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 SUPPLEMENTAL BRIEFING

Note on Motion Calendar: October 20, 2023

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I. INTRODUCTION

On April 17, 2023, the Court stayed this litigation "until after the Ninth Circuit determines whether to grant some or all of the petition [for *en banc* review] in *Wit" v. United Behav. Health*, 58 F.4th 1080 (9th Cir. 2022) ("*Wit 2"*). Dkt. No. 171. Many state attorneys general and various advocacy groups filed *amicus* briefs in support of the petition. Notably, the U.S. Department of Labor argued in favor of *en banc* review because reprocessing was an appropriate – ***even routine*** – remedy under ERISA. *See* Declaration of Eleanor Hamburger in Support of Plaintiff Class's Supplemental Briefing, *Exh. 1*, p. 29 ("Once plaintiffs prove that their claims for coverage were decided under an improper standard, as Plaintiffs did in this case, this Court and others routinely remand the claim so the administrator can apply the proper standard in the first instance").

On August 22, 2023, the Ninth Circuit panel vacated the prior opinion and replaced it with a new one, mooting the petition for *en banc* review. *See Wit v. United Behav. Health*, 2023 U.S. App. LEXIS 22122 (N.D. Cal. August 22, 2023) ("*Wit 3")*. The new panel decision confirmed that remand with reprocessing is a proper remedy, even under ERISA, abandoning its earlier decision: "[R]emand may be an appropriate remedy in some cases where an administrator has applied an incorrect standard…." *Id*. at *28. The Ninth Circuit panel held that remand is permitted unless it is "a useless formality" and futile. *Id*. at *28–29.

Thus, while *Wit 3* addresses the avenues for relief for ERISA claims (of which none are pled in this case, which raises a single claim of unlawful discrimination under Section 1557 of the ACA),[1] the remedy sought by the Plaintiff Class here is entirely consistent with *Wit 3:* The Class seeks declaratory, injunctive, and other equitable relief that results in a "do-over" by BCBSIL without applying the discriminatory Exclusion. Remand and reprocessing will require BCBSIL to review claims for gender-affirming care under its existing Medical Policy, and if

[1] Plaintiffs stand by and incorporate their prior arguments as to why *Wit 2* did not constrain the Court's ability to provide class-wide injunctive relief here (both prospective and reprocessing), or the viability of class certification in this case. *See*, *e.g.*, Dkt. No. 158 at 4–7; Dkt. No. 169.

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medically necessary, approve and pay the claims consistent with its existing contracts and indemnification agreements but without application of the Exclusion.

This equitable remedy is desperately needed. Since the Court's Order granting summary judgment, BCBSIL has continued to apply with impunity exclusions of gender-affirming care in its self-funded plans. *See generally* Dkt. Nos. 176–177 (Declarations of class members S.R. and Jones).[2] BCBSIL continues to apply gender-affirming care exclusions causing substantial harm to class members like S.L. and Jones. These class members continue to suffer the loss of critically needed health coverage and the uncertainty about whether their ongoing and future medical needs for treatment for gender dysphoria will be met. All class members are irreparably harmed by BCBSIL's ongoing, recalcitrant discrimination. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1115 (9th Cir. 2011) (the denial of medical services necessary to maintain plaintiffs' health is irreparable harm); *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 671–72 (8th Cir. 2022) (affirming holding that the denial of gender-affirming care is irreparable harm).

BCBSIL's motion to decertify must be denied. Class certification continues to be proper here because "in one stroke" the Court has adjudicated that BCBSIL engaged in illegal discrimination by administering the discriminatory exclusion of gender-affirming care that appears in their health plans. *See* Dkt. No. 113, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Similarly, one single order for declaratory, equitable, and injunctive relief will remedy the harm for all class members. And, as described below, *Wit 3* does not impact class certification in this case. All that is left in this matter is to order the proper relief so Plaintiff Class members like S.L. and Jones do not continue to suffer discrimination at the hands of BCBSIL.

