THE HONORABLE ROBERT J. BRYAN

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

DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' REPLY IN SUPPORT OF MOTION TO STAY PENDING APPEAL [DKT. 210]

NOTE ON MOTION CALENDAR: JANUARY 12, 2024

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I. INTRODUCTION

Plaintiffs' response to Blue Cross Blue Shield of Illinois ("BCBSIL")'s Motion to Stay Pending Appeal further demonstrates why a stay pending appeal to the Ninth Circuit is not only appropriate, but necessary. Plaintiffs concede that they do not oppose "a limited stay of the Court-ordered reprocessing during BCBSIL's appeal." Dkt. 216 ("Response") at 2. So the Court should, at a minimum, enter such a stay.

More generally, Plaintiffs' response effectively concedes that they will not be harmed by a stay. Plaintiffs claim that a temporary stay pending appeal would irreparably "jeopardize S.L.'s health" and the health of other class members. *Id.* at 1. But this is the first time counsel has suggested that the relief they seek is an urgent matter. To the contrary, their conduct indicates otherwise. As noted, Plaintiffs suggest a stay of retrospective reprocessing relief, which would stay the reprocessing of S.L.'s claims and the claims of other class members pending appeal. *Id.* at 2. Plaintiffs did not seek preliminary injunctive relief at any time during the pendency of this case. Their late-arriving assertion of irreparable harm should be rejected.

BCBSIL, on the other hand, will be irreparably harmed if a stay is not entered. BCBSIL is the *only* third-party administrator ("TPA") in the market that may not administer a plan with an exclusion of certain treatments for gender dysphoria, even if the plan sponsor who included the exclusion has the right to design a plan with an exclusion under the law. Absent a stay, BCBSIL will experience unique strains in its relationship with its clients and will be at a competitive disadvantage compared to every other TPA in the nation.

With respect to the merits, this Court is the first in the nation to hold that a TPA such as BCBSIL can be held liable under Section 1557 for exclusions included in an ERISA benefits plan by the employer, even when that employer holds sincerely held religious beliefs protected by the Religious Freedom Restoration Act ("RFRA"). The novel and complex task of harmonizing Section 1557, ERISA, and RFRA will benefit from appellate review. As this Court recognized, this case "takes place in the midst of a sharply divided regulatory and litigation background," *see*

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Dkt. 207 at 11, and the Ninth Circuit will have a strong basis to come to a different conclusion from this Court.

Plaintiffs' arguments that BCBSIL has no likelihood of success in the Ninth Circuit fails to even address any of BCBSIL's specific arguments. Plaintiffs' Opposition fails to consider:

(1) BCBSIL's argument that the exclusions do not discriminate on the basis of sex, instead mischaracterizing Ninth Circuit precedent and disregarding the operative federal regulations;

(2) BCBSIL's argument that it does not receive any federal financial assistance for its TPA activities, so Section 1557 does not apply; and

(3) The Biden administration's 2022 proposed rule implementing Section 1557 interpreted the statute as inapplicable to third-party administrators such as BCBSIL who were not the source of any exclusion at issue.

The Opposition also misrepresents BCBSIL's argument concerning RFRA, confusingly emphasizes that the claim does not involve ERISA while conceding that classwide relief depends on ERISA's enforcement scheme, denies that their claims are for monetary relief even though the purpose of reprocessing is to determine whether they can receive money, and ignores the serious problems plaguing the class representatives.

Recognizing similar important legal issues, the Ninth Circuit in *Wit v. United Behav. Health*, 79 F.4th 1068 (9th Cir. 2023), stayed the district court's claims reprocessing order pending appeal. *See* Dkt. 210 ("Motion"), Exs. A and B. The Court should do the same here.

II. ARGUMENT

A. BCBSIL has a reasonable probability of prevailing on appeal.

Plaintiffs fail to address any of BCBSIL's arguments demonstrating that its appeal raises serious legal issues as to whether BCBSIL violated Section 1557. Plaintiffs do not contest the "sharply divided regulatory and litigation background" spanning three different statutory schemes demonstrated by BCBSIL, see Dkt. 207 at 11, that firmly establishes that this Court should enter a temporary stay pending the adjudication of BCBSIL's appeal before the Ninth Circuit.

