

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard on his own behalf and on behalf of similarly situated others; and PATRICIA PRITCHARD,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

No. 3:20-cv-06145-RJB

PLAINTIFF CLASS'S OPPOSITION
TO DEFENDANT'S MOTION TO
DECERTIFY

**Note on Motion Calendar:
March 3, 2023**

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I. INTRODUCTION

BCBSIL “discriminated against the Plaintiffs and the class Plaintiffs by denying them services for gender-affirming care under individual and class Plaintiffs’ insurance policies.” Dkt. No. 148 at 20. Without any new evidence or change in the applicable law, BCBSIL now moves to decertify the class. Dkt. No. 156. BCBSIL is wrong on the law.

BCBSIL argues that the equitable and declaratory relief sought by the Class is improper because of a recent decision, *Wit v. United Behav. Health*, 2023 U.S. App. LEXIS 2039, *28 (9th Cir. Jan. 26, 2023). *Wit’s* holding regarding injunctive relief is inapplicable, resting solely on ERISA’s substantive law. Specifically, Ninth Circuit found that ERISA’s 29 U.S.C. § 1132(a)(1)(B) does not provide for retrospective injunctive relief. *Id.* *The Class, however, makes no ERISA claim.* In contrast, Section 1557 claim authorizes the Court to utilize the full panoply of equitable powers to remedy illegal discrimination.

The Class does not seek a common fund award of money damages. Dkt. No. 38, ¶¶113, § VII, ¶¶3-4. It seeks declaratory and equitable relief requiring BCBSIL to process past, present and future claims for gender-affirming care without administering the Exclusions. That some class members may be reimbursed for some gender-affirming care does not transform the equitable remedy sought into “monetary damages.” *See e.g., Senne v. Kan. City Royals Baseball Corp.*, 2021 U.S. Dist. LEXIS 137819, *84 (N.D. Cal. July 23, 2021).

BCBSIL further asserts that any classwide declaratory relief would be mired in individual factual determinations preventing class certification. Dkt No. 156 at 6. However, the Court’s Order on summary judgment is easily adapted to classwide declaratory relief. *See* Dkt. Nos. 148 at 20; 153-1 at 2. BCBSIL’s Motion should be denied.

II. RELEVANT FACTS

The undisputed facts in Dkt. Nos. 148 and 153 are incorporated herein.

A. The Class Sought Equitable Relief Including Processing of Wrongfully Denied Claims.

Plaintiffs amended their complaint to ensure that any equitable relief obtained for C.P. would be available to all class members. Dkt. Nos. 26 at 2; 27, ¶2. The classwide relief sought is declaratory and injunctive relief, including reprocessing of claims. Dkt. No. 38, ¶113, § VII, ¶4; *see also* Dkt. No. 143 at 3.

Consistent with these representations, the equitable relief sought by the Class does not provide for a specific monetary amount of damages. *See generally*, Dkt. No. 153. Instead, the proposed relief seeks an injunction that prohibits BCBSIL from administering the Exclusions to all past, present and future claims and requires BCBSIL to reprocess previously denied claims. *See id.* at 1. Such claims processing, if ordered, will proceed according to the Court’s order, the remaining terms of the plan documents, and the governing Administrative Services Agreements (“ASAs”) and indemnification contracts in place at the time.

B. Processing Pre-authorizations and Claims Denied Due to the Exclusions May or May Not Result in Payments by BCBSIL.

Under the standard BCBSIL summary plan description and ASA, the employer delegates to BCBSIL all discretionary authority to adjudicate claims. Dkt. 84-13 at 111 (discretionary clause); *see e.g.*, Hamburger Decl., *Exh. 1*, § 15.3. Under ERISA, while employers can retain the right to make final decisions about coverage, they typically delegate their authority to make coverage determinations to their TPAs. *See e.g.*, *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1297 (9th Cir. 2014). That is the case in C.P.’s plan.