[2] The Plaintiff Class has moved to add S.L. and Jones as additional named plaintiffs and class representatives, since Plaintiffs C.P. and Patricia Pritchard are no longer enrolled in a health plan administered by BCBSIL. *See* Dkt. No. 175; Dkt. No.178, ¶5.

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II. FACTS

A. Procedural History.

This case was filed on November 23, 2020. Dkt. No. 1. The Court denied BCBSIL's motion to dismiss by an order issued on May 4, 2021. Dkt. No. 23. Plaintiffs then moved to amend their Complaint to include class allegations, which the Court permitted. Dkt. No. 37.

Discovery closed on August 12, 2022. Dkt. No. 73. Daubert Motions were fully briefed and decided by November 21, 2022. Dkt. No. 125.

Plaintiffs moved for class certification, and the parties each moved for summary judgment. Dkt. Nos. 78, 87, and 96. The Court granted class certification on November 9, 2022, and the class certification order was amended on December 12, 2022. Dkt. Nos. 113, 143. The Court further granted Plaintiffs' motion for summary judgment and denied Defendant's summary judgment motion on December 21, 2022. Dkt. No. 148.

On February 9, 2023, Plaintiffs moved for class-wide declaratory and injunctive relief. Dkt. No. 153. At the same time, Defendant moved to decertify the Class. Dkt. No. 156. After argument on March 9, 2023, the Court issued an Order to Show Cause asking the parties to brief why the case should not be stayed pending a decision by the Ninth Circuit regarding the petition for *en banc* review in *Wit 2*. Dkt. No. 166. Subsequently, the Court entered a stay in this matter. Dkt. No. 171. The Court ordered the parties to notify the Court within 10 days of the Ninth Circuit's decision regarding *en banc* review, but that by no later than September 5, 2023, they should file a status report. *Id*., p. 2.

On August 22, 2023, the Ninth Circuit panel in *Wit* took the unusual step of withdrawing its second opinion in the case and substituted a new, third decision.

B. *Wit v. United Behavioral Health.*

The Ninth Circuit's most recent decision supports the declaratory, injunctive, and other equitable relief sought by the Plaintiff Class as well as continued class certification.

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In *Wit*, a group of plaintiffs filed a class action lawsuit against United Behavioral Health ("UBH"), a third-party administrator (like BCBSIL), in the U.S. District Court for the Northern District of California. *Wit 3*, 2023 U.S. App. LEXIS 22122 at *8. The lawsuit challenged the coverage guidelines used by UBH to decide coverage of certain mental health treatment. *Id*. at *14–16. The class action lawsuit brought claims under ERISA only. *Id*. at 9. After a bench trial, the court largely ruled in favor of the plaintiffs, ordering declaratory relief, prospective injunctive relief, and retrospective injunctive relief in the form of "reprocessing" claims denied at least in part due to the operation of UBH's guidelines. *Id*. at *20–21. The District Court also held that any class members' failure to exhaust administrative remedies was excused due to futility, and it ordered equitable tolling of the class members' claims subject to reprocessing. *Id*. at *21.

UBH appealed, and a panel of the Ninth Circuit issued and withdrew two earlier opinions. The panel's second opinion took outlier positions on the potential viability of reprocessing as a remedy (holding it to be a "means" of obtaining the remedy of monetary damages, rather than a remedy in its own right), at least as to some types of ERISA claims. *Wit 2*, 58 F.4th at 1094–95. *Wit 2* also cast doubt on the permissibility of equitable tolling of claims and appeals deadlines and statutes of limitations, at least as to some ERISA claims where the deadlines are mandated by the insurance contract. *Id*. at 1097–98. These legal conclusions stood in conflict with *Cigna Corp. v. Amara*, 563 U.S. 421, 435 (2011), in which the U.S. Supreme Court approved the remedy of reprocessing ERISA claims without application of the unlawful plan requirements. *Id*. The petition for *en banc* review drew widespread support from the U.S. Department of Labor, States' Attorneys General, and many advocacy groups. In response, the Ninth Circuit panel withdrew the decision. *Wit 3* abandons the panel's earlier critique of the reprocessing remedy and affirmatively concludes that equitable tolling and reprocessing are proper where an administrator has applied an incorrect standard to health claims and reprocessing is not futile. *Wit 3*, 2023 U.S. App. LEXIS 22122, at *28–29.

