

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

**ALINA BOYDEN and
SHANNON ANDREWS,**

Plaintiffs,

Case No. 17-cv-264

vs.

**STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,**

Defendants.

DECLARATION OF CAITLIN M. MADDEN

I, Caitlin M. Madden, do hereby declare:

1. I am an attorney with Hawks Quindel, S.C., and am one of the attorneys representing the Plaintiffs, Alina Boyden and Shannon Andrews, in the above-captioned matter.

2. The parties in this matter have engaged in discovery. In the course of discovery, Defendants have produced the following documents:

- a. Attached hereto as **Exhibit A** is a true and correct copy of the December 30, 2016 Open Meeting Minutes, Bates No. ETF000571.
- b. Attached hereto as **Exhibit B** is a true and correct copy of Defendants' Supplemental Responses to Discovery Requests, dated April 20, 2018.
- c. Attached hereto as **Exhibit C** is a true and correct copy of the January 30, 2017 ETF Memorandum, Bates No. BoydenProd6_000067.

- d. Attached hereto as **Exhibit D** is a true and correct copy of the December 30, 2016 GIB closed session meeting minutes, Bates No. ETF000570. **Exhibit D** has been filed under seal as Defendants seek to claw back this document.
- e. Attached hereto as **Exhibit E** is a true and correct copy of the Department of Justice's January 13, 2017 fiduciary duty memo, produced as an attachment to Bates No. ETF0001893. **Exhibit E** has been filed under seal as Defendants seek to claw back this document.
3. The parties have conferred numerous times on the discovery issues in this matter. Attached hereto as **Exhibit F** is a true and correct copy of Attorney Colin Roth's request to claw back certain discovery documents, dated March 16, 2018.
4. Attached hereto as **Exhibit G** is a true and correct copy of Plaintiffs' response to Defendants' claw back requests, dated April 3, 2018.
5. Attached hereto as **Exhibit H** is a true and correct copy of Defendants' reply to Plaintiffs' response to its claw back requests, dated April 6, 2018.
6. On April 12, 2018, counsel for Plaintiffs and Defendants met and conferred on multiple issues, including testimony relating to the Closed Session and the Closed Session meeting minutes and fiduciary duty memo which Defendants seek to claw back. Plaintiffs asserted that attorney-client privilege over the Closed Session, the Closed Session meeting minutes, and the fiduciary duty memo have been waived because the conclusions from the Closed Session and the fiduciary duty memo that were purportedly based on legal advice have been publicized, and that this

discovery is relevant as to Defendants' decision to reinstate the exclusion. Defendants maintained that any questions related to legal advice behind the "four contingencies" on which the reinstatement of the exclusion was based would not be allowed, and that the fiduciary duty memo is not relevant, as well as protected by attorney-client privilege.

7. Counsel for Plaintiffs and Defendants again met and conferred on April 17, 2018. Plaintiffs maintained their position that the development of the "four contingencies" at the December 30, 2016 closed session are relevant and any attorney-client privilege relating to the session has been waived, including the January 13, 2017 DOJ memo regarding GIB's fiduciary duty, because it is related to satisfying one of the contingencies. Defendants responded that because their defense does not rely on the closed session but rather upon the cost and efficacy justifications asserted in their supplemental interrogatory, this testimony is not relevant.

8. The parties met and conferred on April 26, 2018, and confirmed that they have arrived at impasse on the discoverability of the December 30, 2016 closed session meeting minutes and deposition testimony, and the relevance and attorney-client privilege protection for the January 13, 2017 fiduciary duty memo.

Dated this 27th day of April, 2018.

/s/ Caitlin M. Madden
Caitlin M. Madden

Exhibit A

DRAFT

MINUTES

December 30, 2016

Group Insurance Board

State of Wisconsin



Location:

State Revenue Building – Events Room
2135 Rimrock Rd, Madison, WI 53713

BOARD MEMBERS PRESENT:

Michael Farrell, Chair
Herschel Day, Secretary (via telephone)
Terri Carlson (via telephone)
Chuck Grapentine
Waylon Hurlburt

Ted Neitzke (via telephone)
Stacey Rolston (via telephone)
Nancy Thompson (via telephone)
JP Wieske (via telephone)
Bob Ziegelbauer (via telephone)

BOARD MEMBERS ABSENT:

Bonnie Cyganek, Vice Chair

PARTICIPATING EMPLOYEE TRUST FUNDS (ETF) STAFF:

Bob Conlin, Secretary
John Voelker, Deputy Secretary
Office of Strategic Health Policy:
Lisa Ellinger, Director
Eileen Mallow, Deputy Director

Office of the Secretary:
Cheryllynn Wilkins, Board Liaison

OTHERS PRESENT:

ETF Information Technology Services:
Kadimma Mbanefo
ETF Legal Services:
Diana Felsmann, David Nispel
ETF Office of Communications:
Mark Lamkins
Department of Justice:
Kevin Potter
Department of Transportation:
Richard Way
Fair Wisconsin:
Megin McDonell

General Public:
Caitlyn Allen, Cora Allen-Coleman,
Luella Allen-Waller, Kyle Bittorf, DJ
Bruce, Brittyn Calyx, Rowan Calyx,
Fred Day, Alex Fleagle, Jordan Foley,
Alex Frye, Laura Gutknecht, Michele
Hatchell, Ronni Hayon, Tracey Janke,
Gabriel Javier, Caleb Johnson,
Corrine Jutz, Owen Karcher, Autumn
Kent, Lex Lancaster, Darla Lannert,
Ray McMahon, Jaymee Meier, Jaime
Neidermeier, Pamela Oliver,

0052885	Mtg Date	Item #
3 Board		
GIB	2.8.17	1

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General Public (continued):

Kathy Oriel, David Patton, Rachel Perry, Jennifer Pressman, Emily Ptak-Pressman, Melanee Ratman, Dan Ross, Erica Rotondo, Betsy Stovall, Steph Tai, Nick Telson, Jo Tent, Mitchell Turine, Sara Whitworth, CV Vitolo-Haddad

GSAFE:

Sawyer Johnson

Human Rights Campaign (HRC):

Joanne Lee

Madison Area Transgender Association (MATA):

Violet Byrns

Our Lives Magazine:

Patrick Farabaugh, Emily Mills

OutReach:

Ginger Baier

Physicians Plus:

Ron Sebranek

Michael Farrell, chair, called the meeting of the Group Insurance Board (Board) to order at 3:00 p.m. Waylon Hurlburt is attending today's meeting as the Department of Administration designee.

