UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar and Reid Olson, Plaintiffs, -v- Essentia Health, Innovis Health, LLC, dba Essentia Health West, HealthPartners, Inc., and HealthPartners Administrators, Inc., Defendants.	Case No.: 0:16-cv-00100-DWF/LIB **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT AND TO STAY DISCOVERY**

INTRODUCTION

Plaintiffs Brittany R. Tovar and Reid Olson, Tovar's son, allege that HealthPartners, Inc. ("HealthPartners") and/or HealthPartners Administrators, Inc. ("HPAI") discriminated against them in violation of Section 1557 of the Patient Protection and Affordable Care Act or "ACA," 42 U.S.C. § 18116(a). Section 1557 prohibits certain forms of sex discrimination through the enforcement mechanism provided under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, et seq.

HealthPartners and HPAI support transgender rights. Indeed, in a brief filed at the Eighth Circuit, the Transgender Legal Defense and Education Fund lauded HealthPartners' "broad and inclusive coverage guidelines." (*See* Amici Curiae Brief of Transgender Legal Defense and Education Fund, filed October 25, 2016, in the *Tovar*

appellate record, at p. 11.) But this motion is not about transgender discrimination. The questions before the Court on HealthPartners' and HPAI's motion to dismiss are:

1) Whether Congress intended Section 1557 to reverse then-existing federal law that employer plan sponsors are solely legally responsible for the design of and coverage decisions for their plans, and

2) If so, whether the federal government unambiguously communicated that change to entities receiving federal funding before the alleged injuries in this case, as required by the Spending Clause of the United States Constitution.

The answer to both questions is no. Nothing in the 289 words of Section 1557 indicates that Congress intended it to repeal the legal framework of the Employee Retirement Income Security Act of 1974 ("ERISA") concerning the relationships and responsibilities of third-party administrators, plan sponsors, and plan participants. And even if such a change was intended, nothing in Section 1557 puts third-party administrators on notice of this change. Moreover, the Obama administration stated through regulations implementing Section 1557 that it intended to maintain ERISA's framework that plan sponsors -- not TPAs -- have sole legal responsibility for plan design and coverage.

Here, HPAI administered Tovar's employer-provided health plan according to its terms, as it was required to do under ERISA, 29 U.S.C. § 1104(a)(1)(D). In doing so, it notified Tovar about a then-existing exclusion for gender reassignment services or surgery. Tovar's former employer, Essentia Health/Innovis Health, LLC, ("Essentia"),

determined the scope of coverage provided under the plan, and Essentia had the sole power to retain or change the exclusion at issue in this case.

Tovar initially brought this case against HPAI and HealthPartners under Section 1557 and against Essentia under Title VII of the Civil Rights Act of 1964 and the Minnesota Human Rights Act. In 2016, the Court dismissed Tovar's entire case against HPAI and HealthPartners for lack of Article III standing and against Essentia because Tovar did not allege a plausible claim under Title VII or the MHRA.

The Eighth Circuit affirmed in part. *Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017). The Eighth Circuit also concluded that Tovar potentially had Article III standing to bring a claim against HPAI and HealthPartners because it was unclear from her Complaint whether she had been reimbursed for payments that she allegedly made to purchase Olson's medication. *Id*. at 778-79.

The Eighth Circuit remanded the case for this Court to consider whether Tovar falls "within the class of plaintiffs whom Congress has authorized to sue under the ACA" and whether HPAI and HealthPartners can be "liable under that statute for administering a plan whose allegedly discriminatory terms were under the sole control of another organization." *Id*. at 779.

Tovar then sought to amend her Complaint to include Olson as a Plaintiff to the Section 1557 claim against HealthPartners and HPAI. HealthPartners and HPAI did not oppose the amendment, but expressly reserved all defenses and their right to file a motion to dismiss. Over Essentia's objections, the Court granted Tovar leave to amend. (Court Document 60.)

The Court should dismiss Plaintiffs' First Amended Complaint. (Court Document 66, hereinafter "First Amended Complaint.") Tovar now concedes that she has no unreimbursed out-of-pocket expenses related to Olson's care that allegedly should have been covered under Essentia's plan. As a result, Tovar lacks Article III standing to assert a Section 1557 claim.

Even if Tovar had Article III standing, Plaintiffs' Section 1557 claims against HPAI and HealthPartners should be dismissed. Plaintiffs have alleged that the Essentia health plan itself was discriminatory, not that HPAI or HealthPartners applied the health plan in a discriminatory manner. As such, their claims (if any) must be directed against Essentia, the plan sponsor, not against HPAI, the third-party administrator of the plan, or HealthPartners, its parent company. Plaintiffs do not fall within the class of plaintiffs authorized to sue a third-party administrator under Section 1557.

FACTUAL BACKGROUND

A. HPAI and HealthPartners.

HPAI is a third-party administrator for employer-sponsored self-insured health plans. (Court Document 14-1 at p. 26 of 149.) A third-party administrator provides administrative services such as assessing whether claims fall within the terms of an employer sponsored health plan and facilitating payment for covered claims. (*Id.*) *See also 2 Health L. Prac. Guide § 18:8 (2016)* (TPAs generally receive claims, "verify beneficiary coverage, review the accuracy of claims and collect money . . . from the self-insured plan to pay the claims"). A self-insured plan is one in which the scope of coverage is determined by the employer plan sponsor (in this case, Essentia) and all costs

for covered health care are paid by that plan sponsor. (*Id.*) In other words, HPAI is not financially responsible for claims or reimbursement of out-of-pocket costs under a self-insured plan; the plan sponsor is responsible for the payment. (Court Document 14-1 at p. 26 of 149.)

HealthPartners is the parent corporation of HPAI. Plaintiffs purport to assert a claim against the third-party administrator of Essentia's health plan, and HealthPartners is not the third-party administrator of that plan. (*Id.* at pp. 25-26 of 149.)