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C. BCBSIL Continues to Discriminate Against Class Members on the Basis of Sex.

At the March 9, 2023 hearing, BCBSIL's counsel stated that the Court's Order on summary judgment "sent a message" to BCBSIL and other third-party administrators ("TPAs"):

> I submit to you, Your Honor, the message is sent. Your order is out there. It is a published order.

Dkt. No. 167A, p. 28:1–4. Notwithstanding the long-held and reasonable presumption that parties "will adhere to the law as declared by the court," *Comm. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008), BCBSIL continues to administer the illegal exclusion without regard for the Court's order. *See*, *e.g.*, Dkt. No. 176, ¶¶ 7, 11–13; Dkt. No. 177. ***The Court's message has not been clearly heard by BCBSIL***.

Indeed, in nearly the same breath, BCBSIL's counsel explained that it considered the summary judgment Order and any injunctive relief to enforce it to be an "empty bag" because TPAs like BCBSIL would assertedly find ways to evade it. Dkt. No. 167A, p. 28:11–14 ("Because even if you make that substantive ruling that, yes, I agree with the cases that say those exclusions violate 1557, then you are [left] with an empty bag because you cannot, against the TPA, effectuate the relief you need."). BCBSIL's counsel further stated that it would only act according to "the directive of the plan's sponsor," claiming that ERISA required as much, despite the Court's order on summary judgment that the Affordable Care Act's anti-discrimination law forbids such discrimination by a TPA. *See Id*. at 29:1–4. BCBSIL's claim – that ERISA requires it to act according to the instructions of the plan sponsor, even when doing so would require BCBSIL to violate a court order and other federal law – is false. *See* 29 U.S.C. §1144(d); Dkt. No. 148 ("ERISA specifically provides that its requirements are not to be construed to invalidate or impair laws like Section 1557"). BCBSIL must comply with federal law, first and foremost, even if the plan sponsor directs otherwise. Without a court order, BCBSIL will continue to defy the law.

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BCBSIL's ongoing discrimination causes suffering and irreparable harm to class members. *See generally* Dkt. Nos. 176–177. For example, class member S.L. is diagnosed with both precocious puberty and gender dysphoria. Dkt. No. 176, ¶2. She is enrolled in a self-funded health benefit plan administered by BCBSIL offered through a non-religious employer. *Id*., ¶4. When she enrolled, her mother and health care provider obtained pre-approval for her treatment with puberty blockers, which are medically necessary to treat both of her diagnosed conditions. *Id*., ¶¶7–8, *Exh. 1*. Despite pre-authorization, BCBSIL has denied coverage for the puberty blockers, claiming that they are subject to the Exclusion. *Id*., ¶9, *Exh. 2*. On March 17, 2023, S.L.'s mother appealed the denial, and again BCBSIL denied all coverage for the treatment because BCBSIL considered the treatment "related to" gender dysphoria. *Id*., ¶11, *Exh. 3*. A BCBSIL membership services representative indicated to S.R. that BCBSIL would have likely covered the treatment if S.L. was not transgender and sought the puberty blockers solely to treat her precocious puberty. *Id*., ¶13.

The cost of S.L.'s puberty blockers is unaffordable without health insurance. *Id*., ¶15. S.L. will likely need a new dose of puberty blocker in the near future. *Id*., ¶14. If BCBSIL continues to deny coverage of her puberty blockers, and her parents are unable to find another way to cover or pay for the treatment, she will suffer further irreparable harm as a result of the lost medical treatment.

Similarly, class member Emmett Jones has been forced to pay out-of-pocket for gender affirming chest reconstruction, despite the Court's summary judgment order. *See generally*, Dkt. No. 177. Mr. Jones received surgery after the Court's Order in December 2022, and to date, BCBSIL has denied all coverage. *Id.,* ¶¶8–10. Moreover, Mr. Jones anticipates that he may require additional gender affirming surgery in the future, but consistent with BCBSIL's representations to Mr. Jones and to this Court, such surgery will be denied unless the Court orders injunctive relief. *See id*., ¶13.