Mr. Potter from the Department of Justice (DOJ) attended the meeting in order to discuss the July 12, 2016, Board action to approve changes to the Guidelines Contract and Uniform Benefits for 2017 (Ref. GIB | 7.12.16 | 3A). These changes are in compliance with the federal Department of Health and Human Services (HHS) final regulations pertaining to Section 1557 of the Affordable Care Act (ACA) issued on May 18, 2016.

The state of Wisconsin has joined a federal lawsuit in Texas challenging the legality of the HHS regulations. The lawsuit requested a preliminary injunction be issued to preclude the enforcement of the HHS regulations, and a decision was expected soon. The request was heard on December 20, 2016, but no decision was issued by the time of the December 30 Board meeting.

The Chair announced the Board would convene in closed session pursuant to the exemptions contained in Wis. Stat § 19.85 (1) (g) to confer with legal counsel concerning advice about strategy to be adopted with respect to litigation in which the Board is or is likely to become involved. Mr. Nispel, Mr. Potter, Ms. Wilkins and Mr. Mbanefo were invited to remain during the closed session.

MOTION: Mr. Grapentine moved to convene in closed session, pursuant to the exemptions contained in Wis. Stat. § 19.85 (1) (g) to confer with legal counsel concerning advice about strategy to be adopted with respect to litigation in which the Board is or is likely to become involved. Mr. Hurlburt seconded the motion, which passed on the following roll call vote:

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Members Voting Aye: Carlson, Day, Farrell, Grapentine, Hurlburt, Neitzke, Rolston, Thompson, Wieske, Ziegelbauer

Members Absent: Cyganek

The Board convened in closed session at 3:13 p.m. Mr. Neitzke departed at 5:00 p.m. Other ETF staff were invited into closed session at 6:15 p.m. The Board reconvened in open session at 6:24 p.m.

ANNOUNCEMENT OF ACTION TAKEN ON BUSINESS DELIBERATED DURING CLOSED SESSION

Mr. Farrell announced the Board met in closed session to consult with DOJ and ETF Legal Counsel regarding the final HHS rule. The Board will receive an update on this matter at the January 18, 2017, Board meeting. The Board also reserves the right to revisit the benefit in the future as necessitated by legal action, statutory compliance, potential financial impact, or in keeping with the Board's fiduciary responsibilities.

DISCUSSION AND CONSIDERATION OF 2017 UNIFORM BENEFITS – BENEFITS AND SERVICES RELATED TO GENDER REASSIGNMENT OR SEXUAL TRANSFORMATION - HHS NONDISCRIMINATION RULE

The Board's discussion of the gender reassignment language proposed was based on the legality of the final HHS rule.

MOTION: Mr. Hurlburt moved to reinstate the current exclusion related to benefits and services related to gender reassignment or sexual transformation contingent on all of the following:

- ***Subject to a court ruling or an administrative action that enjoins, rescinds or invalidates the HHS Rule;***
- ***Subject to compliance with Wis. Stat. section 40.03 (6)(c);***
- ***Subject to renegotiation of contracts that maintain or reduce premium costs for the state; and finally***
- ***Subject to the opinion of the DOJ that the action taken does not constitute a breach of board members' fiduciary duties.***

Mr. Wieske seconded the motion, which passed on the following roll call vote:

Members Voting Aye: Carlson, Farrell, Grapentine, Hurlburt, Rolston, Wieske, Ziegelbauer

Members Voting Nay: Day, Thompson

Members Absent: Cyganek, Neitzke

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ADJOURNMENT

MOTION: Mr. Grapentine moved to adjourn the meeting. Mr. Hurlburt seconded the motion, which passed unanimously on a voice vote.

The meeting adjourned at 6:32 p.m.

Date Approved: _____

Signed: _____

Herschel Day, Secretary
Group Insurance Board

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

**STATE DEFENDANTS' SUPPLEMENTED RESPONSES AND
OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR
ADMISSION, INTERROGATORIES, AND REQUESTS FOR
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Federal Rules of Civil Procedure 26, 33, 34, and 36, Defendants State of Wisconsin Department of Employee Trust Funds, State of Wisconsin Group Insurance Board, Robert J. Conlin, Secretary of the Department of Employee Trust Funds (ETF), Board of Regents of the University of Wisconsin System, Raymond W. Cross, President of the University of Wisconsin System, Rebecca M. Blank, Chancellor of the University of Wisconsin-Madison, University of Wisconsin School of Medicine and Public Health, and Robert N. Golden, M.D., Dean of the University of Wisconsin School of Medicine and Public Health (the "State Defendants"), by their counsel, hereby object and respond to Plaintiffs First Set of Requests for

Admission, Interrogatories and Requests for Production of Documents and Things.

GENERAL OBJECTIONS

The State Defendants assert the following objections as to each of the Plaintiffs' First Set of Requests for Admission, Interrogatories and Requests for Production of Documents and Things to State Defendants ("Plaintiffs' First Requests"):

1. The State Defendants object to the Plaintiffs' First Requests to the extent that they purport to impose burdens other than or beyond those imposed by Rules 26, 33, 34 and 36 of the Federal Rules of Civil Procedure.

2. The State Defendants object to Instruction No. 1, to the extent that it includes individual members of the Board of Regents of the University of Wisconsin System and individual members of the Group Insurance Board on the grounds that it requires these State Defendants to seek discovery from individuals that are not defendants in this case that is not in the possession, custody, or control of the State Defendants.