With delegated authority from employers, BCBSIL adjudicates claims. Hamburger Decl., *Exh. 1*, § 15.3, *exh. 1* at 22. Once the claims are adjudicated, **BCBSIL**

1 *pays for claims* first and then sends a request for payment to the employer. *Id.*, *Exh. 1*,
 2 *exh. 2*, § 6. The contract between BCBSIL and its employers includes a provision to
 3 ensure payment of claims incurred before the termination date but submitted after the
 4 contract terminated. *Id.*, *Exh. 1, exh. 2*, § 8.1 (“run off claims”). This provision holds the
 5 employer responsible for any valid and approved “run off claims.” *Id.* BCBSIL also
 6 insisted on an indemnity agreement with each employer that sought to include the
 7 Exclusions. *See e.g.*, *Hamburger Decl.*, *Exh. 2* at 9; *Exh. 3* at 129:22–133:3. If ordered, the
 8 proposed injunction will require BCBSIL to adjudicate all claims that were denied
 9 pursuant to the Exclusions consistent with the remaining terms and conditions of the
 10 plans.¹ If the claims are adjudicated as medically necessary and valid, under existing
 11 contracts BCBSIL must pay them (albeit, adjusted and priced according to the contracts,
 12 subject to co-payments and deductibles). *Id.*, *Exh. 1*, § 15.3, *exh. 2*, § 6. Then, BCBSIL
 13 may pursue the relevant employer for reimbursement, according to the ASAs and
 14 indemnity agreements. *See id.*, *Exh. 3*. If the claims are adjudicated as invalid under the
 15 remaining terms and conditions of the plans, *without applying the Exclusions*, BCBSIL
 16 will not be required to pay the claims and no reimbursement will be required from the
 17 relevant employer. Ultimately, whether any employer will pay is governed by the
 18 contracts between BCBSIL and the employers, and is beyond the issues before this
 19 Court.

20 III. ARGUMENT

21 A. BCBSIL Does Not Show “Good Reason” to Move to Decertify the Class.

22 A court has “considerable discretion” to modify or decertify a class. *United Steel*
 23 *v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010). Nonetheless, “[d]ecertification is
 24

25 ¹Other class members incurred out-of-pocket payments for gender-affirming care after they were
 26 denied pre-authorization. *See* Dkt. No. 156 at 7; *see generally*, J.N. Decl.

1 a drastic step, not to be taken lightly.” *Bund v. Safeguard Props. LLC*, 2018 U.S. Dist.
 2 LEXIS 180038, at *10 (W.D. Wash. Oct. 19, 2018) (quotations omitted).

3 BCBSIL, as the moving party, bears the burden of going forward to demonstrate
 4 that “the prerequisites for certification no longer exist in light of discovery or other
 5 developments.” *Dilts v. Penske Logistics, LLC*, 2013 U.S. Dist. LEXIS 192323, at *4–5 (S.D.
 6 Cal. Jan. 17, 2013). This is a heavy burden since “doubts regarding the propriety
 7 of class certification should be resolved in favor of certification.” *Id.* at *5. *After* the
 8 moving party demonstrates good reason to revisit class certification, the plaintiffs must
 9 show that Rule 23’s requirements are still met. *See In re Korean Ramen Antitrust Litig.*,
 10 2018 U.S. Dist. LEXIS 48606, at *15 (N.D. Cal. Mar. 23, 2018); *see* Dkt. No. 156 at 6.

11 BCBSIL argues two bases for revisiting class certification, both of which are
 12 meritless:

13 **1. Class Counsel’s Statements During the Status Conference Were**
 14 **Nothing New.**

15 BCBSIL relies upon statements made by Class counsel at the December 12, 2022
 16 status conference for a “good reason” to revisit class certification. Dkt. No. 156 at 2–3.
 17 The statements by class counsel contained no new information, and merely addressed
 18 the logistics of how injunctive relief requiring claims processing could occur. The same
 19 relief had long been sought by the Class. *See e.g.*, Dkt. No. 38, ¶113, § VII, ¶4; Dkt. No.
 20 78 at 3; Dkt. No. 99 at 4; Dkt. No. 143 at 3. The Class’s Motion for Declaratory and
 21 Injunctive relief is consistent with this approach. *See* Dkt. No. 153. The statements offer
 22 no basis for decertification.