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III. ARGUMENT

A. The Declaratory, Injunctive, and Other Equitable Relief Sought by the Class is Proper.

Courts have broad equitable authority to enjoin defendants from violating Section 1557 of the ACA. In case after case, when a court concludes that a defendant subject to the ACA's anti-discrimination law has violated it, equitable relief, including injunction, is proper. *See*, *e.g.*, *Fain v. Crouch*, 2022 U.S. Dist. LEXIS 137084, at *45 (S.D. W. Va. Aug. 2, 2022) (enjoining defendants "from enforcing or applying [a gender-affirming care] exclusion" under Section 1557); *Flack v. Wis. Dep't of Health Servs.,* 395 F. Supp. 3d 1001, 1003 (W.D. Wis. 2019) (same); *Boyden v. Conlin,* 341 F. Supp. 3d 979, 1005 (W.D. Wis. 2018) (plaintiffs have a right to pursue equitable relief for violations of Section 1557). Given BCBSIL's continued administration of the Exclusion – despite the Court's ruling that to do so is unlawful discrimination – injunctive relief from ongoing discrimination is proper and necessary. BCBSIL experiences no "burden" when it is simply ordered to comply with the law. *BMW of N. Am., LLC v. Rocco,* 2020 U.S. Dist. LEXIS 217040, at *34 (C.D. Cal. Nov. 18, 2020).[3]

To ensure that class members' rights to be free from illegal discrimination are broadly vindicated, the Court should order the following:

(1) **Issue declaratory judgment about the discriminatory exclusion.** Where, as here, a TPA administers coverage that causes the very discrimination prohibited by federal law, declaratory judgment is proper. BCBSIL does not dispute it.

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[3] Plaintiffs are entitled to immediate declaratory and prospective injunctive relief, ***with or without class certification***. *See*, *e.g.*, Dkt. No. 169 at 4–5. The proposed declaratory and prospective injunctive order, with or without a class, is essentially the same: BCBSIL is a covered "health program" subject to Section 1557 of the Affordable Care Act, pursuant to which it may not lawfully and shall not administer any categorical exclusion of coverage of gender affirming care. *See* Fed. R. Civ. P. 65(d)(2). A certified class is not needed to order BCBSIL to obey Section 1557 in all of its activities. *See Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (an injunction may benefit persons other than the prevailing party).

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(2) **Excuse class members from appeals deadlines and exhaustion.** This equitable remedy is proper under at least two different equitable doctrines: (1) equitable tolling and (2) anticipatory repudiation.

(a) *Equitable Tolling.* As described previously, equitable tolling is available where class members diligently pursued their claims, by requesting pre-service authorization or submitting post-service claims, only to be misinformed about the claim by the defendant. *Rodriguez v. Airborne Express*, 265 F.3d 890, 902 (9th Cir. 2001). That is what occurred here. This is a particularly appropriate remedy when, as in the case at bar, the plan "administrator contends in its briefs 'that the plaintiffs are not entitled to the [benefit sued for] under the terms of the Plan.'" *Z.D. v. Group Health Coop*, 2012 U.S. Dist. LEXIS 149610, at *30–31 (W.D. Wash. Oct. 17, 2012), *quoting Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991). Just as in *Z.D.*, this Court should equitably toll all of the deadlines and order BCBSIL to reprocess the claims. *Id.*, 2012 U.S. Dist. LEXIS 149610, at *30–31. Even *Wit 3* implicitly concedes that equitable tolling together with remand and reprocessing is proper where all class members were denied under an incorrect standard, such that they did not receive a "full and fair" review of their claim. *Wit 3*, 2023 U.S. App. LEXIS 22122, *31.[4]

(b) *Anticipatory Repudiation.* Under the doctrine of anticipatory repudiation, the Court may excuse any obligation imposed on class members to exhaust their administrative appeals upon denial or, in the case of class members who received pre-service authorization denials, to timely submit post-service claims, because BCBSIL communicated that any further action by the class member would not result in a different coverage determination. *See Hendricks v. Aetna Life Ins. Co.*, 2023 U.S. Dist. LEXIS 133509 (C.D. Cal. July 25, 2023), at *1.