B. The Essentia Plan.

During 2015, Essentia was the plan sponsor for a health plan offered to Essentia employees in which Tovar elected to participate (the "2015 Plan"). (First Amended Complaint at ¶¶ 17, 30, 34.) The 2015 Plan was an ERISA-governed plan and Essentia was the "plan sponsor" under the 2015 Plan. (Court Document 14-1 at p. 25 of 149.) Under federal law, a "plan sponsor" is the entity that "established or maintained" the benefit plan. 29 U.S.C. § 1002(16)(B). As plan sponsor, Essentia had "all powers and discretion necessary" to administer the 2015 Plan, including all powers to change the 2015 Plan. (*Id.* at pp. 25-26 of 149.) Because the 2015 Plan was self-insured, Essentia was "solely responsible for payment of [any] eligible claims" and paid such "claims from its own funding as expenses for covered services" when those expenses were incurred. (*Id.*)

Essentia's 2015 Plan contained an exclusion for gender reassignment services and surgery. (*Id.* at p. 51, ¶ 15.) Tovar does not claim to have sought such services. Olson, sought such services. (First Amended Complaint at ¶ 23.)

C. Tovar's Objection To Essentia's 2015 Plan.

In March 2015, Tovar sought clarification from Essentia and HPAI regarding the exclusion for gender reassignment services and surgery in Essentia's 2015 Plan. (*Id.* at ¶ 35.) On April 9, 2015, HPAI notified Tovar that Essentia was the sponsor of her plan and that HPAI did not have the authority to remove the exclusion. (*Id.* at ¶ 37; Court Document 14-1 at pp. 67-70 of 149.)[1] HPAI also stated that the 2015 Plan would continue to provide coverage for gender dysphoria. (Court Document 14-1 at pp. 67-70 of 149.)

On June 9, 2015, HPAI responded to another letter from Tovar. (*Id.* at pp. 73-75 of 149.) Once again, HPAI stated that Essentia's "plan does not include coverage for services and/or surgery for gender reassignment." (*Id.* at p. 73 of 149.) HPAI further stated that it was "obligated to follow the terms of the plan" and could not "make an exception" for gender reassignment services or surgery. (*Id.* at p. 74 of 149.) Finally, HPAI explained that Tovar could bring a lawsuit under ERISA if she was dissatisfied with the response. (*Id.*)

D. The Lupron Claim.

On April 29, 2015, Tovar's doctor recommended that Olson begin taking Lupron. (First Amended Complaint at ¶ 43.) In response, HPAI explained that Essentia's 2015 Plan did not cover Lupron. (*Id.* at ¶ 47.) Tovar elected not to purchase Lupron for Olson and, incurred no out-of-pocket costs. (*See id.* at ¶ 62.) Tovar and Olson did not file an

[1] For privacy, HPAI has provided redacted versions of various letters. Un-redacted versions are available for the Court upon request.

appeal regarding Lupron. (*See* Court Document 14-1 at p. 79 of 149 (outlining the appeals process for a pharmacy pre-authorization denial).)

E. The Androderm Claim.

During 2015 Olson was also prescribed Androderm, a form of testosterone. (First Amended Complaint at ¶ 63.) The claim for that prescription was initially rejected, but shortly thereafter, the denial was reversed. (*Id.* at ¶¶ 66-67.) Olson concedes that he received Androderm under the 2015 Plan. (*Id.* at ¶ 67.) Tovar alleged that she was "forced to pay for Androderm out of pocket," but has since admitted that she has been fully reimbursed by Essentia. (*Id.* at ¶¶ 66-67; *see also* Court Document 65, transcript at 6 ("Ms. Tovar is not alleging that she has any unreimbursed medical expenses"); transcript at 17 ("All of the economic loss that they experienced was reimbursed").)

F. Essentia's 2016 Health Plan.

Effective January 1, 2016, before this lawsuit was filed, Tovar elected coverage under an amended Essentia health plan (the "2016 Plan"). (Court Document 14 at ¶ 6; Court Document 14-1 at pp. 82-149 of 149.) The 2016 Plan was self-insured by Essentia and HPAI was the third-party administrator. (Court Document 14-1 at pp. 105-106 of 149.) Essentia's 2016 Plan contained no exclusion for gender reassignment services or surgery. (*Id.* at pp. 149 of 149.) Plaintiffs do not contend that either of them were denied any service under Essentia's 2016 Plan. (*See* First Amended Complaint.)

G. The Surgery Inquiry.

Shortly before Essentia's 2016 Plan became effective, Tovar contacted HPAI to inquire about pre-authorization for gender reassignment surgery for Olson. (First

Amended Complaint at ¶ 68.) HPAI provided accurate information regarding the exclusion. (*Id.*) But, as discussed above, beginning on January 1, 2016, Essentia's plan contained no exclusion for gender reassignment services or surgery. (Court Document 14-1 at p. 149 of 149.)

H. The Department of Health and Human Services and Office of Civil Rights Provide Regulations and Rules.

In May 2016, after Essentia issued the 2016 Plan, the Department of Health and Human Services' Office of Civil Rights ("OCR") issued regulations concerning Section 1557, which became effective on July 18, 2016. *Tovar*, 857 F.3d at 780 n.4 (Benton, J., dissenting). The portion of the regulations relating to health plan coverage became effective January 1, 2017. The parties agree that those regulations, and OCR's explanatory commentary, are entitled to *Chevron* deference.[2] *Id*. at 779-80.