23 **2. Wit Is Irrelevant to the Claims in this Case.**

24 *Wit*’s holding is limited to ERISA. *Wit*, 2023 U.S. App. LEXIS 2039, at *26. The
 25 Ninth Circuit panel’s disapproval of reprocessing as an injunctive remedy is limited to
 26 only claims brought under ERISA’s 29 U.S.C. § 1132(a)(1)(B). *Id.* Instead, a claim under

1 § 1132(a)(1)(B) must demonstrate that, but for the application of the disputed issue, the
 2 plaintiff may be entitled to the benefits on remand. *Id.* Accordingly, the *Wit* court
 3 concluded that there were too many individual issues related to whether each class
 4 member would be entitled to ERISA benefits, if the disputed mental health guidelines
 5 were not applied. *Id.* The *Wit* decision is narrow, focused on the substantive rights of
 6 ERISA enrollees under 29 U.S.C. § 1132(a)(1)(B).²

7 BCBSIL misleadingly takes dicta out of context to apply it to this non-ERISA case.
 8 See Dkt. No. 156 at 5 (quoting *Wit*, “reprocessing is not truly the *remedy* that Plaintiffs
 9 seek, it is the *means to the remedy* that they seek”). The statement in *Wit* applies only
 10 to ERISA’s 29 U.S.C. § 1132(a)(1)(B). See *id.*, 2023 U.S. App. LEXIS 2039, at *26. This is
 11 apparent when considering the next sentence: “But Plaintiffs expressly disclaimed the
 12 actual remedy available to them and narrowed their theory of liability under
 13 § 1132(a)(1)(B)...” *Id.* *Wit* only limits the injunctive relief available under ERISA’s 29
 14 U.S.C. § 1132(a)(1)(B).³

15 Section 1557 differs markedly from ERISA. Federal anti-discrimination law has
 16 always offered courts broad equitable/injunctive remedies address legal violations.
 17 “There can be little doubt that where a violation of [anti-discrimination law] is found,
 18 the court is vested with broad remedial power to remove the vestiges of
 19 past discrimination and eliminate present and assure the non-existence of future
 20 barriers to the full enjoyment of equal [] opportunities by qualified [protected
 21 individuals].” *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1971).
 22 These remedial provisions “are intended to give the courts wide discretion in exercising
 23

24 ² The *Wit* decision is difficult to square with *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011), and the
 25 *Wit* plaintiffs intend to seek *en banc* review. See Dkt. No. 154, at ¶2.

26 ³ *Wit* does not even foreclose reprocessing under ERISA’s catchall claim, 29 U.S.C. § 1132(a)(3). See
id., 2023 U.S. App. LEXIS 2039, at *28.

1 their equitable powers to fashion the most complete relief possible, requiring that
2 persons aggrieved by discriminatory ... practices 'be, so far as possible, restored to a
3 position where they would have been were it not for the unlawful discrimination.'" *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980) (quoting *Franks v.*
4 *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

6 Unless a statute affirmatively restricts a court's equitable jurisdiction, and Section
7 1557 does not, "the full scope of that jurisdiction is to be recognized and applied." *Porter*
8 *v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Rodriguez v. Hayes*, 591 F.3d 1105, 1120
9 (9th Cir. 2010). In other words, "absent clear direction to the contrary by Congress, the
10 federal courts have the power to award any appropriate relief in a cognizable cause of
11 action brought pursuant to a federal statute." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503
12 U.S. 60, 70-71 (1992). The availability of equitable relief under Title IX and Section 1557
13 is well established. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998)
14 (injunctive or equitable relief fulfills Title IX's focus on protecting individuals from
15 discriminatory practices); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 868
16 (9th Cir. 2014) ("the district court had broad powers to tailor equitable relief so as to
17 vindicate the rights" protected under Title IX); *Kadel v. Folwell*, 2022 U.S. Dist. LEXIS
18 218104, at *10 (M.D.N.C. Dec. 5, 2022) (granting summary judgment on claims for
19 injunctive relief under Section 1557); *Fain v. Crouch*, 2022 U.S. Dist. LEXIS 137084, at *45
20 (S.D. W. Va. Aug. 2, 2022) (enjoining Medicaid program "from enforcing or applying [a
21 gender-affirming care] exclusion" under, *inter alia*, Section 1557). Section 1557 provides
22 the Class with broad substantive rights to injunctive relief including "make whole"
23 remedies for illegal discrimination. *See id.*

24 BCBSIL argues that this case is brought under ERISA because the class definition
25 references ERISA self-funded plans. *See* Dkt. No. 156 at 5, n.1. Mere reference to ERISA
26 in the class definition does not invoke a claim under 29 U.S.C. § 1132(a)(1)(B). The

1 Class’s Section 1557 claim is independent of any ERISA rights. *See* 42 U.S.C. § 18116(a).
2 And ERISA cannot be construed to “invalidate or impair” any rights under Section 1557.
3 Dkt. No. 148 at 16; 29 U.S.C. § 1144(d).