3. The State Defendants further object to Instruction No. 1 as it relates to requests for electronically produced or stored documents on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Notwithstanding and without waiving these objections,

electronically produced or stored documents for the following State Defendant custodians were searched using the following search terms:

<u>Custodian</u>	<u>Search Terms</u>
<i>ETF custodians</i>	
Bob Conlin (ETF Secretary)	transgender*
John Voelker (ETF Deputy Secretary)	“sex discrimination”
Pam Henning (ETF Assistant Deputy Secretary)	“sexual transformation*” “gender identity”
Liz Doss-Anderson (Ombudsperson)	“gender transition*”
James Kates (Ombudsperson)	“gender identity disorder”
Mary Richardson (Ombudsperson)	“gender dysphoria”
Lisa Ellinger (Director of the Office of Strategic Health Policy)	transsexual* “gender transition*”
Eileen Mallow (Deputy Director of the Office of Strategic Health Policy)	“gender reassignment*” “gender confirmation*”
Arlene Larson (Manager of Federal Health Programs & Policy)	“sex hormone*” “hormone therap*”
Tara Pray (Member Engagement and Communication Leadworker)	Segal “reinstatement of the benefit exclusion”
Sara Brockman (GIB liaison)	Boyden
Joan Steele (Health Policy Advisor)	Andrews
Shayna Schomber (formerly Gobel) (Manager of Self-Insured Health, Dental, and Supplemental Benefits)	“breast augmentation*” “augmentation mammoplasty” “vaginoplasty”
Renee Walk (Strategic Health Policy Advisor)	penectomy
Jeff Bogardus (Manager of Pharmacy Benefits)	bilateral orchiectomy clitoroplasty urethroplasty
Steve Hurley (Director of the Office of Policy, Privacy and Compliance)	labiaplasty
Mary Alice McGreevy (Privacy Officer)	perineoplasty
Lucas Strelow (Policy Advisor)	subcutaneous mastectomy
Laura Patterson (Policy Advisor)	hysterectomy
Tarna Hunter (Director of Government Relations)	ovariectomy metoidioplasty phalloplasty

	vaginectomy scrotoplasty “arbitrary discrimination”
<i>Other custodians (same search terms)</i>	
Rebecca Blank (Chancellor, University of Wisconsin – Madison)	
Robert Golden (Dean, School of Medicine and Public Health)	
Raymond Cross (President, University of Wisconsin System)	

Responsive non-privileged emails that resulted from this search will be provided in response to the Plaintiffs’ Requests for the Production of Documents. Responsive emails were also collected from the relevant email accounts of GIB members who served at the time the coverage exclusion at issue was under consideration.

4. The State Defendants object to second paragraph in Instruction No. 5 on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. This instruction has a multiplier effect of making a separate interrogatory with discrete subparts for each document produced, creating an impermissible attempt to require answers to interrogatories in excess of the number permitted by Fed. R. Civ. P. 33.

5. The State Defendants object to Instruction No. 11 to the extent it applies to responsive documents that are privileged in their entirety and protected from disclosure. These documents will be included on a compliant

privilege log, but will not be otherwise produced because they are privileged and protected from disclosure.

6. The State Defendants object to Instruction No. 13 because it requests that they provide information that is not within their personal knowledge. Under Fed. R. Civ. P. 33, answers to interrogatories must be made “under oath,” which compels signatories to only provide responses they know to be truthful.

7. The State Defendants object to Instruction Nos. 16 and 17 as applied to the Requests for Admissions on the grounds that such requests would be vague and ambiguous under these instructions, and may require different responses or objections for each verb tense. Requests for Admissions will be responded to as written with no change in verb tense.

8. The State Defendants object to the Plaintiffs’ First Requests to the extent they seek to require the State Defendants to disclose information prepared in anticipation of litigation or protected from disclosure by the attorney-client privilege, work-product doctrine, or any other applicable privileges on the ground that such discovery is impermissible under Rule 26(b) of the Federal Rules of Civil Procedure. The State Defendants do not waive, and expressly reserve, the protection for materials prepared in anticipation of litigation, the attorney-client privilege, the work-product doctrine, and every other privilege and doctrine with respect to each and

every document protected by such privilege or doctrine. Inadvertent production of any such protected information shall not constitute a waiver of any privilege or protection or of any other ground for objection to discovery with respect to the information contained therein. Nor shall such inadvertent production waive the right of the State Defendants to object to the use of any such document or the information contained therein in this action or during any subsequent proceeding. Upon notification that such disclosure was inadvertent, the information and any copies thereof shall be returned immediately.

9. The State Defendants object to any discovery directed at Defendant University of Wisconsin School of Medicine and Public Health (SMPH). In Plaintiffs' response to the State Defendants' motion to dismiss, they concede that "SMPH may be dismissed as a defendant." (Dkt. 39:20 (n.11).)

**SPECIFIC OBJECTIONS AND RESPONSES TO
REQUESTS FOR ADMISSION**

The State Defendants hereby incorporate the General Objections described above into each response below, as if fully restated therein.

REQUEST FOR ADMISSION NO. 1: Admit that the Defendant, Board of Regents, employs Plaintiff, Alina Boyden.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Admit.

REQUEST FOR ADMISSION NO. 2: Admit that the Board of Regents is responsible for paying Alina Boyden’s salary and providing her with the benefits of employment provided to her as a state employee, including health insurance coverage.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: The Board of Regents objects that the phrase “responsible for . . . providing her with the benefits of employment provided to her as a state employee” is vague and ambiguous. Subject to and without waiving that objection, the Board of Regents responds as follows:

Admit that the Board of Regents is responsible for paying Alina Boyden’s salary. Deny the remainder of Request for Admission No. 2.

REQUEST FOR ADMISSION NO. 3: Admit that Defendant, Board of Regents, employs Plaintiff, Shannon Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admit.

