defendants of this requested relief and the hearing on their application for a temporary restraining order.

128. To obtain injunctive relief, an applicant must show: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (stating elements for temporary injunction); *see also In re Turner*, 558 S.W.3d 796, 799 (Tex. App.—Houston [14th Dist.] 2018) (stating same elements in assessing application for temporary restraining order).

Plaintiffs Have a Valid Cause of Action Against Defendants and a Probable Right To the Relief Sought.

129. Here, Plaintiffs have a probable right to recovery on their declaratory judgment cause of action. Based on the plain language of section 533.038(g) and the letters of Senator Perry, Representative Parker, and Representative Krause, Plaintiffs *plainly* have an absolute right to continuity of care with each of their specialty providers with whom they have established a relationship. It is up to THHSC to "develop a clear and easy process" to allow that to occur, yet THHSC undeniably has failed to do so almost a full year since the law became effective.

Injunctive Relief Is Necessary To Prevent a Probable, Imminent, and Irreparable Injury.

130. The requested injunctive relief is necessary to prevent Plaintiffs (and other Medicaid recipients with complex medical needs who have an established relationship with a specialty provider) from suffering probable, imminent, and irreparable harm. As demonstrated, Plaintiffs (and likely thousands of other Medicaid recipients with complex medical needs around the State of Texas) have already lost continuity of care with one or more specialty providers with whom they have an established relationship, or their MCO has threatened to stop covering such care in the future, in violation of section 533.038(g). The right of Medicaid recipients with complex medical needs to continuity of care with their trusted specialty provider with whom they have an established relationship will be irreparably interrupted or terminated if THHSC and all of the MCOs in the State of Texas are not enjoined as requested.

131. TCHP has already informed all of its members who have an established relationship with Apple HMS that Apple HMS will no longer be in-network with TCHP effective September 1st, and that those patients must switch to an alternate DME provider in TCHP's provider network immediately. That universe of patients includes at least 40 home ventilator-dependent pediatric Medicaid recipients with complex medical needs, 100 enteral feeding-dependent pediatric

Medicaid recipients with complex medical needs, and 100 respiratory care/home oxygen-dependent pediatric Medicaid recipients with complex medical needs. The care provided to such patients by Apple HMS is literally life-sustaining.

132. As demonstrated, switching Apple HMS's medically-fragile patients to a different provider in the middle of the COVID-19 pandemic is unnecessary and unreasonably dangerous. It is self-evident that such patients will be irreparably harmed if they are exposed to COVID-19 in their medically-fragile condition.

133. Loss of access to medical treatment or benefits is well recognized by courts in Texas and other jurisdictions as a source of irreparable harm and grounds for an injunction. *See, e.g., T.L. v. Cook Children's Med. Ctr.*, No. 02-20-00002-CV, 2020 Tex. App. LEXIS 5791, at *170 (Tex. App.—Fort Worth July 24, 2020, no pet. h.) (reversing trial court's denial of temporary injunction to stop physician from discontinuing life-saving treatment for a terminally ill minor patient inter alia because "[i]f [hospital was] allowed to withdraw life-sustaining treatment from T.L. before a trial on the merits can be had, Mother and T.L. will suffer permanent, irreparable damage."); *Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979) (stating that "the threatened termination of benefits such as medical coverage for workers and their families obviously raise[s] the spectre of irreparable injury"); *Hinckley v. Kelsey-Hayes Company*, 866 F. Supp. 1034, 1044 (E.D. Mich. 1994) ("[R]eductions in retiree insurance coverage constitute irreparable harm, meriting a preliminary injunction."); *Zotto v. Scovill, Inc.*, No. Civ. N-85-494, 1985 U.S. Dist. LEXIS 14061, 1985 WL 14176, *2 (D. Conn. Nov. 7, 1985) ("[A] reduction in medical benefits establishes the threat of irreparable harm because the practical effect of the reductions could well be to preclude retirees from seeking needed medical treatment . . ."); *Bass v. Richardson*, 338 F.

Supp. 478, 489 (S.D.N.Y. 1971) ("The injury to those whose health is maintained on the slenderest chemical balance provided through medication is not merely irreparable; it is ultimate.").

134. Indeed, Plaintiffs (and the thousands of other Medicaid recipients around the State of Texas who have complex medical needs and an established relationship with a specialty provider) have no adequate remedy at law. The interruption or termination of a medically-fragile Medicaid recipient's established relationship and continuity of care with a trusted specialty provider is irreplaceable and cannot be remedied with money damages.

Nominal Bond Requested

135. Plaintiffs respectfully request the entry of a nominal bond. Plaintiffs are low-income, Medicaid-dependent children with complex medical needs. They are merely seeking to require THHSC and Texas MCOs to comply with their legal obligations pursuant to section 533.038(g). TCHP and THHSC will not suffer any harm as a result of the entry of the requested injunctive relief.