4 BCBSIL also argues that Plaintiffs’ claim is brought under ERISA because ERISA
5 “incorporates” the ACA. Dkt. No. 156 at 5, n. 1. BCBSIL cites no provision of ERISA that
6 “incorporates” Section 1557, much less show how doing so transforms a Section 1557
7 violation into an ERISA claim. The equitable relief available to the Class under Section
8 1557 is not limited by either ERISA or the *Wit* decision.

9 BCBSIL’s claim that the declaratory relief sought here violates *Wit* is also
10 meritless. *See* Dkt. No. 156 at 6. A simple declaration of Class members’ right to have
11 their claims adjudicated without the illegal Exclusions requires no individualized
12 analysis. *See* Dkt. Nos. 148 at 20; No.153-1 at 2.

13 **B. Class Certification Remains Appropriate.**

14 **1. The Rule 23(a) Requirements Are Met.⁴**

15 BCBSIL disputes that commonality and typicality are met, but its objection rests
16 entirely on misreading *Wit*. Dkt. No. 156 at 7. Mistakenly, BCBSIL argues that the Class
17 is limited to only the remedies under ERISA’s 29 U.S.C. § 1123(a)(1)(B), “to recover
18 benefits or to enforce or clarify rights under the plan.” *Id.* Not true. The Class did not
19 bring a claim under ERISA, and ERISA does not limit the Class’s Section 1557 claim or
20 available remedies.

21 BCBSIL also argues that “reprocessing is not proper relief” because “such relief
22 would not be typical for the class.” *Id.* at 7. BCBSIL is wrong again. Here, “[a] single,
23 indivisible injunction ordering [defendant] to abate those policies and practices would
24

25 ⁴ The Class incorporates herein all previous arguments in support of class certification. *See* Dkt. Nos.
26 78, 99, 113, 143.

1 provide relief to each member of the class, thus satisfying Rule 23(b)(2).” *B.K. v. Snyder*,
 2 922 F.3d 957, 971 (9th Cir. 2019) (quotations omitted); *Parsons v. Ryan*, 754 F.3d 657, 675
 3 (9th Cir. 2014). *Melendres v. Arpaio*, 784 F.3d 1254, 1264 (9th Cir. 2015), cited by BCBSIL,
 4 supports the Class. There, the Ninth Circuit concluded that where all class members
 5 were subject to the same “systemwide violation” of the law, a class is properly certified
 6 to seek “systemwide relief” in the form of an injunction. *Id.*, 784 F.3d at 1264. Here, all
 7 class members were denied coverage due to BCBSIL’s administration of the Exclusions.
 8 The remedy sought is systemic: an injunction requiring administration of all claims
 9 (past, present, and future) without illegal discrimination.

10 Finally, BCBSIL asserts it no longer administers 106 of the 398 plans that contain
 11 the Exclusions during the class period, such that it cannot reprocess claims for those
 12 plans.⁵ Dkt. No. 156, pp. 7-8; Dkt. No. 156-2, ¶3. BCBSIL’s professed “impossibility”
 13 without more, merits no weight. The standard ASA and indemnity language provides
 14 a process for (1) handling claims after the contract between BCBSIL and employers has
 15 terminated; and (2) addressing payments related to a court order holding BCBSIL liable
 16 for administering the Exclusions. *Hamburger Decl., Exh. 1, exh. 2, § 8.1; Exh. 2 at 9; Exh.*
 17 *3, pp. 131:15-133:3.* That the injunction may be administratively difficult for BCBSIL is
 18 irrelevant to class certification. *See Rodriguez*, 591 F.3d at 1125.

19 **2. The Class Satisfies Fed. R. Civ. P. 23 (b)(1).**

20 BCBSIL makes three arguments for decertification under Rule 23 (b)(1), none of
 21 which are applicable. *See* Dkt. No. 156, pp. 8-9.

22 *First*, as noted above, *Wit* does not limit the remedies available under Section
 23 1557. Courts have repeatedly held that injunctive relief is not money damages, even
 24

25 ⁵ Curiously, BCBSIL does not declare that any class member was enrolled in any of the plans it no
 26 longer administers. *See* Dkt. No. 156-2, ¶3.