The OCR commentary explains that "third party administrators are generally not responsible for the benefit design of the self-insured plans they administer and that ERISA . . . requires plans to be administered consistent with their terms." 81 Fed. Reg. 31432 (May 18, 2016). Nevertheless, a third party administrator may be liable under Section 1557 "when the alleged discrimination is in the administration of the plan," for example where a third party administrator "threatens to expose an employee's transgender . . . status to the employee's employer." 81 Fed. Reg. 31433. But, when "the

[2] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

alleged discrimination relates to the benefit design of a self-insured plan," then "OCR will typically" direct a complaint to the self-insured employer. *Id*.[3]

I. Tovar And Olson Are No Longer Covered Under An Essentia Health Plan.

Effective July 29, 2016, Tovar's employment with Essentia ended. (*See* Stipulation filed March 6, 2017, in the *Tovar* appellate record, at ¶ 2.) Tovar continued coverage under the 2016 Plan from August 1 to October 31, 2016. (*Id.* at ¶ 3.) Since October 31, 2016, Plaintiffs have not had health coverage through any plan sponsored by Essentia and administered by HealthPartners or HPAI. (*Id.* at ¶ 4.)

ARGUMENT

The Court should dismiss Plaintiffs' First Amended Complaint. The Court lacks subject matter jurisdiction over Tovar's Section 1557 claim because Tovar has no unreimbursed out of pocket expenses that allegedly should have been covered by the 2015 Plan. Even if Tovar had such expenses, they would have to be paid by Essentia, and Tovar has asserted no claim against Essentia in the First Amended Complaint.

Tovar's lack of standing aside, Plaintiffs' claims against HealthPartners and HPAI fail. The claims relate to coverage under the 2015 Plan itself, not to the administration of the 2015 Plan. Tovar and Olson do not claim that the 2015 Plan covered gender

[3] The OCR commentary also addresses the circumstances under which a third-party administrator that *does not* receive federal funding may be subject to Section 1557 liability by virtue of its relationship to a health plan issuer that *does* receive federal funding. 81 Fed. Reg. 31433. For purposes of this motion only, HPAI and HealthPartners are not addressing the question of whether they receive federal funding because the Court does not need to address that question in order to grant HPAI and HealthPartners' motion.

reassignment services or surgery and that HealthPartners or HPAI nevertheless refused to process Olson's claim for discriminatory reasons. As such, Tovar and Olson are not among the class of plaintiffs permitted to sue a third-party administrator under Section 1557. The Court should dismiss Plaintiffs' Section 1557 allegations for failure to state a claim upon which relief can be granted.

If the Court declines to dismiss the entire First Amended Complaint, it should still dismiss any claim for declaratory or injunctive relief and should stay discovery while the motion to dismiss is under advisement. Plaintiffs no longer participate in any Essentia health plan administered by HPAI or HealthPartners and have no standing to argue that they are entitled to declaratory or injunctive relief. As to discovery, the parties should avoid that burden and expense until the Court concludes that one or more of the Plaintiffs have asserted a viable claim. *Tovar*, 857 F.3d at 778.

A. The Court Should Dismiss Tovar's Claim For Lack Of Subject Matter Jurisdiction.

1. Standard of Review.

Under Federal Rule of Civil Procedure 12(b)(1), the court "must" dismiss an action when the court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A district court may weigh evidence to determine whether it has power to hear a case. *Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990). A court may rely on the face of the complaint or upon the factual truthfulness of allegations to determine whether it lacks subject matter jurisdiction. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993).

"In a factual attack [on subject matter jurisdiction], the court inquires into and resolves factual disputes and is free to consider matters outside the pleadings." *Montgomery v. Compass Airlines, LLC*, 98 F. Supp. 3d 1012, 1017-18 (D. Minn. 2015) (internal citations and quotations marks omitted); *Vera v. Chertoff*, No. CIV 07-3837, 2008 WL 3911289, at *5 (D. Minn. Aug. 25, 2008) ("In a factual attack, the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case") (*quoting Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977)). "[T]he court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute." *Titus*, 4 F.3d at. "The Court does not accept the facts alleged in the complaint as true, and the plaintiff bears the burden of establishing subject-matter jurisdiction." *Bartl v. Enhanced Recovery Co., LLC*, Slip Copy, No. 16-cv-252 (JNE/KMM), 2017 WL 1740152, at *2 (D. Minn. May 3, 2017) (*citing Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 915 (8th Cir. 2015)).

2. Tovar's Complaint Fails for Lack of Subject Matter Jurisdiction.

As the Eighth Circuit has noted in this case:

> The requirements of Article III standing are well settled: a plaintiff must show "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks and alterations omitted).

Tovar, 857 F.3d at 777. The Eighth Circuit then determined that Tovar may have alleged a concrete and particularized injury in fact because Tovar:

> contends that the defendants' discriminatory conduct denied her the benefits of her insurance policy and forced her to pay out of pocket for some of her son's prescribed medication. The record is silent on whether Tovar has been fully reimbursed for these out of policy payments, but the record at this point is sufficient to establish an injury in fact for purposes of Article III standing.

Id. at 778 (footnote omitted).

Tovar does not have standing to assert a claim against HPAI or HealthPartners because she concedes she experienced no economic loss. The First Amended Complaint makes clear that Tovar has no unreimbursed out-of-pocket expenses. (First Amended Complaint at ¶ 67.) Her counsel conceded as much at the hearing on Tovar's Motion to Amend. (Court Document 65, transcript at 6, 17.) Accordingly, Tovar's claim fails for lack of Article III standing. *Tovar*, 857 F.3d at 778.

Tovar may not rely on conclusory allegations of "emotional distress" to avoid this result. First, the Eighth Circuit found a potential Article III injury based upon Tovar's vague allegations concerning economic loss. *Tovar*, 857 F.3d at 778. The Eighth Circuit would not have reached that issue if Tovar's generalized allegations about emotional distress were sufficient for purposes of Article III standing.

Second, it is well established that a parent does not have standing to seek damages for their own emotional distress allegedly caused by a violation of her child's civil rights. *See, e.g., Pierzynowski v. Police Dept. City of Detroit*, 941 F. Supp. 633, 640 (E.D. Mich. 1996) (allowing family member claims would "open the floodgates" of litigation); *Pierce v. Stinson*, 493 F. Supp. 609, 610 (E.D. Tenn. 1979). As such, Tovar's Section 1557 claim should be dismissed for lack of subject matter jurisdiction.