REQUEST FOR ADMISSION NO. 4: Admit that the Board of Regents is responsible for paying Shannon Andrews’ salary and providing her with the benefits of employment provided to her as a state employee, including health insurance coverage.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: The Board of Regents objects that the phrase “responsible for . . . providing her with the benefits of employment provided to her as a state employee” is vague and ambiguous. Subject to and without waiving that objection, the Board of Regents responds as follows:

Admit that the Board of Regents is responsible for paying Shannon Andrews' salary. Deny the remainder of Request for Admission No. 4.

REQUEST FOR ADMISSION NO. 5: Admit that the Board of Regents is responsible under Wisconsin law to offer GIB-approved health insurance plans to their eligible employees, including Boyden and Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: The Board of Regents objects that the phrase "responsible under Wisconsin law to offer GIB-approved health insurance plans to their eligible employees" is vague and ambiguous. Subject to and without waiving that objection, the Board of Regents responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 6: Admit that Raymond W. Cross ("Cross"), is responsible under Wisconsin law to offer GIB-approved health insurance plans to University employees, including Boyden and Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Raymond W. Cross objects that the phrase "responsible under Wisconsin law to offer GIB-approved health insurance plans to University employees" is vague and ambiguous. Subject to and without waiving that objection, Raymond W. Cross responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 7: Admit that Rebecca M. Blank ("Blank"), is responsible under Wisconsin law to offer GIB-approved health insurance plans to University of Wisconsin employees, including Boyden and Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: Rebecca M. Blank objects that the phrase “responsible under Wisconsin law to offer GIB-approved health insurance plans to University of Wisconsin employees” is vague and ambiguous. Subject to and without waiving that objection, Rebecca M. Blank responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 8: Admit that the School of Medicine is responsible under Wisconsin law to offer GIB-approved health insurance plans to their employees, including Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: The Board of Regents objects that the School of Medicine is not a separate, suable legal entity under state law. The Board of Regents further objects that the phrase “responsible under Wisconsin law to offer GIB-approved health insurance plans to their employees” is vague and ambiguous. Subject to and without waiving those objections, the Board of Regents responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 9: Admit that Robert N. Golden, M.D. (“Golden”), is responsible under Wisconsin law to offer GIB-approved health insurance plans to their employees, including Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Robert N. Golden objects that the phrase “responsible under Wisconsin law to offer GIB-approved health insurance plans to their employees” is vague and

ambiguous. Subject to and without waiving that objection, Robert N. Golden responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 10: Admit that the University is engaged in an industry affecting commerce and has more than fifteen (15) employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Deny.

REQUEST FOR ADMISSION NO. 11: Admit that the School of Medicine is engaged in an industry affecting commerce and has more than fifteen (15) employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Deny.

REQUEST FOR ADMISSION NO. 12: Admit that GIB is part of ETF.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: GIB and ETF object that the phrase “part of ETF” is vague and ambiguous. Subject to and without waiving that objection, GIB and ETF respond as follows:

Deny.

REQUEST FOR ADMISSION NO. 13: Admit that ETF is “a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year” or is an “agent of such a person.”

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Admit.

REQUEST FOR ADMISSION NO. 14: Admit that GIB is “a person engaged in an industry affecting commerce who has fifteen (15) or more

employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year” or is an “agent of such a person.”

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Deny.

REQUEST FOR ADMISSION NO. 15: Admit that ETF staff concluded in or about June, 2016 that ETF was a “covered entity” under the Affordable Care Act (ACA), with respect to the self-insured health insurance plans it offers state employees.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Admit.

REQUEST FOR ADMISSION NO. 16: Admit that ETF staff concluded that ETF could be held liable under the ACA for denying health insurance coverage for gender transition.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Deny.

REQUEST FOR ADMISSION NO. 17: Admit that ETF receives federal funds.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Admit.

REQUEST FOR ADMISSION NO. 18: Admit that GIB sets the guidelines for eligibility and specifies the contractual terms for group health insurance plans for state employees.

RESPONSE TO REQUEST FOR ADMISSION NO. 18: GIB objects that the phrase “sets the guidelines for eligibility and specifies the contractual terms” is vague and ambiguous. Subject to and without waiving that object, GIB responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 19: Admit that GIB establishes the health insurance coverage benefits available for Alina Boyden and Shannon Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 19: GIB objects that the phrase “establishes the health insurance coverage benefits” is vague and ambiguous. Subject to and without waiving this objection, GIB responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 20: Admit that ETF and Robert J. Conlin (“Conlin”), as Secretary of ETF, execute the decisions of GIB with respect to health insurance coverage.

RESPONSE TO REQUEST FOR ADMISSION NO. 20: ETF and Secretary Conlin object that the phrase “execute the decisions of GIB with respect to health insurance coverage” is vague and ambiguous. Subject to and without waiving this objection, ETF and Secretary Conlin respond as follows:

Deny.

REQUEST FOR ADMISSION NO. 21: Admit that Defendant Conlin, as Secretary of ETF, promulgates, with the approval of GIB, all rules required for the administration of group health insurance plans for state employees, including Boyden and Andrews.

RESPONSE TO REQUEST FOR ADMISSION NO. 21: Deny.

REQUEST FOR ADMISSION NO. 22: Admit that Defendant Conlin, as Secretary of ETF, provides executive leadership for the policy development and administration of group health insurance for state employees.

RESPONSE TO REQUEST FOR ADMISSION NO. 22: Secretary Conlin objects that the phrase “provides executive leadership for the policy development and administration of group health insurance for state

employees” is vague and ambiguous. Subject to and without waiving this objection, Secretary Conlin responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 23: Admit that Defendant Conlin, as Secretary of ETF, develops and recommends policy to the GIB relating to changes in the design of employee benefit plans.

RESPONSE TO REQUEST FOR ADMISSION NO. 23: Secretary Conlin objects that the phrase “develops and recommends policy to the GIB relating to changes in the design of employee benefit plans” is vague and ambiguous. Subject to and without waiving this objection, Secretary Conlin responds as follows:

Deny.