1 when an injunction causes payment of money. The term “remedy” “can mean either
2 specific relief obtainable at the end of a process of seeking redress, *or* the process itself,
3 the procedural avenue leading to some relief.” *Booth v. Churner*, 532 U.S. 731, 738 (2001)
4 (emphasis added). When an injunction requires that a procedural avenue be followed,
5 the fact that the ultimate outcome may involve payment does not transform the remedy
6 into one for money damages. *CIGNA*, 563 U.S. at 441 (“[T]hat this relief takes the form
7 of a money payment does not remove it from the category of traditionally equitable
8 relief”); *see e.g., Bowen v. New York*, 476 U.S. 467, 476 (1986) (affirming injunction
9 requiring reprocessing without application of illegal policy).

10 The Ninth Circuit confirms as much. *See e.g., Pauma Band of Luiseno Mission*
11 *Indians of the Pauma & Yuina Reservation v. California*, 813 F.3d 1155, n.19 (9th Cir. 2015)
12 (“equitable relief, which may take the form of money, is different than monetary
13 damages...”); *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993) (claims seeking
14 “invalidation of a rule used to determine eligibility for benefits” did not amount to claim
15 for the underlying benefits themselves); *see also, Thornton v. Comm'r of Soc. Sec.*, 2020 U.S.
16 Dist. LEXIS 220711, at *8–9 (W.D. Wash. Nov. 24, 2020) (ordering reprocessing of
17 wrongfully denied Social Security benefits); *Hart v. Colvin*, 310 F.R.D. 427, 438–39 (N.D.
18 Cal. 2015) (same); *Huynh v. Harasz*, 2015 U.S. Dist. LEXIS 154078, at *30 (N.D. Cal.
19 Nov. 12, 2015) (where “[d]efendants implemented a uniform, blanket, and illegal policy
20 in denying all reasonable accommodation requests” reprocessing of those requests is an
21 appropriate form of injunctive relief); *Senne*, 2021 U.S. Dist. LEXIS 137819 at *84.

22 **Second**, without class certification, there is a high risk of inconsistent
23 adjudications. The Court has concluded that BCBSIL may not administer
24 discriminatory exclusions like that in C.P.’s plan. This determination is dispositive for
25 all class members and for all of BCBSIL’s activities. Class members should not have to
26 re-litigate the issue, plan-by-plan or member-by-member.

1 **Third**, BCBSIL has a statutory and a regulatory obligation to treat similarly
2 situated enrollees the same. 29 U.S.C. § 1144(d); 29 C.F.R. § 2560.503-1(b)(5); 42 U.S.C.
3 § 18116(a). BCBSIL must comply with Section 1557 in all of its activities. *T.S. v. Heart of*
4 *CarDon*, 2021 U.S. Dist. LEXIS 49119, at *27 (S.D. Ind. Mar. 16, 2021). If BCBSIL is
5 prohibited from administering the Exclusion in C.P.’s plan because it is illegal
6 discrimination under Section 1557, it is similarly prohibited from administering the
7 Exclusion in any other plan. BCBSIL identifies no basis by which any class member
8 should be treated differently.

9 **3. The Class Satisfies Fed. R. Civ. P. 23(b)(2).**

10 BCBSIL repeats its meritless argument that the injunctive relief sought in this case
11 is actually an award of money damages, which fails for the previously stated reasons.
12 *See* Dkt. No. 156 at 9; § III.B.2 *supra*.

13 BCBSIL also argues that an injunction prohibiting BCBSIL from administering
14 the Exclusions is not “final relief,” citing out-of-jurisdiction cases. Dkt. No. 156 at 9–10.
15 That is not the law in this Circuit, and, in any event, BCBSIL misreads the cases.

16 The Ninth Circuit has long approved of permanent injunctive relief to enforce a
17 defendant’s compliance with a court order, even when the injunction requires
18 reprocessing. *See e.g., Defs. of Wildlife v. United States EPA*, 420 F.3d 946, 978 (9th Cir.
19 2005) (Typically, when an entity violates the law, “we vacate the [entity’s] action and
20 remand to the [entity] to act in compliance with its statutory obligations.”); *Idaho*
21 *Watersheds Project v. Hahn*, 307 F.3d 815, 823 (9th Cir. 2002) (approving injunction
22 requiring reprocessing of 68 permits); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d
23 1318, 1325–26 (9th Cir. 1975) (equitable remedies include placing class members in the
24 position “which they would have occupied but for the discrimination”); *see also Ollier*,
25 768 F.3d at 859 (approving injunction under Title IX including reinstatement); *Criswell*

1 *v. W. Air Lines, Inc.*, 514 F. Supp. 384, 394 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544, 546 (9th
2 Cir. 1983) (injunction including reinstatement and retraining); *EEOC v. Hacienda Hotel*,
3 881 F.2d 1504, 1518 (9th Cir. 1989) (approving permanent injunctive relief since the
4 “district court is required to attempt to make victims of discrimination whole by
5 restoring them to the position in which they would have been absent
6 the discrimination”).