B. The Court Should Dismiss Plaintiffs' Claims For Failure To State A Claim Upon Which Relief May Be Granted.

When the Eighth Circuit remanded this case, it directed the parties and the district court to address whether Tovar was among the class of plaintiffs whom Congress authorized to sue under Section 1557. *Tovar*, 857 F.3d at 779. To do that, the Court should consider established law under Title IX and ERISA. For Plaintiffs' claims to be viable, Congress must have changed established law and unambiguously communicated these changes to third-party administrators receiving federal funding. The Obama-era 1557 regulations demonstrate that no such changes were intended, and Plaintiffs' claims fail.

1. Standard of Review.

The Court will dismiss a complaint that fails to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). While the Court "accept[s] the factual allegations of the complaint as true," those "allegations must supply sufficient 'facts to state a claim to relief that is plausible on its face.'" *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

2. Plaintiffs' Section 1557 Claims Fail Because HPAI and HealthPartners Were Not Given Notice Of Alleged Discrimination And Did Not Control the 2015 Plan.

Plaintiffs claim that HealthPartners and HPAI violated Section 1557 by "designing and serving as the third party administrator for the" 2015 Plan and by "enforcing the

Plan's discriminatory exclusion." (First Amended Complaint at ¶ 76.) Their claims relate exclusively to the 2015 Plan itself, and the exclusion for gender reassignment services or surgery. (*Id.*)[4]

To determine whether Tovar and Olson are members of the class of plaintiffs authorized to bring suit under Section 1557, the Court must examine whether Tovar and Olson fall within the zone of interests protected by Section 1557 and identify the proximate cause of their alleged injury. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, __ U.S. __, 134 S. Ct. 1377, 1388-90 (2014). The zone of interests protected by Section 1557 includes prohibiting sex discrimination in the manner proscribed by Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Here, the proximate cause of Plaintiffs' alleged injury -- emotional distress caused by a health plan exclusion -- was the 2015 Plan itself, not HPAI or HealthPartners.

Section 1557 of the ACA is enforced through various statutes, including Title IX, and is almost identical to Title IX. *Compare* 42 U.S.C. § 18116(a) *with* 20 U.S.C. § 1681(a). To incur liability under Title IX, an entity "must be (1) deliberately indifferent (2) to known acts of discrimination (3) [that] occur under its control." *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 456 (8th Cir. 2009). Entities are not liable under Title IX unless an "appropriate person has actual knowledge of discrimination and fails to adequately respond." *Id.; Grandson v. Univ. of Minnesota*, 272 F.3d 568, 571

[4] HealthPartners and HPAI do not concede that they receive federal funding or that Section 1557 applies to them in this case. Plaintiffs do not even allege that HPAI receives federal funding. The Court need not address these issues in order to grant this motion to dismiss.

(8th Cir. 2001). An "appropriate person" is one "who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf." *Plamp*, 565 F.3d at 456.

A plaintiff may not recover damages under Title IX unless an official with authority to institute corrective measures had actual notice and was deliberately indifferent to the alleged misconduct. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 & 291 (1998); *Grandson*, 272 F.3d at 575 ("There was no allegation of prior notice of their complaints to appropriate UMD officials, no allegation of deliberate indifference by such officials, and no allegation they had afforded UMD a reasonable opportunity to rectify the alleged violations"). "Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice. Title IX's express means of enforcement -- by administrative agencies -- operates on an assumption of actual notice to officials of the funding recipient." *Gebser*, 524 U.S. at 288. Thus, absent "prior notice to" one "with authority to address the complaint and a response demonstrating deliberate indifference to the alleged violation," a claim under Title IX fails as a matter of law. *See Grandson*, 272 F.3d at 576 (emphasis added).

Tovar and Olson do not claim that either gave HPAI or HealthPartners actual notice of a violation of Section 1557, that HPAI or HealthPartners deliberately disregarded such notice, or that HPAI or HealthPartners had the authority to disregard the terms of the 2015 Plan. To the contrary, the First Amended Complaint merely alleges that, in March 2015, after the 2015 Plan was in effect, Tovar sought "clarification

regarding the enforcement of the exclusion." (First Amended Complaint at ¶ 35.) Neither Tovar nor Olson ever appealed the alleged denial of any service or medication to HealthPartners, HPAI, or Essentia.

By the time HPAI received Tovar's March 2015 letter, it was obligated under federal law to apply the terms of Essentia's 2015 Plan as written. 29 U.S.C. § 1104(a)(1)(D). HPAI communicated as much to Tovar. (Court Document 14-1 at pp. 67-70 of 149.) Even if Plaintiffs attempt to characterize Tovar's March 2015 letter as notice of discrimination under Title IX, HPAI was not deliberately indifferent to that notice. The exclusion was removed effective January 1, 2016, the very next time Essentia offered a health plan. (*Id.* at p. 149 of 149.) Plaintiffs did not put Defendants on notice of any alleged violations of Section 1557 committed against them between March 2015 and January 1, 2016, when Essentia removed the exclusion, because they did not raise their concerns with anyone at Defendants with authority to "institute corrective measures." *Plamp*, 565 F.3d at 456.

HPAI or HealthPartners did not, as a matter of law, have control over the alleged discrimination. Essentia's 2015 Plan was self-insured. (*Id.* at pp. 25-26 of 149.) "A self-insured employer bears the financial risk of paying its employees' health-insurance claims rather than contracting with a separate insurance company to provide the coverage and bear the financial risk. A self-insured employer often hires a third-party administrator to manage administrative functions like processing claims." *Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Servs.*, 801 F.3d 927, 934 n.6 (8th Cir. 2015) (*citing 1A Steven Plitt, et al.,* Couch on Insurance § 10:1 n.1 (3d ed. 2013)),

vacated on other grounds, *Dept. of Health & Human Servs. v. CNS Int'l Ministries*, __ U.S. __, No. 15-775, 2016 WL 2842448 (2016). *See also Dordt Coll. v. Burwell*, 801 F.3d 946, 947 n.2 (8th Cir. 2015) (internal citation omitted) ("A self-insured employer bears the financial risk of paying its employees' health-insurance claims and often hires a third-party administrator to manage administrative functions like processing insurance claims. An insured employer, by contrast, contracts with a separate insurance company to provide healthcare coverage, bear the financial risk of insurance claims, and manage related administrative functions."), *vacated on other grounds, Burwell v. Dordt Coll.*, __ U.S. __, 136 S. Ct. 2006, 195 L.E.2d 209 (2016). Under federal law, a third-party administrator is required to administer a self-insured health plan according to its terms. *See* 29 U.S.C. § 1104(a)(1)(D) (benefit plan decisions are required to be made "in accordance with the documents and instruments governing the plan").