[4] *Wit 3* holds that there is no exhaustion requirement for an ERISA breach of fiduciary duty claim, while there may be for a claim that is a "disguised benefit claim" under ERISA. *See Wit 3*, 2023 U.S. App. LEXIS 22122, *39–40. Here, the Class brings neither an ERISA breach of fiduciary duty nor an ERISA benefit claim. Rather, the Class brings a discrimination claim against BCBSIL, which is not limited or bound by ERISA requirements. Dkt. No. 38, §§V–VI.

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"Repudiation occurs when a party makes 'a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time.'" *Id*. at *10, *quoting Minidoka Irrigation Dist. v. Dep't of the Interior*, 154 F.3d 924, 926 (9th Cir. 1988). Where, as here "[a]s a matter of actual business practice, [the TPA] systematically denied coverage," no exhaustion requirement is required. *Hendricks*, 2023 U.S. Dist. LEXIS 133509, at *11. In such instances, the enrollee is not held to "strict compliance with claim rules" when the TPA has declared it will not pay the claim regardless of the enrollee's compliance. *Id*., *quoting Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 177 (2nd Cir 2012). As part of a ruling on anticipatory repudiation, the Court may establish a new timeframe by which past claims may be submitted to BCBSIL.

3. Enjoin BCBSIL to process all claims without applying the discriminatory exclusion. BCBSIL must process all claims (where the date of service is during the class period or in the future) without application of the illegal exclusion, once and if submitted by class members. Section 1557 provides the Class with broad substantive rights to injunctive relief including "make whole" remedies for illegal discrimination. *See* Dkt. No. 158, at 5–6. Moreover, as U.S. District Court Judge Robert Lasnik concluded in *Z.D. v. Group Health Coop.*, "this is precisely the sort of relief the Supreme Court found consistent with [ERISA] §502(a)(1)(B) in *CIGNA* [*Corp. v. Amara*, 563 U.S. 421, 435 (2011)]." *Id*., 2012 U.S. Dist. LEXIS 149610, at *29 (W.D. Wash. Oct. 17, 2012). *See also*, *Hendricks*, 2023 U.S. Dist. LEXIS 133509, at *22. *Wit 3* confirms that this approach is proper where, as here, "an administrator applie[d] the wrong standard" so that through reprocessing free of the unlawful restriction, class members may receive a "full and fair review" by the administrator. *Id*., 2023 U.S. App. LEXIS 22122, *28.

B. The Requested Declaratory and Injunctive Order is Final Relief.

At oral argument, BCBSIL claimed that the remedy sought by the Plaintiff Class was meaningless because BCBSIL could not process and pay the claims in a manner contrary to the directive of the plan sponsor. Dkt. No. 167A, pp. 28:11–14, 29:1–4. As described above, this is

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untrue. *See* 29 U.S.C. §1144(d). If this Court orders claims reprocessing without discrimination, BCBSIL must provide it.

BCBSIL's own internal medical policy (Dkt. No. 84-4) describes how class members' claims should be adjudicated without the Exclusion. If class members' claims meet these standards established by BCBSIL in its medical policy, then the claims must be approved as valid.

BCBSIL's existing contracts with employers describe how any approved and valid claims must be paid. Specifically, if BCBSIL adjudicates a claim as medically necessity and valid, then it pays the claim (subject to adjusted pricing, copayments, and deductibles, etc.). *See* Dkt. No. 160-1, §15.3, *Exh. 2*, §6. BCBSIL then may seek reimbursement from the relevant employers for the claims under the existing contracts and under the indemnity agreements that BCBSIL put in place with every employer that requested the Exclusion. Dkt. No. 160-2 at 9; Dkt. No. 160-3 at 131:15–133:3. Specifically, BCBSIL's Rule 30(b)(6) witness testified that, as a standard practice, BCBSIL insisted on indemnification anytime an employer asked it to administer the Exclusion:

> Q. Does Blue Cross Blue Shield of Illinois have an indemnity provision with other ASO plans that have gender-affirming care exclusions?
>
> …
>
> A. Yes.
>
> Q. And does Blue Cross Blue Shield of Illinois always have an indemnity provision whenever it is asked to administer a gender-affirming care exclusion?
>
> A. Yes.
>
> …
>
> Q. Does the indemnity provision say that the plan for an employer will pay for any losses incurred by Blue Cross Blue Shield of Illinois as a result of administering the exclusion?
>
> …

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> A. Yes, if that's what's written in the language.
>
> Q. And is it your understanding that that's the written language in all of these indemnity provisions?
>
> A. Yes.

Dkt. No. 160-3 at 131:15–133:3. BCBSIL offers no contrary evidence, only its unsupported suggestion that BCBSIL's parallel agreements with its other employers might not have the same requirements. *See*, *e.g.*, Dkt. No. 163, p. 6. A mere statement in a brief cannot contradict BCBSIL's Rule 30(b)(6) testimony.

In any event, whether BCBSIL pays for the coverage, or the relevant employer does, has no relevance here. That issue will be determined outside of this litigation by the contracts between BCBSIL and the employers. This case establishes that BCBSIL cannot play any role in discrimination against transgender enrollees, even when directed to do so by an ERISA employer. BCBSIL is responsible for the role it played and continues to play in perpetrating illegal discrimination. As part of reprocessing, BCBSIL must pay all valid and approved claims.

In sum, if the Court enjoins BCBSIL to process and pay claims without administering the Exclusion, but consistent with all other relevant contracts and indemnification agreements, the Class has a final remedy. Claims that are medically necessary, approved, and valid will be paid by BCBSIL, subject to deductibles, copayments, and other standard adjustments, just like any other claims. BCBSIL may seek reimbursement of those claims from the various employers for the coverage under the existing contracts and indemnity agreements. The Court's injunctive order will be meaningful and enforceable, not an "empty bag."

C. Class Certification Remains Proper.

As argued previously, class certification remains proper at this remedies stage. *See generally* Dkt. No. 158. Nothing in *Wit 3* requires decertification of the Class. Under the class definition, BCBSIL applied a standard illegal discriminatory exclusion to all class members' pre-service or post-service claims. Dkt. No. 143, pp.2–3. All of the requirements of Rule 23 are easily met.

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1. *Commonality and Typicality Are Met.*

BCBSIL previously argued that, at the remedy stage, too many "individualized questions" are involved in determining class members' entitlement to benefits, and that each member must establish medical necessity as a pre-requisite to class certification. Dkt. No. 163, p. 4. BCBSIL's "individualized questions" is a red herring.

In *Hendricks*, 2023 U.S. Dist. LEXIS 133509, a federal district court ***rejected*** the same arguments about "individualized questions" that BCBSIL made in its Motion to Decertify. *Compare id. with* Dkt. Nos. 156, 163. The *Hendricks* court wholly rejected that argument:

> The presence of "individualized questions" is neither here nor there. Plaintiffs need not show … that every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2).…Plaintiffs' proposed class action thus has the capacity to generate common ***answers*** apt to drive the resolution of the litigation.

Hendricks, 2023 U.S. Dist. LEXIS 133509, at *16–17 (internal citations and quotations omitted, emphasis in original). The *Hendricks* court further noted that the defendant's complaint about "individualized issues" did not impact the Court's analysis when a class is certified under Rule 23(b)(1) and (b)(2), as is the case here. *Id*. at *17–18. Where a single common answer can resolve a key issue for the class – here whether BCBSIL can administer a discriminatory exclusion of gender affirming care – commonality is met.

The *Hendricks* court also concluded that where a TPA employed a standard basis for denying coverage that is subject to challenge, the plaintiff class is entitled, as a whole, to a "positive benefits determination." *Id*. at *19. Explaining that a court can only consider the specific rationale that an ERISA TPA provided when denying the claim, the *Hendricks* trial court ruled that it could issue a class-wide "positive benefits determination" by holding that the TPA's standard rationale for denial was invalid. *Id*., *citing Collier v. Lincoln Life Assurance Co. of Bos.*, 53 F.4th 1180, 1182 (9th Cir. 2022). That is precisely what the Plaintiff Class seeks here – a

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declaration and injunctive relief that BCBSIL cannot use the standard rationale – the Exclusion – to deny claims because to do so is illegal discrimination. Under *Hendricks*, an order invalidating the denial and requiring reprocessing is a "positive benefits determination."