REQUEST FOR ADMISSION NO. 24: Admit that ETF creates and distributes a document describing Uniform Benefits for State Employees, which includes descriptions of health benefits and exclusions from those benefits.

RESPONSE TO REQUEST FOR ADMISSION NO. 24: Admit.

REQUEST FOR ADMISSION NO. 25: Admit that Defendant Conlin, as Secretary of ETF, enters into contracts with group health insurance providers, such as Dean and WPS, that specify the health benefits and exclusions to be covered under plans offered to state employees.

RESPONSE TO REQUEST FOR ADMISSION NO. 25: Deny.

REQUEST FOR ADMISSION NO. 26: Admit that Defendant Conlin issued a memorandum on January 30, 2017, in which he concluded, in consultation with the GIB chair, that the criteria for reinstating the exclusion of gender confirmation treatment had been met and stated that

“ETF issued a 2017 health plan contract amendment to all participating health plans to reinstate the benefit exclusion, effective February 1, 2017.”

RESPONSE TO REQUEST FOR ADMISSION NO. 26: Admit that Defendant Conlin issued a memorandum on January 30, 2017 that contains the quoted language; otherwise deny.

REQUEST FOR ADMISSION NO. 27: Admit that only transgender persons seek “surgery and sex hormones associated with gender reassignment.”

RESPONSE TO REQUEST FOR ADMISSION NO. 27: The State Defendants lack the information needed to admit or deny this Request for Admission.

REQUEST FOR ADMISSION NO. 28: Admit that the exclusion of health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” adversely affects only transgender persons, since only they seek such procedures, services and supplies for “gender reassignment.”

RESPONSE TO REQUEST FOR ADMISSION NO. 28: The State Defendants lack the information needed to admit or deny this Request for Admission.

REQUEST FOR ADMISSION NO. 29: Admit that the document titled “The Secretary’s Role” (revised: April 2012), attached as **Exhibit A**, is a true and correct copy of an authentic document created by ETF.

RESPONSE TO REQUEST FOR ADMISSION NO. 29: Admit.

REQUEST FOR ADMISSION NO. 30: Admit that the document titled “Correspondence Memorandum” (dated June 22, 2016) (includes one internal Attachment: A), attached as **Exhibit B**, is a true and correct copy of an authentic document created by ETF.

RESPONSE TO REQUEST FOR ADMISSION NO. 30: Admit.

REQUEST FOR ADMISSION NO. 31: Admit that the document titled “Correspondence Memorandum” (dated August 12, 2016) (includes two (2) internal Attachments: A and B), attached as **Exhibit C**, is a true and correct copy of an authentic document created by ETF.

RESPONSE TO REQUEST FOR ADMISSION NO. 31: Admit.

REQUEST FOR ADMISSION NO. 32: Admit that the document titled “Correspondence Memorandum” (dated January 30, 2017) (includes two (2) internal Attachments: A and B), attached as **Exhibit D**, is a true and correct copy of an authentic document created by ETF.

RESPONSE TO REQUEST FOR ADMISSION NO. 32: Admit.

**SPECIFIC OBJECTIONS AND RESPONSES TO
INTERROGATORIES**

The State Defendants hereby incorporate the General Objections described above into each response below, as if fully restated therein.

INTERROGATORY NO. 1: Identify and describe all reasons why the State of Wisconsin provides insurance coverage for state employees.

RESPONSE TO INTERROGATORY NO. 1: The State Defendants object that the phrase “provides insurance coverage for state employees” is vague and ambiguous. The State Defendants further object to the extent that this Interrogatory seeks information from non-parties to this litigation. Subject to and without waiving that objection, the State Defendants respond as follows:

Wisconsin Stat. § 40.01(1) provides that “a ‘public employee trust fund’ is created to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age, disability, death, illness and accident, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale, by providing for the orderly and humane departure from service of employees no longer able to perform their duties effectively, by establishing equitable benefit standards throughout public employment, by achieving administrative expense savings and by facilitating transfer of personnel between public employers.”

INTERROGATORY NO. 2: Identify and describe all reasons why the State of Wisconsin has the Gender Confirmation Treatment Exclusion, including, but not limited to, each and every state or governmental interest that you contend is advanced by the Gender Confirmation Treatment Exclusion, and a detailed explanation for why you contend that the Exclusion furthers that state interest, and all facts in support of your explanation.

RESPONSE TO INTERROGATORY NO. 2: Defendants ETF, Robert J. Conlin, the Board of Regents, Raymond W. Cross, Rebecca M. Blank, the School of Medicine, and Robert N. Golden, lack knowledge regarding the information sought by this Interrogatory. GIB objects that this Interrogatory is premature given that discovery is still ongoing in this matter and because expert disclosure deadlines have not yet arrived. GIB expects that the information requested by this Interrogatory will be addressed by expert

testimony and thus it incorporates into this Response any future relevant expert testimony. Subject to and without waiving these objections, GIB responds as follows:

The coverage exclusion contained in the Uniform Benefits section IV.A.1.c. furthers the state interests contained in Wis. Stat. § 40.01(1), among others.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2: In addition to the state interests contained in Wis. Stat. § 40.01(1), the coverage exclusion contained in the Uniform Benefits section IV.A.1.c. furthers the state interests in (1) avoiding potential costs associated with the coverage at issue; and (2) declining to provide coverage for treatments that are experimental and have not been demonstrated to be safe and effective for treating gender dysphoria.

INTERROGATORY NO. 3: To the extent that any state interest that you identified in response to the preceding interrogatory is related to protection of the State of Wisconsin and/or its taxpayers from adverse economic or financial consequences, describe with particularity how the State and/or its taxpayers would suffer adverse economic consequences if transgender state employees were provided health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.”

RESPONSE TO INTERROGATORY NO. 3: See the response to Interrogatory No. 2.

INTERROGATORY NO. 4: Identify and describe all the responsibilities of ETF and the ETF Secretary with respect to GIB, including,

but not limited to, its responsibilities related to budgeting, program coordination and related management functions.