To assert a plausible Section 1557 claim, Olson was required to allege that HPAI or HealthPartners had the authority to change the 2015 Plan after it was issued. *Gebser*, 524 U.S. at 277; *see also id.* at 290 ("we hold a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination").

Essentia was the plan sponsor under the 2015 Plan. (Court Document 14-1 at pp. 25-26 of 149.) This means that, under federal law and under the 2015 Plan itself, Essentia established the 2015 Plan and determined what benefits to provide and what coverage to extend to plan participants. 29 U.S.C. § 1002(16)(B). HealthPartners and

HPAI did not decide what benefits were available in the 2015 Plan sponsored by Essentia. (*Id.* at p. 26 of 149.) HealthPartners and HPAI also did not pay claims under Essentia's self-insured plan. Essentia paid those costs. (*Id.*)

Under Title IX, a plaintiff must show that he gave notice to an official at the defendant who had "authority to address the alleged discrimination and to institute corrective measures." *Gebser*, 524 U.S. at 277. As explained above, a third-party administrator has no control over the self-insured plan terms once that plan has been issued by the plan sponsor. Thus, there was no individual at HPAI or HealthPartners to whom Olson could give the notice required by *Gebser*, because no one at HPAI or HealthPartners had the ability to change or disregard the provisions of the 2015 Plan. Olson cannot maintain a Section 1557 claim against HealthPartners or HPAI when he does not and cannot allege facts to establish that HealthPartners or HPAI had any "authority to address the alleged discrimination" or "to institute corrective measures." *Gebser*, 524 U.S. at 290.

Plaintiffs have attempted to plead around established law concerning plan sponsors by alleging that HPAI or HealthPartners "created and presented" the terms of coverage under the 2015 Plan. (First Amended Complaint at ¶ 28.) Specifically, Plaintiffs contend that, "by designing" the 2015 Plan and "enforcing the Plan's discriminatory exclusion," HPAI or HealthPartners violated Section 1557. (*Id.* at ¶ 76.)

But Plaintiffs are not permitted to make allegations about the 2015 Plan that are contradicted by the plan itself. *Arctic Cat Inc. v. Polaris Indus. Inc.*, Nos. 13-3579, 13-3595 JRT/FLN, 2014 WL 5325361, at *23 n.9 (D. Minn. Oct. 20, 2014) ("Generally,

when a written instrument contradicts allegations in the complaint to which it is attached, the exhibits trump the allegations"); *see also Wright & Miller*, SA Fed. Prac. & Proc. Civil § 1327 (3d ed.). The Court should reject Plaintiffs' attempt to rely on parole evidence of the contracting process that contradicts the plain terms of the 2015 Plan. The 2015 Plan makes clear that Essentia was the plan sponsor and had all authority over the Plan. As plan sponsor, Essentia was responsible for the 2015 Plan as a matter of law. 29 U.S.C. § 1002(16)(B).

Plaintiffs have no authority for the notion that Section 1557 or Title IX reach the act of "designing" an allegedly discriminatory program. For example, if a college had implemented a funding program that discriminated on the basis of sex, the college would be responsible for that activity under Title IX, not the vendor that allegedly designed the program for the college. Likewise, a consultant that drafted a discriminatory sports program for a university would not be liable under Title IX when the university implemented the program. Rather, the university itself would be liable for its own discrimination.

Plaintiffs cannot avoid this result with allegations that HPAI supposedly drafted the exclusion for gender reassignment services or surgery. *See ICC Leasing Corp. v. Midwestern Machinery Co.*, 257 N.W.2d 551, 554 (Minn. 1977) ("preliminary negotiations cannot be allowed to contradict or vary the plain terms of a written contract"). "The law is clear that oral evidence of discussions, negotiations, or understandings is not admissible to vary or contradict the terms of a clear, unambiguous, and integrated written contract." *Jansen v. Herman*, 230 N.W.2d 460, 463 (Minn. 1975).

The 2015 Plan is a formal ERISA-governed health plan that makes clear that Essentia is the plan sponsor with all authority under the plan. (Court Document 14-1 at pp. 25-26.) Even if HPAI had proposed the gender reassignment exclusion (which it did not do), the proximate cause of Olson's alleged injury would still be the plan itself because Olson was not harmed by the exclusion until after it was adopted and became part of the 2015 Plan and until after he sought coverage under the 2015 Plan.

Plaintiffs' allegations about HPAI supposedly "drafting" the 2015 Plan are also irrelevant. As noted above, the proximate cause of Olson's alleged injury is not the drafting of a plan but the coverage provided under that plan, which Plaintiffs contend did not comply with Section 1557. That coverage was offered by Essentia, and any benefits that were offered, or that should have been offered, under the plan would be paid by Essentia. Because the proximate cause of Olson's alleged injury was the 2015 Plan itself, his claim (if any) must be brought against the plan or Essentia, the plan sponsor. *Lexmark Inter'l*, 134 S. Ct. at 1388-90 (to determine whether one is a member of the class of plaintiffs permitted to sue under a statute, a court must identify the proximate cause of alleged injury).

3. Plaintiffs' Claims Fails Because A Third Party Administrator Cannot Be Liable Under The Facts As Alleged In The First Amended Complaint.