To be clear, "in light of the nature and purpose of [Plaintiffs'] lawsuit, no policy of ERISA favoring individualized eligibility determinations compels a different result." *Morgan v. Laborers Pension Tr. Fund for N. California*, 81 F.R.D. 669, 674 (N.D. Cal. 1979).

2. *Class Certification under Rule 23(b)(1) and (2) is Proper.*

In *Hendricks*, the trial court also concluded that class certification under Rule 23(b)(1) and (b)(2) is proper. "Injunctive relief concerning … coverage is still available and corresponding declaratory relief, Fed. R. Civ. P. 23(b)(2), likewise remains available." *Id*. at *22. That is precisely what the Plaintiff Class seeks.

BCBSIL's argument that the class really seeks monetary rather than injunctive relief relied entirely on *Wit 2's* seeming disapproval of reprocessing as an ERISA remedy. *See*, *e.g.*, Dkt. No. 156, pp. 5–6. This argument has no basis whatsoever now that *Wit 3* replaced the earlier opinion and confirms that reprocessing is proper where the common standard imposed by defendant was illegal and each class member submitted claims that they were entitled to benefits (either via pre-service or post-service requests for coverage). *See Wit 3*, 2023 U.S. App. LEXIS 22122, *28.

Reprocessing without discrimination is the remedy the Class seeks. That is the classic remedy for illegal discrimination – equitable relief designed to restore those who were injured to where they would have been but for the unlawful discrimination. *Sangster v. United Air Lines, Inc.,* 633 F.2d 864, 867 (9th Cir. 1980); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 868 (9th Cir. 2014) ("the district court had broad powers to tailor equitable relief so as to vindicate the rights" protected under Title IX). Class members are entitled to a "do-over" to have their claims processed and paid without application of the discriminatory exclusion.

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3. *The Class Definition is Proper.*

In *Wit 3*, the panel held that the trial court had incorrectly certified classes because the class definition necessarily included individuals who did not have their claims for mental health benefits decided using unlawful standards. *Wit 3*, 2023 U.S. App. LEXIS 22122, at *30–32. In other words, the class definition included individuals whose claims were not impacted by the improper coverage guidelines. That is not the case here.

The class definition approved by the Court encompasses only individuals whose pre-service requests or post-service claims "were, are, or will be" subject to BCBSIL's application of the Exclusion of gender-affirming care. Dkt No. 143 at 2. And, this Court found that imposition of the Exclusion was necessarily unlawful discrimination on the basis of sex, in violation of the ACA. Dkt. No. 148 at 11–12. Individuals are only included in the Class if they were, are, or will be subjected to the unlawful standard Exclusion central to this case. The Class certified by the Court is wholly consistent with the *Wit 3* decision and is proper.

IV. CONCLUSION

The Court should order the proposed class-wide declaratory, equitable, and injunctive relief, as well as nominal damages for C.P. and Ms. Pritchard.

DATED: September 22, 2023.

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I certify that the foregoing contains 4,707 words, in compliance with the Local Civil Rules.

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Attorneys for Plaintiffs and the Class

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 AMENDED] ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS-WIDE DECLARATORY AND PERMANENT INJUNCTIVE RELIEF **Note on Motion Calendar: October 20, 2023**

THIS MATTER having come before the Court upon the Plaintiffs' Motion for Classwide Declaratory and Permanent Injunctive Relief (Dkt. 153), and the parties' briefing related to that Motion (Dkts. 161, 164, 168–169) and the parties supplemental briefing filed on September 22, 2023, and the Court having considered the Motion and the pleadings in this matter, and it appearing to be in the best interest of the case, therefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion is GRANTED.