7 The proposed equitable and injunctive order would provide “final injunctive
8 relief.” BCBSIL cites two out-of-jurisdiction cases for its argument that reprocessing is
9 not “final relief:” *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481 (7th Cir. 2012) and *Kartman*
10 *v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 886 (7th Cir. 2011). Neither is relevant.
11 The class in *Jamie S.* was rejected because the class alleged individual violations of the
12 law, requiring individualized determinations of liability and individualized injunctive
13 relief; there was no unified legal injury that could be cured by a single injunction. *See*
14 *id.*, 668 F.3d at 486. In contrast, here, all class members were harmed by the same
15 discriminatory action taken by BCBSIL: its administration of the Exclusions. The
16 proposed injunction resolves the dispute for all class members.

17 *Kartman* is also inapplicable. In that case, a lawsuit contending that an insurer
18 had underpaid its insureds for hail damage to their roof, the class sought an injunction
19 to require the defendant to “implement a reasonable, objective standard” for assessing
20 their roofs. *Id.*, 634 F.3d at 889. The Seventh Circuit rejected this approach, concluding
21 that there was no actionable claim over the method used by State Farm to adjudicate
22 claims. *Id.* at 890.

23 This case is very different. The Class asserts that Section 1557 prohibits
24 administration of health claims in a manner that discriminates based on sex. Dkt. No.
25 38. The Court concluded that BCBSIL violated Section 1557 as to all class members. Dkt.
26 No. 148 at 12. Here, BCBSIL’s own internal medical policy prescribes how Class claims

1 should be adjudicated, without the Exclusions. *See* Dkt. No. 84-4. Ultimately, *Kartman*
 2 and its progeny are inapplicable where “a single injunction or declaratory judgment
 3 would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564
 4 U.S. 338, 360 (2011). Here, a single injunction would direct BCBSIL to adjudicate past,
 5 present and future claims without illegal discrimination. Even Seventh Circuit caselaw
 6 distinguishes *Kartman* on this basis. *See Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of*
 7 *Chi.*, 797 F.3d 426, 443 (7th Cir. 2015).⁶

8 *Third*, BCBSIL argues that the proposed injunctive order would not require any
 9 non-party to pay a claim, such that relief would not be “final.”⁷ Dkt. No. 156 at 11. To
 10 be clear, the proposed injunction is intended to bind only BCBSIL to do what it is
 11 required to do under the existing contracts *without discrimination*. So long as BCBSIL
 12 complies with the injunction, there is nothing further for this Court to do, making the
 13 injunctive order final.

14 The Court is not required to adjudicate who ultimately pays for the injunctive
 15 relief (BCBSIL or the employers) since that question involves non-parties and unrelated
 16 contract claims. That said, if BCBSIL adjudicates the claims without illegal
 17 discrimination and concludes that the claims are covered, then BCBSIL must pay
 18 (subject to adjusted prices, co-pays and deductibles). *Hamburger Decl., Exh. 1*, § 15.3,
 19 *exh. 2*, § 6. BCBSIL then can pursue the employers for payment under its various

21
 22 ⁶ *Day v. Humana Ins. Co.*, 335 F.R.D. 181, 199 (N.D. Ill. 2020), cited by BCBSIL, Dkt. No. 156 at 10, is
 23 irrelevant. The district court dismissed the class claims, *with leave to amend*, because the plaintiff failed
 24 to plead that Humana acted in a uniform manner to deny a particular treatment to all class members.
Day, 335 F.R.D. at 199. Here, the Court concluded that BCBSIL uniformly denied access to gender-
 affirming care to all class members. Dkt. No. 148 at 12.

25 ⁷ *Takeda v. Nw. Nat. Life Ins. Co.*, 765 F.2d 815 (9th Cir. 1985), cited by BCBSIL at Dkt. No. 156 at 11-
 26 12, is inapplicable. The plan administrator in *Takeda* was a necessary party because it was unclear whether
 the plan administrator or the TPA made the decision at issue in the case. *Id.* at 820. Here, BCBSIL
 administered the Exclusions, conduct that the Court concluded was illegal discrimination.