RESPONSE TO INTERROGATORY NO. 4: ETF and Secretary Conlin object that the phrase “responsibilities related to budgeting, program coordination and related management functions” is vague and ambiguous. Subject to and without waiving that objection, ETF and Secretary Conlin respond as follows:

The statutory authority and responsibilities of ETF and its Secretary with respect to GIB are set forth in Wis. Stat. ch. 40, including in Wis. Stat. §§ 40.03(1)–(2), (6) as well as in Wis. Stat. §§ 15.03, 15.04, and 15.165(2). In particular, ETF staff administer the programs under the purview of the GIB. This includes analysis of benefit and contract changes, vendor contract administration, and management of day-to-day program operations. ETF staff also facilitate GIB meetings.

INTERROGATORY NO. 5: Identify and describe all the responsibilities of ETF and the ETF Secretary with respect to health insurance coverage for state employees.

RESPONSE TO INTERROGATORY NO. 5: ETF and Secretary Conlin object that the phrase “all the responsibilities of ETF and the ETF Secretary with respect to health insurance coverage for state employees” is vague and ambiguous. Subject to and without waiving that objection, ETF and Secretary Conlin respond as follows:

The statutory authority and responsibilities of ETF and its Secretary with respect to health insurance coverage for state employees are set forth in Wis. Stat. ch. 40, including in Wis. Stat. §§ 40.02(25)(b), 40.03(1)–(2), and 40.51, as well as in Wis. Admin. Code § ETF 10.20 and Wis. Admin. Code ETF ch. 40. More detail on the Group Health Insurance Program can be found in an ETF publication available at <http://etf.wi.gov/publications/et8902.pdf>.

INTERROGATORY NO. 6: For the period from January 2012 to the present, identify the number of state employees provided individual health insurance coverage annually and the number of state employees provided family health insurance coverage annually.

RESPONSE TO INTERROGATORY NO. 6: To the best of ETF's knowledge, the yearly statistics that follow reflect subscriber or contract counts (including Graduate Assistants) and thus depict the number of state employees provided individual and family health insurance coverage annually:

- 2017 individual: 26,463; family: 42,767
- 2016 individual: 26,168; family: 43,054
- 2015 individual: 26,430; family: 44,339
- 2014 individual: 25,981; family: 44,441
- 2013 individual: 25,450; family: 44,378
- 2012 individual: 25,325; family: 44,830

INTERROGATORY NO. 7: For the period from January 2012 to the present, identify the total amount of state funds spent on health insurance coverage for state employees annually and specify the figures, calculations or statistics the State maintains regarding those expenditures.

RESPONSE TO INTERROGATORY NO. 7: ETF objects that the phrases “total amount of state funds” and “specify the figures, calculations or statistics the State maintains regarding those expenditures” are vague and ambiguous. Subject to and without waiving that objection, ETF responds as follows:

<u>Year</u>	<u>Employer (estimate)</u>	<u>Employee (estimate)</u>	<u>Total</u>
2012	\$905,265,208.30	\$127,941,944.50	\$1,033,207,152.80
2013	\$946,162,383.20	\$134,209,071.00	\$1,080,371,454.20
2014	\$987,394,303.90	\$139,909,389.50	\$1,127,303,693.40
2015	\$1,026,746,076.20	\$145,053,934.00	\$1,171,800,010.20
2016	\$979,741,313.30	\$131,984,136.50	\$1,111,725,449.80
2017	\$998,003,809.42	\$132,613,004.50	\$1,130,616,813.92
Total	\$5,843,313,094.32	\$811,711,480.00	\$6,655,024,574.32

INTERROGATORY NO. 8: Identify and explain the reasons for the denials of the Plaintiff, Alina Boyden’s, requests for coverage of gender confirmation surgery and/or rejection of any appeals of those denials of coverage.

RESPONSE TO INTERROGATORY NO. 8: Defendants Board of Regents, Raymond W. Cross, Rebecca M. Blank, the School of Medicine, and

Robert N. Golden had no authority over any of Alina Boyden's requests for health insurance coverage of particular procedures.

As for ETF and GIB, Alina Boyden's request for coverage was denied based on the State of Wisconsin Group Health Insurance Uniform Benefits. Specifically, Section IV.A.1.a. of the 2016 Uniform Benefits, Exclusions and Limitations, excludes coverage for "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." Dean Health Plan affirmed its denial of coverage in a grievance decision dated July 8, 2016. ETF's ombudsperson services affirmed Dean's denial in a letter dated September 20, 2016. ETF did not receive a request for an appeal through ETF's administrative appeals process.

INTERROGATORY NO. 9: Identify and explain the reasons for the denials of the Plaintiff, Shannon Andrews', requests for payment for gender confirmation surgery under her employee health insurance plan and/or rejection of any appeals of those denials.

RESPONSE TO INTERROGATORY NO. 9: Defendants Board of Regents, Raymond W. Cross, Rebecca M. Blank, the School of Medicine, and Robert N. Golden had no authority over any of Shannon Andrews' requests for health insurance coverage of particular procedures.

As for ETF and GIB, Shannon Andrews' request for coverage of services provided in October of 2015 was denied based on a coverage exclusion in her health insurance policy. Specifically, the policy excluded

coverage for certain surgical services including “HEALTH CARE SERVICES for, or leading to, sex transformation surgery and sex hormones related to such TREATMENT.” WPS affirmed its denial of coverage in a grievance decision dated May 5, 2016. On July 1, 2016, Ms. Andrews submitted a health insurance complaint to ETF. On July 26, 2016, before responding to her complaint, ETF learned through an online article in the Milwaukee Journal/Sentinel that the ACLU had filed an EEOC complaint against ETF on behalf of Dr. Andrews based on the denial of her request for coverage. (See <https://www.jsonline.com/story/news/politics/2016/07/26/transgender-researcher-files-discrimination-complaint/87604452/>.) ETF did not subsequently respond to Dr. Andrews’ July 1, 2016, health insurance complaint.