Specifically, in accordance with Fed. R. Civ. P. 65(d)(1) and the Court's Order on the cross motions on summary judgment (Dkt. 148), class-wide declaratory and permanent injunctive relief is ordered to ensure that class members may have their past, present, and future claims for gender-affirming care adjudicated by BCBSIL without the

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administration of the discriminatory categorical exclusions of gender-affirming care (the "Exclusions").

The specific terms of the classwide declaratory and injunctive relief are as follows:

1. ***Declaratory Judgment.*** The Court declares and issues a final judgment that Blue Cross Blue Shield of Illinois ("BCBSIL"), its agents, employees, successors, and all others acting in concert with them, including Health Care Service Corporation (of which BCBSIL is a division), violated Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), and discriminated on the basis of sex against Plaintiff C.P. and the Plaintiff Class, including members such as S.L. and Emmett Jones, when it administered and enforced the Exclusions. As a "health program or activity" subject to Section 1557, BCBSIL cannot discriminate in any of its activities, including, but not limited to, its activities as a third-party administrator.

2. ***Prospective Permanent Injunction.*** BCBSIL, its agents, employees, successors, and all others acting in concert with them, including Health Care Service Corporation, are hereby PERMANENTLY ENJOINED from administering or enforcing the Exclusions and any policies or practices that wholly exclude or limit coverage of gender-affirming care, so long as it is a "health program or activity" under the ACA's Section 1557, 42 U.S.C. § 18116(a).

3. ***Equitable Relief:*** The Court further ORDERS the following retrospective equitable relief:

(a) ***Equitable Tolling.*** BCBSIL is enjoined from applying the original time limits in Class members' health plans for submitting claims or appealing adverse benefit determinations, but only as to pre-service requests and post-service claims for gender-affirming care that were denied based upon the Exclusions during the Class period. Class members will have 12 months from the date the Class notice is

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mailed to submit claims for gender-affirming care that are associated with denials for pre-authorization and/or post-service denials based upon the Exclusions.

(b) ***Claims Processing.*** BCBSIL shall accept, process, and pay these claims consistent with the remaining terms of the plans, the Administrative Services Agreements, other contracts, and indemnification agreements, subject to this Order and without administering the Exclusions.

(c) ***Class Notice and Distribution.*** BCBSIL shall cause to be distributed to Class members, at its own expense, a Court-approved Notice regarding this Order. Class counsel shall also post the Court-approved Notice on its website. Class counsel shall draft a proposed notice, in consultation with BCBSIL counsel. An agreed-upon notice shall be provided to the Court for review no later than October 27, 2023. BCBSIL shall create and provide to Class counsel its plan for identifying class members and sending them the Notice required by this Order, including efforts to identify and correct bad addresses for Class members and send or resend them the Notice at the corrected address(es). Defendant shall provide this plan to Class counsel no later than 14 days following the signing of this Order. If Class counsel disagrees with the plan, the parties shall meet and confer to attempt to resolve the matter in good faith. Should the parties be unable to reach agreement on the contents of the Notice or the plan for its distribution to Class members, each party may submit their proposed Notice and/or proposed distribution plan to the Court by the above-listed date by which the parties must

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otherwise provide an agreed-upon Notice to the Court. No briefing is permitted regarding the form of the Class Notice or the nature of the Notice Distribution Plan.

In addition to the class-wide declaratory and injunctive relief, the Court ORDERS an award of individual nominal damages in the amount of $1 to Plaintiffs C.P. and Patricia Pritchard. This award of individual nominal damages does not preclude Plaintiffs from seeking injunctive relief pursuant to this order (i.e., processing of the previously denied claims for gender-affirming care). Nor shall the award of nominal damages be interpreted as a determination by the Court that Plaintiffs failed to offer credible proof of actual damages resulting from Defendant's denying C.P.'s claim for gender-affirming care based upon its administration of the Exclusions in violation of Section 1557 of the ACA.

The Plaintiff Class may submit a motion for attorney fees, litigation costs, and case contribution awards by no later than November 9, 2023.

DATED this _____ day of October, 2023.

Robert J. Bryan
United States District Judge

Presented by:

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