B. Declaratory Judgment Against TCHP and THHSC

136. Plaintiffs incorporate the above-referenced paragraphs as if set forth in their entirety.

137. Plaintiffs seek a declaratory judgment against THHSC and the MCO Defendants under the Uniform Declaratory Judgments Act ("UDJA"), Texas Civil Practice and Remedies Code chapter 37. The UDJA provides one avenue for a party whose rights have been affected by a statute to seek declaratory relief against the State. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.011 (West 1997). The UDJA is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Id*. § 37.002(b); *IT-Davy*, 74 S.W.3d at 855. Specifically, the UDJA provides that: "A person interested

under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a).

138. Plaintiffs are entitled to a declaration of their rights, status, and legal relations under section 533.038(g). A declaratory judgment is an appropriate avenue to seek judicial declarations regarding rights under a health care statute pertaining to a Medicaid MCO. *See Hawkins v. El Paso First Health Plans, Inc.*, 214 S.W.3d 709 (Tex. App.—Austin 2007) (explaining that the requested declarations fell squarely within the supreme court's description of the type of suit against the State that is not barred by sovereign immunity—a suit for declaratory relief against official state actors who allegedly act without legal or statutory authority in attempt to compel the state officials to act within their official capacity) (citing *IT-Davy*, 74 S.W.3d at 855).

139. A justiciable controversy is "a real and substantial controversy involving a genuine conflict of tangible interests[.]" *Scurlock Permian Corp. v. Brazos Cty.*, 869 S.W.2d 478, 487 (Tex. App.—Houston [1st Dist.] 1993). A justiciable controversy exists between Plaintiffs and Defendants because Plaintiffs are Medicaid recipients with complex medical needs, each of whom has at least one established relationship with a specialty provider that has been terminated or threatened due to their MCO's refusal to approve covered services by that provider, contrary to the clear mandates of section 533.038(g). Plaintiffs fall within the protections of section 533.038(g), which THHSC and the MCO Defendants are not following.

140. Specifically with regard to TCHP members who have an established relationship with Apple HMS, TCHP has stated, both verbally and in writing, that after September 1st such

members will no longer be able to receive care from their specialty provider, Apple HMS, with whom they have an established relationship. This plainly violates the continuity of care guarantee of section 533.038(g).

141. A declaratory judgment confirming Plaintiffs' rights under section 533.038(g) would determine the controversy between the parties. Accordingly, Plaintiffs seek declarations that:

a. THHSC must develop a clear and easy process that allows all Medicaid recipients with complex medical needs who have established a relationship with a specialty provider to continue receiving care from that provider, regardless of whether the provider is in-network or out-of-network with the recipient's current MCO[3];

b. In accord with section 533.038(g), Medicaid recipients with complex medical needs are entitled to continue receiving care from a specialty provider with whom they have established a relationship, even if the provider is not or ceases to be in-network with the recipients' MCO;

c. Medicaid MCOs cannot interfere with a Medicaid recipient's continued care from a specialty provider with whom the recipient has established a relationship;

d. DME companies, including Apple HMS, are "specialty providers" for purposes of section 533.038(g); and

e. TCHP members who receive or have received since September 1, 2019 any DME equipment, supplies, and/or services from Apple HMS have established a relationship with Apple HMS.

IX.
ATTORNEYS' FEES

142. Plaintiffs seek their attorneys' fees pursuant to Texas Civil Practice & Remedies Code § 38.001, et seq. and the Texas UDJA. All conditions precedent have occurred or have been satisfied.

[3] To be clear, Plaintiffs do not ask the Court to decide the "clear and easy process" mandated by the Legislature in section 533.038(g). That is THHSC's job.

X.
CONCLUSION

143. Texas law guarantees Medicaid recipients with complex medical needs the right to continuity of care with their established specialty providers, regardless of whether such providers are in-network or out-of-network with the recipient's MCO. THHSC has not yet developed the "clear and easy process" explaining how that is supposed to occur, as mandated by the Legislature. However, Texas MCOs cannot use THHSC's failure to develop such a process, despite a Legislative mandate, as an excuse to unilaterally terminate established relationships between specialty providers and Medicaid recipients with complex medical needs who fall within the protections of section 533.038(g). It is imperative that the Court take immediate action to enforce section 533.038(g) as written and to redress the irreparable harm that will occur if THHSC and Texas MCOs continue to ignore the law.

Respectfully submitted,

NICHOLS BRAR WEITZNER & THOMAS LLP

/s/ Zachary W. Thomas

Scott Nichols
Texas Bar No. 14994100
(281) 727-8442
snichols@nicholsbrar.com
Zachary W. Thomas
Texas Bar No. 2470739
(832) 316-2535
zthomas@nicholsbrar.com
1923 Washington Avenue
Houston, Texas 77007

Attorneys for Plaintiffs