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First, Plaintiffs do not address BCBSIL's arguments that the exclusions are lawfully based on "medical diagnosis" and not unlawfully based on "sex." Instead, Plaintiffs mischaracterize *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022), as supporting the notion that "gender-affirming care exclusions" are unlawful, Response at 7, when the Ninth Circuit expressly reserved that issue for further district court proceedings, *see* 28 F.4th at 114. Plaintiffs also fail to address the many authorities contrary to their position, including HHS's 2020 Rule[1] interpreting Section 1557 to mean that "categorical coverage exclusions" for gender-affirming care do not discriminate on the basis of sex and case law upholding that policy. *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 114 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021).

S*econd*, Plaintiffs wrongly claim that BCBSIL "cannot identify" a "federal rule that allows BCBSIL to avoid liability for administering a discriminatory" exclusion. Response at 8. Again and again, BCBSIL has pointed to HHS's 2020 Rule, the relevant portions of which have been codified at 45 C.F.R. § 92.3. *See, e.g.*, Motion at 7 (citing 2020 Rule, 85 Fed. Reg. 37,244); *see also Religious Sisters of Mercy v. Azar,* 513 F. Supp. 3d 1113, 1136 (D.N.D. 2021)*, aff'd in part Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022) ("With the 2020 Rule's arrival . . . health insurers now remain subject to Section 1557 only for the parts of their operations that receive federal funding.").

Third, Plaintiffs do not even acknowledge that federal regulations proposed by the Biden administration make clear that TPAs are not liable for a plan's violation of the ACA or Title IX if, as here, the TPA did not design the plan. *See* Nondiscrimination in Health and Health Education Programs or Activities, 87 Fed. Reg. 47,824, 47,876 (August 4, 2022). BCBSIL is not the source of any plan designs at issue here. The Biden administration disagrees with the Court that the statute clearly includes TPAs who did not design the plan exclusion.

[1] *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160 (June 19, 2020).

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Fourth, Plaintiffs mischaracterize BCBSIL's RFRA argument. BCBSIL is not asserting a claim under RFRA. *Contra* Response at 8–9. Rather, BCBSIL is relying on the Supreme Court's interpretation that RFRA limits the scope of Section 1557 to preclude its application to exclusions based on sincerely-held religious belief. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) ("RFRA operates as a kind of super statute, displacing the normal operation of other federal laws."); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

Plaintiffs assert that the Ninth Circuit's decision in *Wit v. United Behavioral Health* does not apply. But they fail to address (and never deny) that the Court's classwide relief relies on the claims processing and appeals mechanisms in ERISA. Plaintiffs likewise do not deny that the benefit each Plaintiff seeks is money, while acknowledging that Rules 23(b)(1) and 23(b)(2) prohibit certification where class members claim money as final relief.

Plaintiffs also fail to address the adequacy and typicality problems posed by the new named Plaintiffs. They ignore BCBSIL's sworn declarations that (1) it no longer has a relationship with over 100 of the 398 plans subject to the Court's order, (2) Plaintiff Emmett Jones's claims for gender-affirming care were not denied based on a plan exclusion and he has not exhausted his available administrative appeals, and (3) Jones' plan removed its exclusion effective July 1, 2023. Dkts. 156-2, 185, 195.

At a minimum, BCBSIL's arguments to which Plaintiffs have not responded establish that success of BCBSIL's appeal is a "reasonable probability" or a "fair prospect" and that "serious legal questions are raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011).

B. BCBSIL Will Suffer Irreparable Injury Absent a Stay of the Injunction.

As Plaintiffs' own authorities demonstrate, the Court's injunction must be stayed because it will disproportionately and irreparably harm BCBSIL while benefitting its competitors. This Court's injunction is expressly limited only to BCBSIL. Nothing in this Court's Order prohibits other TPAs from continuing to administer similar exclusions, which will competitively advantage those competitors and competitively disadvantage BCBSIL. The irreparable harm here is impossible to overlook.