Plaintiffs' claims fail even if the Court disregards the notice and control requirements for bringing a Section 1557 claim. Plaintiffs do not allege that gender reassignment services were covered under the 2015 Plan and that HPAI or HealthPartners

said otherwise in order to discriminate against Olson.[5] Nor do Plaintiffs allege that HPAI or HealthPartners had any discretion to disregard express provisions of the 2015 Plan. Rather, they appear to claim that HPAI discriminated against Olson by following the express provisions of Essentia's 2015 Plan and accurately describing coverage under that plan.

As a condition of Congress' power to legislate under its spending power, Title IX requires a funding recipient receive notice that, by accepting federal funding, it becomes exposed to certain liabilities. *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002). "[T]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Barnes*, 536 U.S. at 186. A recipient of federal funds may be liable under Title IX "only for its own misconduct. The recipient itself must 'exclud[e] [persons] from participation in . . . den[y] [persons] the benefit of, or . . . subject[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX." *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640-41 (1999) (emphasis added); *see also id.* at 644-46.

Under the final OCR regulations, a third-party administrator does not violate Section 1557 by simply following the terms of an ERISA plan:

> Fundamentally, OCR will determine whether responsibility for the decision or other action alleged to be discriminatory rests with the

[5] Tovar also does not allege that she is transgender or that she experienced discrimination directed at her.

> employer or with the third party administrator. Thus, where the alleged discrimination is related to the administration of the plan by a third party administrator that is a covered entity, OCR will process the complaint against the third party administrator because it is that entity that is responsible for the decision or other action being challenged in the complaint. Where, for example, a third party administrator denies a claim because the individual's last name suggests that she is of a certain national origin or threatens to expose an employee's transgender or disability status to the employee's employer, OCR will proceed against the third party administrator as the decision-making entity. Where, by contrast, the alleged discrimination relates to the benefit design of a self-insured plan–for example, where a plan excludes coverage for all health services related to gender transition–and where OCR has jurisdiction over a claim against an employer under Section 1557 because the employer falls under one of the categories in § 92.208, OCR will typically address the complaint against that employer.

81 Federal Register at 31432 (emphasis added).

Olson has not alleged a viable Section 1557 discrimination claim against HPAI or HealthPartners. Nothing in the First Amended Complaint even remotely suggests that gender reassignment services or surgery would have been covered and paid by Essentia but for some action or decision by HPAI or HealthPartners. Nor does Olson claim that HPAI or HealthPartners took some action to prevent him from receiving all of the coverage afforded under the 2015 Plan.

Olson's allegations do not account for the fact that this case involves two different "health program[s] or activit[ies]." 42 U.S.C. § 18116(a). As plan sponsor, Essentia owned the 2015 Plan. As third-party administrator, HPAI owned specific services under the 2015 Plan. According to *Davis*, federal funding recipients can only be liable for their own misconduct with their own programs. 526 U.S. 640-41. Because Olson alleges that

an exclusion in the 2015 Plan violated Section 1557, his remedy (if any) lies against the 2015 Plan itself or the plan sponsor.

Holding a third-party administrator liable under Section 1557 for failing to disregard the terms of a self-insured plan would create a catch-22 for third-party administrators and require them to violate ERISA to avoid Section 1557 liability. Put differently, ERISA required HPAI and HealthPartners to comply with the 2015 Plan as written. 29 U.S.C. § 1104(a)(1)(D). Olson claims that Section 1557 required HPAI and HealthPartners to disregard Essentia's plan (and ERISA) and conclude that gender reassignment services and surgery were covered under the 2015 Plan. It is unclear what Olson believes this would have accomplished, given the undisputed fact that Essentia (and not HPAI or HealthPartners) paid for covered claims under the 2015 Plan and HPAI/HealthPartners had no authority to cover expressly excluded services.

Olson's reading of Section 1557 creates unnecessary tension between Section 1557 and ERISA, and purports to require third-party administrators to choose between violating one or the other. Rather than impose such an absurd construction of Section 1557, the Court should follow the OCR regulations, interpret Section 1557 consistent with ERISA and find that, if the terms of a self-insured plan violate Section 1557, then the remedy for such a violation lies against the entity that has control over the plan -- the plan sponsor. Such a ruling is consistent with Title IX's requirement that a plaintiff prove that the alleged discrimination occurred under the defendant's control. *See Plamp*, 565 F.3d at 456.

In contrast to cases where a covered entity plausibly engaged in actual discrimination under the ACA, in this case HPAI simply followed Essentia's 2015 Plan in a non-discriminatory manner. In *Callum v. CVS Health Corp.*, for example the court held that the plaintiff, a black male who had PTSD, alleged a plausible claim for discrimination under Section 1557 against a pharmacy that denied his request to shop after hours. 137 F. Supp.3d 817 (D. S.C. Sept. 29, 2015). The pharmacy denied the plaintiff's request to shop after hours (something within its power to allow), but allowed a white female customer to do so. *Id.* at 830-31. The *Callum* court found that CVS was a covered entity under Section 1557, and that the plaintiff had stated a plausible claim for race and disability discrimination. *Id.* at 848.

Similarly, in *Rumble*, the court determined that a transgender plaintiff alleged a plausible claim for discrimination under Section 1557 where the defendant medical providers asked inappropriate questions and made inappropriate comments about the plaintiff's hormone use, used an inappropriate tone when questioning of the plaintiff and assaulted the plaintiff during an exam. *Rumble v. Fairview Health Services, Inc.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415, *18 (D. Minn. Mar. 16, 2015). In other words, the plaintiff in *Rumble* specifically alleged that he was treated unfairly because of his status as a transgender male.