INTERROGATORY NO. 10: Identify and describe any actions taken by Secretary Conlin to determine whether the Gender Confirmation Treatment Exclusion results in arbitrary discrimination, consistent with his obligations under Wis. Stat. § 15.04(1)(g).

RESPONSE TO INTERROGATORY NO. 10: Secretary Conlin objects that the phrase “consistent with his obligations under Wis. Stat. § 15.04(1)(g)” is vague and ambiguous. Secretary Conlin further objects to this request, to the extent that it addresses communications protected by the attorney-client privilege. Subject to and without waiving that objection, Secretary Conlin responds as follows:

Secretary Conlin is familiar with the language in Wis. Stat. § 15.04(1)(g), which requires heads of state agencies to “examine and assess the statutes under which the head has powers or regulatory responsibilities, the procedures by which those statutes are administered and the rules promulgated under those statutes.”

Secretary Conlin is familiar with Wis. Stat. ch. 40, which governs ETF, and the ETF chapters of the Wisconsin Administrative Code. Under Wis. Stat. § 40.03(2)(f), ETF’s Secretary may delegate to other ETF employees any power or duty of the Secretary. Secretary Conlin has delegated regular review of those statutes and administrative code provisions to ETF’s Office of Legal Services (OLS), Office of Policy, Privacy and Compliance (OPPC), Division of Retirement Services (DRS), and Office of Strategic Health Policy (OSHP).

With respect to health insurance, Secretary Conlin has delegated regular review of applicable statutes and administrative code provisions to OLS, OPPC, and OSHP. Regarding the State of Wisconsin Group Health Insurance Program’s Uniform Benefits and the administration of that Program, for purposes of Wis. Stat. § 15.04(1)(g), Secretary Conlin has delegated review of the Uniform Benefits primarily to OSHP.

Specific to the Uniform Benefits exclusion at issue in this case, the exclusion was a part of the first publication of the Uniform Benefits, effective

January 1, 1994. It was included in the Uniform Benefits by the Group Insurance Board (GIB) because the Section IV. benefits and services were generally accepted by health insurance companies and health care providers to be experimental and not medically necessary. ETF notes that this type of exclusion remained the industry standard until the issuance of the federal Department of Health and Human Services (HHS) final rule interpreting Section 1557 of the Patient Protection and Affordable Care Act (ACA) on May 18, 2016. Also, the GIB has final authority over the Uniform Benefits' health insurance coverage provisions, under Wis. Stat. § 40.03(6) and Wis. Admin. Code § ETF 10.20.

To remain current on employee benefits law and policy and industry-wide standards, Secretary Conlin subscribes to many different publications and email updates, which he reviews on a daily basis. He also maintains memberships in multiple professional organizations.

The following is a non-exhaustive list of specific actions taken by ETF and Secretary Conlin to review the Uniform Benefits coverage exclusion at issue in this case:

- On May 18, 2016, HHS issued the final rule on the Patient Protection and Affordable Care Act Section 1557 provision on nondiscrimination in health programs and activities. ETF's OSHP staff and ETF attorneys reviewed the final rule.

- Subject to and without waiving the attorney-client privilege, on May 26, 2016, Secretary Conlin requested a legal opinion from ETF's attorneys on the application of the HHS rule to ETF. On May 29, 2016, ETF attorneys responded to Secretary Conlin's request.
- Subject to and without waiving the attorney-client privilege, on June 1, 2016, ETF attorneys offered legal analysis to OSHP on the application of the HHS rule to ETF.
- Subject to and without waiving the attorney-client privilege, on June 8, 2016, ETF attorneys communicated to Secretary Conlin their legal analysis regarding the application of the HHS rule to ETF.
- On June 15, 2016, OSHP contacted all health plans participating in the State of Wisconsin Group Health Insurance Program to inform them that, in order to comply with the HHS rule, ETF intended to recommend to GIB that the Uniform Benefits exclusion regarding procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment, be removed. OSHP further informed the health plans that ETF intended to recommend to GIB that procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment should be covered under the Uniform Benefits, when medically necessary.

- Prior to the July 12, 2016, Group Insurance Board (GIB) meeting, OSHP drafted a memo entitled “Guidelines Contract and Uniform Benefit Changes for 2017” and dated June 22, 2016. Secretary Conlin reviewed that memo prior to it being finalized and participated in a meeting on July 6th at which the memo was discussed.
- Secretary Conlin attended the July 12, 2016 GIB meeting.
- Subject to and without waiving the attorney-client privilege, on July 26, 2016, ETF attorneys provided Secretary Conlin an update on the status of litigation in related cases and an article that appeared that day in the Milwaukee Journal/Sentinel on the filing of an EEOC complaint by the ACLU on behalf of Shannon Andrews. (See <https://www.jsonline.com/story/news/politics/2016/07/26/transgender-researcher-files-discrimination-complaint/87604452/>)
- Subject to and without waiving the attorney-client privilege, on August 9, 2016, Secretary Conlin requested an update from ETF attorneys on the status of Dr. Andrews EEOC complaint.
- On August 10, 2016, Secretary Conlin received, reviewed and gave feedback on a memo from the Wisconsin Department of Justice (DOJ) entitled “ETF’s Proposed Revisions to Uniform Benefits Provisions Regarding “Gender Identity” Health Services.”

- Subject to and without waiving the attorney-client privilege, on August 10, 2016, ETF attorneys provided a legal case update to Secretary Conlin. That day, Secretary Conlin sought a legal opinion from ETF attorneys based on the update provided.
- Subject to and without waiving the attorney-client privilege, ETF's OLS drafted a memo entitled "Uniform Benefits Provisions Related to Sex Discrimination" and dated August 11, 2016. Secretary Conlin reviewed and provided feedback on that memo prior to it being finalized.
- Subject to and without waiving the attorney-client privilege, on August 11, 2016, Secretary Conlin participated in a meeting to discuss the DOJ memo and the memo from ETF's OLS.
- Secretary Conlin attended the August 16, 2016, GIB meeting.
- Subject to and without waiving the attorney-client privilege, on August 18, 2016, Secretary Conlin discussed the coverage exclusion at issue in this case with ETF attorneys.
- Subject to and without waiving the attorney-client privilege, on August 29, 2016, ETF attorneys provided Secretary Conlin with a legal case update and analysis of sex discrimination cases. That day, Secretary Conlin discussed that update with them.