1 contracts and the indemnification agreements. *See id.*, *Exh. 2* at 9; *Exh. 3*, at 131:15–133:3.

2 This is exactly what BCBSIL does every day with thousands of health care claims.⁸

3 **C. Injunctive Relief Is a Proper Remedy Even If It Places BCBSIL at a**
 4 **Competitive Disadvantage.**

5 BCBSIL argues that the proposed permanent injunctive order would be unfair
 6 since its competitors may continue to administer similar exclusions. Dkt. No. 156 at 13.
 7 BCBSIL suffers no hardship “when a permanent injunction would merely require the
 8 defendant to comply with law.” *BMW of N. Am., LLC v. Rocco*, 2020 U.S. Dist. LEXIS
 9 217040, at *34 (C.D. Cal. Nov. 18, 2020). That other TPAs persist in discriminatory
 10 treatment of transgender enrollees is not a justification for allowing BCBSIL to continue
 11 to do so.

12 BCBSIL’s concern underscores why declaratory relief is critically important in
 13 this case. All TPAs that are subject to Section 1557 cannot discriminate in any of their
 14 activities, including when acting as a claims administrator for ERISA self-funded plans.
 15 Such a declaratory judgment will signal to BCBSIL’s alleged competitors which are
 16 subject to Section 1557 that they cannot engage in the sex discrimination in the
 17 administration of benefits.

18 **IV. CONCLUSION**

19 The Court should deny BCBSIL’s Motion to Decertify the Class.

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⁸ CHI and the other employers are not “necessary parties.” *See Carr v. United Healthcare Servs.*, 2016 U.S. Dist. LEXIS 182561, at *9 (W.D. Wash. May 31, 2016).

1 DATED: February 27, 2023.

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4 /s/ Eleanor Hamburger

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12 *I certify that the foregoing contains 4,161 words,
13 in compliance with the Local Civil Rules.⁹*

14 LAMBDA LEGAL DEFENSE AND
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16 /s/ Omar Gonzalez-Pagan

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Attorneys for Plaintiffs

⁹ By agreement of the parties, this Motion, opposition and reply are briefed according to word limits in LCR 7(e)(2).

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard on his own behalf and on behalf of similarly situated others; and PATRICIA PRITCHARD,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

NO. 3:20-cv-06145-RJB

[PROPOSED] ORDER DENYING
DEFENDANT’S MOTION TO
DECERTIFY THE CLASS

**Note on Motion Calendar:
March 3, 2023**

This matter came before the Court on Defendant Blue Cross Blue Shield of Illinois’ Motion to Decertify the Class. Plaintiff C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard, were represented by Eleanor Hamburger and Daniel S. Gross of Sirianni Youtz Spoonemore Hamburger PLLC, and Omar Gonzalez-Pagan and Jennifer C. Pizer of Lambda Legal Defense and Education Fund, Inc. Defendant Blue Cross Blue Shield of Illinois was represented by its counsel, Gwendolyn C. Payton, John R. Neeleman and Stephanie N. Bedard of Kilpatrick Townsend & Stockton LLP.

The Court reviewed and considered the pleadings and record herein, including:

- Defendant BCBSIL’s Motion to Decertify the Class, with exhibits;
- Plaintiff Class’s Opposition to Defendant’s Motion to Decertify;

- 1 • Declaration of J.N. in Support of Plaintiffs' Opposition to Defendants' Motion
- 2 to Decertify;
- 3 • Declaration of Eleanor Hamburger and all exhibits in Support of Plaintiff
- 4 Class's Opposition to Defendant's Motion to Decertify;
- 5 • BCBSIL's reply brief and all declarations and exhibits in support of BCBSIL's
- 6 reply brief, if any; and
- 7 • _____
- 8 • _____.

9 Based upon the foregoing, and for good cause shown, the Court hereby DENIES
10 Defendant BCBSIL's Motion. Defendants do not meet their burden of coming forward
11 with "good reason" to decertify the Class. Additionally, the Class continues to meet the
12 requirements for class certification as described in Dkt. No. 143.

13 DATED this _____ day of March 2023.

14
15 _____
16 Robert J. Bryan
17 United States District Judge

18 Presented by:

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