In *Se. Pennsylvania Transp. Auth. v. Gilead Scis., Inc.*, the Eastern District of Pennsylvania granted a Hepatitis C drug manufacturer's motion to dismiss a claim alleging discrimination in violation of Section 1557. 102 F. Supp.3d 688, 702 (E.D. Pa. 2015). The plaintiffs argued that the drug manufacturer's pricing discriminated against

persons with disabilities and had a disparate impact on racial minorities. *Id.* at 696. The court found that even if the plaintiffs were considered disabled, they failed to show that the drug manufacturer's actions discriminated on the basis of disability: "[t]here are no allegations that [the manufacturer] changes the prices of its drugs depending upon whether the potential consumer has Hepatitis C." *Id.* at 700.

Callum, Rumble, and Gilead Scis. differ greatly from this case. Olson does not allege that HPAI or HealthPartners treated him differently from any other person covered under Essentia's 2015 Plan. *See Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005) (discussing concept of similarly-situated comparators in the context of Title VII discrimination case). Olson does not, for example, suggest that HealthPartners or HPAI had the authority to waive exclusions in Essentia's 2015 Plan but elected not to do so for discriminatory reasons. Because nothing in the First Amended Complaint suggests that HealthPartners or HPAI treated Olson differently from any other participant in the 2015 Plan, Olson's claim fails.

In prior briefing, Olson's counsel has asserted that HPAI seeks a safe harbor for discrimination. To the contrary, HPAI has never argued that third-party administrators are exempt from Section 1557 or otherwise free to discriminate, just that they are only responsible for their own discrimination. If, during 2016, for example, HPAI refused to process a request for gender reassignment surgery or services after the exclusion had been removed, and did so for discriminatory reasons, it could be liable under Section 1557 for its own discrimination. Likewise, a pharmacy that receives federal funding may not, for discriminatory reasons, refuse to fill a prescription for gender reassignment-

related medication that is otherwise covered under a health plan. But such entities are only liable for their own decisions. In this case, Olson is attempting to impose liability on HPAI for coverage under the 2015 Plan even though Essentia is the plan sponsor. Just as the pharmacy is not liable under Section 1557 for a third-party administrator's refusal to process a claim, a third-party administrator is not liable under Section 1557 for the terms of an ERISA-governed plan.

Under ERISA, "if a [third party administrator] correctly concluded that, under the relevant plan, a particular treatment was not covered, the [third party administrator's] denial of coverage would not be a proximate cause of any injuries arising from the denial. Rather the failure of the plan itself to cover the requested treatment would be the proximate cause." *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 213 (2004) (footnote omitted). As such, "a managed care entity could not be subject to liability . . . if it denied coverage for any treatment not covered by the health plan that it was administering." *Id.* "To take a clear example, if the terms of the health plan specifically exclude from coverage the cost of an appendectomy, then any injuries caused by the refusal to cover the appendectomy are properly attributed to the terms of the plan itself, not the managed care entity that applied those terms." *Id.* at n.3.

The Obama-era OCR regulations are consistent with long-standing rules under ERISA regarding third-party administrator's obligations to carefully adhere to the provisions of plan documents. *See, e.g.*, 29 U.S.C. § 1104(a)(1)(D) & 29 U.S.C. § 1140; *Massachusetts Mut. Life Ins.*, 473 U.S. 134, 142 (1985). They are also consistent with decisions indicating that a third-party administrator may not be held liable under ERISA

for merely administering a self-insured plan. *See, e.g., Samaritan Health Ctr. v. Simplicity Health Care Plan*, 459 F. Supp.2d 786 (E.D. Wis. 2006); *Lampen v. Albert Trostel & Sons Co. Employee Welfare Plan*, 832 F. Supp. 1287 (E.D. Wis. 1993); *Skilstaf, Inc. v. Adminitron, Inc.*, 66 F. Supp.2d 1210 (M.D. Ala. 1999); *Baxter v. C.A. Muer Corp*, 941 F.2d 451, 454-55 (6th Cir. 1991).

The regulations recognize and reinforce the distinct roles of plan sponsors and third-party administrators. Where, as here, the alleged discrimination relates to coverage under a self-insured plan, the claim under Section 1557 should be directed at the plan sponsor, not the third-party administrator that is bound under ERISA to follow the plan. *See* 81 Fed. Reg. 31433; *Tovar*, 857 F.3d at 781 (Benton, J., dissenting).

4. Plaintiffs' Claims Fail Because The Constitutionally Required Notice to Third-Party Administrators That Section 1557 Changed Their Legal Responsibilities For Self-Insured Plans Has Not Been Provided.

Plaintiffs will no doubt argue that Section 3 above is wrong because ERISA is supposedly irrelevant. They likely contend that Section 1557 created new legal responsibilities for third-party administrators. Self-insured plan design and coverage that has never been the legal responsibility of third-party administrators in other contexts is now, according to Plaintiffs, the responsibility of third-party administrators for purposes of Section 1557. This argument fails because Section 1557 was enacted under Congress' Spending Clause authority.

As a condition of Congress' power to legislate under its spending power, Title IX requires a funding recipient to be placed on notice that, by accepting federal funding, it

becomes exposed to certain liabilities. *Barnes*, 536 U.S. at 185-86 (2002). "[T]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Barnes*, 536 U.S. at 186.

Nothing in the text of Section 1557 states that Congress intended to change the underlying ERISA framework that third-party administrators and plan sponsors had been operating under for decades. Nothing in Section 1557 defines which entities own self-insured plans. Nothing in the few words of Section 1557 put third-party administrators on notice that they are now responsible for another entity's health program or activity.

The regulations similarly failed to put third-party administrators on notice of these supposed new responsibilities. In fact, through the regulations confirm that Section 1557 did not change the previously understood ERISA framework. The regulation commentary discussed above demonstrates that plan sponsors remain solely liable for plan design and coverage and that third-party administrators remain responsible for their administration services. 81 Federal Register at 31432. But even if the regulations could be interpreted to somehow provide notice of a dramatic change in the law, they were issued in 2016, after Essentia had already removed the gender reassignment exclusion. Thus, the regulations cannot provide the Constitutionally required notice to support Plaintiffs' claims against HPAI or HealthPartners in this case.