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Plaintiffs made no effort to distinguish any of the binding Ninth Circuit authority holding that a threatened loss of market share, customers, and goodwill supports a finding of irreparable harm. Motion at 11-12; *see, e.g., Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *Microsoft Corp. v. Motorola*, 871 F. Supp. 2d 1089, 1103 (W.D. Wash.), *aff'd*, 696 F.3d 872 (9th Cir. 2012) ("[L]oss of market share, customers, and access to potential customers demonstrated irreparable harm."). Nor did Plaintiffs attempt to distinguish binding Ninth Circuit case law finding that the deprivation of free exercise rights, such as those encompassed by RFRA, "unquestionably constitutes irreparable injury." *Id.* at 12.

Plaintiffs rely only on *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015), for the proposition that the Court must receive evidence of a competitive injury. But if any showing is required, *Int'l Franchise* suggests the showing is minimal. There, the district court rejected the plaintiff's claim of a competitive injury as not supported by the record, but the Ninth Circuit held the district court erred and that the conclusion of competitive injury could be inferred from "the ordinance's text" at issue in the case, reinforced, of course, by declarations. *Id.* at 411. Here, it is simply logical that an injunction that reduces a client's plan-design discretion *only if that client retains a particular TPA* will disadvantage that TPA. But in case there were any question in the matter, BCBSIL offered an expert who testified at length about how a loss of choice in plan design will harm consumers and employers. Burns Decl., Dkt. 88-1, Ex. B.

Plaintiffs claim that "BCBSIL cannot justify its actions by asserting that its competitors will violate the law," Response at 13 n.3, but they entirely miss the point. The purpose of a stay pending appeal is to allow the Ninth Circuit to determine *whether* TPAs are indeed violating the law when they administer exclusions of gender-affirming care. If the injunction remains in place, BCBSIL would be singled out for a competitive disadvantage during the entire period in which the Ninth Circuit deliberates.

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Plaintiffs also assert that the Court's injunction will not require a "fundamental business change" on BCBSIL's part sufficient to establish a probability of irreparable harm, Response at 13, but the authorities Plaintiffs rely on actually support BCBSIL's position. Implementing the Court's injunction will impact BCBSIL's business relationship with 398 plan sponsors for whom BCBSIL serves or has served as a third party administrator and will require BCBSIL to "renegotiate existing [contractual relationships] on a large scale" with each plan sponsor. *FTC v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019*); see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057–59 (9th Cir. 2009) (irreparable harm likely where order would likely cause "a loss of customer goodwill"). Under Ninth Circuit authority, BCBSIL has demonstrated that its business relationships will be irrevocably and fundamentally disrupted absent entry of a stay pending appeal.

C. The Balance of Equities and Public Interest Favor a Stay.

On appeal, the Ninth Circuit will need to harmonize three statutory schemes of great import to the public: ERISA, RFRA, and Section 1557. The public therefore has a strong interest in maintaining the status quo to give the Ninth Circuit sufficient time to reconcile these statutes.

Plaintiffs offer no credible argument that the status quo imposes a countervailing and irreparable harm against them, particularly given that Plaintiffs never sought emergency relief in the three years this litigation has been pending. They claim that class members seeking reprocessing "should get the coverage they need now," while simultaneously conceding that reprocessing relief could be stayed pending appeal. *See* Response at 14 (encouraging the Court to "enter only a limited stay of reprocessing relief."). Plaintiffs' concession and consent to the administrative stay currently in place demonstrate that Plaintiffs would not be irreparably harmed by a stay pending appeal.

III. CONCLUSION

This Court should issue the requested stay pending appeal.

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Respectfully submitted this 12th day of January, 2024.

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I certify that this memorandum contains 2,090 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS' REPLY IN SUPPORT OF MOTION TO STAY PENDING APPEAL, 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:

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DATED this 12th day of January, 2024.

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