

THE HONORABLE ROBERT J. BRYAN

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

C. P., by and through his parents,  
Patricia Pritchard and Nolle Pritchard;  
and PATRICIA PRITCHARD,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF  
ILLINOIS,

Defendant.

Case No. 3:20-cv-06145-RJB

**BLUE CROSS BLUE SHIELD OF  
ILLINOIS'S RESPONSE TO THE COURT'S  
ORDER TO SHOW CAUSE**

1 Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) hereby responds to the Court’s  
2 14, 2023 Order to Show Cause (Dkt. 166). The Court asks if there is any reason why it should  
3 not stay this action pending the Ninth Circuit’s decision on the *en banc* petition in *Wit v. United*  
4 *Behavioral Health*, 58 F.4th 1080 (9th Cir. 2023), *pet. for rehearing en banc pending*. The  
5 Order to Show Cause requests that the parties “show cause, in writing, if any they have, why this  
6 case should not be stayed until the Ninth Circuit determines whether to grant some or all” of the  
7 petition in *Wit*.

8 It is appropriate for this Court to stay proceedings pending the outcome of the petition for  
9 rehearing in *Wit*. For the reasons previously briefed and discussed at the hearing of March 9,  
10 2023, the panel decision in *Wit* compels vacatur of the class certification order. BCBSIL  
11 maintains that other reasons also warrant vacating the class certification ruling, and this Court  
12 could vacate the order on any of those bases. *See* Dkt. 156. But BCBS does not object to this  
13 Court waiting for the final disposition of *Wit* before considering the matter further.

14 *Wit* addresses the precise issues currently before this Court. As *Wit* explains, certification  
15 under Rule 23(b)(1) or (b)(2) is appropriate only if *this Court’s* injunctive relief ruling in the  
16 named Plaintiffs’ case would have a broad dispositive effect on all absent class members. *Wit*  
17 therefore prohibits certification of claims that 1) actually seek money damages, as is the case  
18 here; or 2) fail to provide final injunctive relief, as is also the case here.

19 Pursuant to *Wit*, a Rule 23(b)(1) or (b)(2) class like the Court certified in this case 1) may  
20 not claim monetary relief, and 2) the class-wide injunctive relief requested must be final. 58  
21 F. 4th at 1094-95. *Wit* also holds that ERISA does not authorize the Court to issue a class-wide  
22 processing or reprocessing injunction.

23 Because *Wit* is dispositive of the pending motions, a stay is appropriate. It makes little  
24 sense for the Court to address BCBSIL’s other reasons for decertifying the class before the Ninth  
25 Circuit in *Wit* determines whether to clarify the panel’s holding or to decide the case on  
26 alternative grounds.

1 Plaintiffs claim that *Wit* is off-point because it arose from an ERISA claim, not a claim  
2 under Section 1557. Their argument is doubly wrong. First, Plaintiffs' effort to narrowly  
3 interpret *Wit* fails. *Wit* reaffirms broadly that Rule 23(b)(1) and (b)(2) do not allow claims for  
4 damages that masquerade as injunctive relief or class-wide claims that fail to provide final relief.  
5 The class certification here suffers from both of these flaws.

6 Second, in any event, here, the reprocessing that Plaintiffs ask this Court to order must  
7 comply with ERISA. The class consists solely of members of ERISA plans complaining of the  
8 denial of ERISA-governed benefits and seeking reprocessing and payment by those ERISA  
9 plans. Dkt. 143 at 2-3. Any reprocessing of claims by the plans must, therefore, comply with  
10 ERISA. *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th  
11 Cir. 1995). Indeed, this Court's certification order necessarily relies on the enforcement  
12 mechanisms provided by ERISA and the procedures provided by the plans themselves pursuant  
13 to ERISA. ERISA section 502(a) "contains a comprehensive scheme of civil remedies to  
14 enforce ERISA's provisions." *Cleghorn v. Blue Shield of California*, 408 F.3d 1222, 1225 (9th  
15 Cir. 2005). As an ERISA third-party administrator, BCBSIL must comply with ERISA and  
16 follow all plan terms, including the claim and appeal procedures established pursuant to ERISA.  
17 29 U.S.C. § 1104(a)(1)(D).

18 In fact, the Ninth Circuit reversed the district court in *Wit* for ordering a remedy that was  
19 not available to members whose plans were governed by ERISA's statutory scheme. *See Wit*, 58  
20 F.4th at 1095 ("The district court abused its discretion in accepting the erroneous legal view that  
21 reprocessing is itself a remedy under § 1132(a)(1)(B) independent from the express statutory  
22 remedies that Congress created . . . . Doing so improperly allowed Plaintiffs to use Rule 23 as a  
23 vehicle for enlarging or modifying their substantive rights where ERISA does not provide  
24 reprocessing as a standalone remedy.").

25 *Wit* establishes that BCBSIL should prevail in its Motion to Decertify and Plaintiffs'  
26 Motion for Injunction and Declaratory relief. Although BCBSIL relies on other grounds for  
27 decertifying the class, it would be prudent for this Court to stay this action until the Ninth Circuit

1 decides the *en banc* petition in *Wit*.

2 Dated this 31<sup>st</sup> day of March, 2023.

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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below I caused a copy of the foregoing document, BLUE CROSS BLUE SHIELD OF ILLINOIS’S RESPONSE TO THE COURT’S ORDER TO SHOW CAUSE, to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court’s rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

<p><b>Eleanor Hamburger</b>                  SIRIANNI YOUTZ SPOONEMORE                  HAMBURGER                  3101 WESTERN AVENUE STE 350                  SEATTLE, WA 98121                  206-223-0303                  Fax: 206-223-0246                  Email: ehamburger@sylaw.com</p>	<p><input checked="" type="checkbox"/> by CM/ECF  <input type="checkbox"/> by Electronic Mail  <input type="checkbox"/> by Facsimile Transmission  <input type="checkbox"/> by First Class Mail  <input type="checkbox"/> by Hand Delivery  <input type="checkbox"/> by Overnight Delivery</p>
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DATED this 31<sup>st</sup> day of March 2023.

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