C. Plaintiffs' Requests for Declaratory And Injunctive Relief Are Moot Regardless Of Whether Their Section 1557 Claims Are Legally Defective.

"In order for a federal court to hear a case, there must be a definite and concrete controversy involving adverse legal interests at every stage in the litigation." *McFarlin v. Newport Special School Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992). "Through the passage of time and the occurrence of irrevocable events, disputes may disappear so that federal courts no longer can grant effective relief." *Id.*

In this case, any requests for injunctive and declaratory relief are moot. Even before this case was filed, Essentia issued a new health plan that did not contain a gender reassignment exclusion. (Court Document 14 at ¶ 6; Court Document 14-1 at pp. 82-149 of 149.) Then, while this case was pending, Plaintiffs dropped their coverage under Essentia's 2016 Plan. (*See* Stipulation filed March 6, 2017, in the *Tovar* appellate record, at ¶ 2.) They no longer participate in any health plan provided by Essentia and administered by HPAI and/or HealthPartners. (*Id.* at ¶ 3.) Accordingly, Plaintiffs' requests for injunctive and declaratory relief are now moot. *McFarlin*, 980 F.2d at 1210.

A narrow exception to the mootness doctrine exists for claims that are "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973). It applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam). In other words, "the plaintiff must demonstrate a

reasonable expectation that the event complained of will recur." *McFarlin*, 980 F.2d at 1211.

Plaintiffs have no reasonable expectation that they might again receive health care under a self-insured plan sponsored by Essentia or administered by HPAI or HealthPartners. Nor do they have any basis to speculate that such a plan might contain a gender reassignment exclusion. It is not enough for Tovar or Olson to suggest a mere "theoretical possibility" that a similar exclusion may potentially exist in another health plan administered by HPAI or HealthPartners: "a 'demonstrated probability' must be shown." *McFarlin*, 980 F.2d at 1211 (*quoting Murphy*, 455 U.S. at 478). Plaintiffs have alleged no facts to support such a "demonstrated probability," and any requests for injunctive and declaratory relief are moot, regardless of whether Plaintiffs have otherwise alleged a viable Section 1557 claim.

D. The Court Should Stay Discovery Pending Resolution Of Defendants' Motions to Dismiss.

Discovery in this case should be stayed while the Court considers the pending motions to dismiss. The Court has broad discretion to stay discovery, particularly when a pending motion may dramatically limit or even eliminate the need for discovery. *Corporate Comm. of the Mille Lacs Band of Ojibwe v. Money Centers of America, Inc.*, No. CV 12-1015 (RHK/LIB), 2012 WL 12549570, *3 (D. Minn. Aug. 21, 2012). "Where . . . a motion to dismiss otherwise seems likely to resolve the entire litigation, a stay of discovery may be appropriate." *TE Connectivity Networks, Inc. v. All Systems*

Broadband, Inc., No. CIV. 13-1356 ADM/FLN, 2013 WL 4487505, at *2 (D. Minn. Aug. 20, 2013).

HPAI and HealthPartners have good cause for seeking a stay of discovery pending a decision on their motion to dismiss. There are several legal grounds for determining that Plaintiffs' claim against HPAI and HealthPartners fails, including one articulated by Circuit Judge Benton. *Tovar*, 857 F.3d at 779-81 (Benton, J., dissenting). The majority decision in *Tovar* specifically directed the parties on remand to address and obtain a ruling on whether, "in the first instance," the claims in this case are being advanced by a member of the class of plaintiffs whom Congress created a cause of action under Section 1557. *Id.* at 778.

Plaintiffs will not be prejudiced by a delay in discovery. Tovar has now conceded that she has no out-of-pocket damages or other economic loss. Olson waited nearly two years to join this case. Having been in the case for less than two months, Olson is in no position to argue that discovery is necessary while the Court considers dispositive motions.

The Court may also stay proceedings regarding Section 1557 because the law seems to be in flux. A federal court has enjoined agency regulations expanding the word "sex" to include gender identity. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp.3d 660, 688-89 (N.D. Tex. 2016). When that occurs, "the ordinary result is that the rules are vacated -- not that their application to the individual petitioners is prescribed." *Rumble v. Fairview Health Services, Inc.*, No. 14-CV-2037 (SRN/FLN), 2017 WL 401940, *4 (D. Minn. Jan. 30, 2017) (*quoting Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d

1399, 1409 (D.C. Cir. 1998)). The regulations under Section 1557 are now being revised and will likely be re-issued. (*See* Status Report filed December 15, 2017 (Court Document 110), in *Franciscan Alliance* District Court matter, N.D. Tex., No. 7:16-cv-00108-O.)

CONCLUSION

Plaintiffs' claims under Section 1557 fail as a matter of law. Tovar lacks Article III standing to bring a claim because she now (belatedly) concedes that she has experienced no loss. Plaintiffs' claims further fail because they have not met the requirements for pursuing a Title IX claim against HealthPartners or HPAI; and because, Plaintiffs' claims relate to coverage under the 2015 Plan itself, and should be directed to the plan sponsor, not the third-party administrator. For each of these reasons, HPAI and HealthPartners request that the Court grant their motion and dismiss the First Amended Complaint with prejudice.

Date: January 16, 2018

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar and Reid Olson,

Plaintiffs,

-v-

Essentia Health, Innovis Health, LLC, dba Essentia Health West, HealthPartners, Inc., and HealthPartners Administrators, Inc.,

Defendants.

Case No.: 0:16-cv-00100-DWF/LIB

LR 7.1(f) AND (h) WORD COUNT COMPLIANCE CERTIFICATE REGARDING MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT AND TO STAY DISCOVERY

I, David M. Wilk, certify that the Memorandum in Support of Defendants' Motion to Dismiss First Amended Complaint and to Stay Discovery complies with Local Rule 7.1(f) and (h).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count and I also certify that this Memorandum has been prepared in 13 pt. font.

I further certify that the above-referenced Memorandum contains 8,464 words.

Date: January 16, 2018

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