- Subject to and without waiving the attorney-client privilege, on August 31, 2016, ETF attorneys gave Secretary Conlin an update on other health plan exclusions similar to the one at issue in this case.
- On December 8, 2016, Secretary Conlin prepared for the upcoming December 13, 2016, GIB meeting. On December 9, 2016, Secretary Conlin participated in a meeting at which the HHS nondiscrimination rule was discussed.
- Subject to and without waiving the attorney-client privilege, on December 12, 2016, ETF attorneys updated Secretary Conlin on the status of ACA Section 1557 litigation. That day, Secretary Conlin discussed that update with them.
- Prior to the December 13, 2016 GIB meeting, Secretary Conlin reviewed the December 8, 2016 memo entitled “Discussion and Consideration of 2017 Uniform Benefits—HHS Nondiscrimination Rule,” written by OSHP and the attachments to that memo. Secretary Conlin offered feedback on that memo before it was finalized.
- Secretary Conlin attended the December 13, 2016 GIB meeting.
- On or about December 28, 2016, Department of Administration Secretary Scott Neitzel contacted Secretary Conlin regarding scheduling a GIB meeting to reconsider the coverage exclusion at issue

in this case. Either later that day, or early the following day, GIB Chair Mike Farrell contacted Secretary Conlin to schedule that meeting.

- Subject to and without waiving the attorney-client privilege, on December 28 and 29, 2016, Secretary Conlin prepared for the December 30, 2016, GIB meeting, in consultation with ETF attorneys and OSHP.
- Prior to the December 30, 2016 GIB meeting, Secretary Conlin reviewed the December 29, 2016 memo entitled “2017 Uniform Benefits and Services Related to Gender Reassignment or Sexual Transformation—HHS Nondiscrimination Rule,” and offered his input.
- Secretary Conlin attended the December 30, 2016, GIB meeting, and was present when the GIB announced that the exclusion at issue in this case would be reinstated after four contingencies were met. One of those contingencies was the issuance of an injunction against enforcement of the HHS rule on nondiscrimination in health programs and activities.
- On December 31, 2016, a federal judge in Texas issued an injunction barring enforcement of the HHS rule. Subject to and without waiving the attorney-client privilege, Secretary Conlin reviewed that injunction and consulted with ETF attorneys.

- Subject to and without waiving the attorney-client privilege, between December 31, 2016 and January 29, 2017, Secretary Conlin met with ETF attorneys and OSHP leadership on multiple occasions to discuss the coverage exclusion at issue in this case.
- Subject to and without waiving the attorney-client privilege, on January 30, 2017, Secretary Conlin wrote a memo to the GIB, in consultation with ETF attorneys and OSHP, detailing the contingencies set by the GIB at the December 30, 2016 meeting, and reporting that those contingencies had been met.
- On January 31, 2017, Secretary Conlin, OLS, and OSHP, after consultation with the GIB chair, issued a 2017 health plan contract amendment to all participating health plans to reinstate the benefits exclusion, effective February 1, 2017.
- Secretary Conlin attended the February 8, 2017, GIB meeting; the health plan contract amendment was part of the GIB meeting materials.
- Subject to and without waiving the attorney-client privilege, on May 9, 2017, ETF attorneys updated Secretary Conlin on the status of litigation regarding ACA Section 1557 regulations.

- Subject to and without waiving the attorney-client privilege, on July 31, 2017, ETF attorneys provided Secretary Conlin with an update on the status of related cases.
- Subject to and without waiving the attorney-client privilege, on October 5, 2017, ETF attorneys updated Secretary Conlin on the status of ACA Section 1557 litigation.

INTERROGATORY NO. 11: Identify and describe any actions taken by Secretary Conlin to remediate any arbitrary discrimination resulting from the Gender Confirmation Treatment Exclusion, consistent with his obligations under Wis. Stat. § 15.04(1)(g).

RESPONSE TO INTERROGATORY NO. 11: Secretary Conlin objects that the phrase “consistent with his obligations under Wis. Stat. § 15.04(1)(g)” is vague and ambiguous. Secretary Conlin further objects that this Interrogatory assumes based on facts not in evidence that “arbitrary discrimination” occurred. Subject to and without waiving these objections, Secretary Conlin responds as follows:

See the response to Interrogatory No. 10. Consistent with that response, Secretary Conlin was directly involved in ETF’s recommendation that the exclusion at issue in this case be removed from the Uniform Benefits.

INTERROGATORY NO. 12: Identify all persons with knowledge of the genesis, formulation and adoption of the Gender Confirmation Treatment Exclusion as it existed prior to June 2016.

RESPONSE TO INTERROGATORY NO. 12: The State Defendants object that the phrase “genesis, formulation and adoption of the Gender Confirmation Treatment Exclusion as it existed prior to June 2016” is vague and ambiguous. Subject to and without waiving that objection, the State Defendants respond as follows:

With respect to ETF, Tom Korpady (Division of Insurance Services Administrator), and Bill Kox (Health Benefits & Insurance Plans Bureau Director), are former ETF employees who may have knowledge regarding the coverage exclusion at issue in this case, as it existed prior to June 2016.

With respect to the other State Defendants, they have no relevant knowledge of the coverage exclusion at issue in this case as it existed before June 2016.

INTERROGATORY NO. 13: Identify all persons with knowledge of the genesis, formulation and adoption of the proposal to eliminate the Gender Confirmation Treatment Exclusion from state employee health benefits plans beginning in 2017.

RESPONSE TO INTERROGATORY NO. 13: The State Defendants object that the phrase “genesis, formulation and adoption of the proposal to eliminate the Gender Confirmation Treatment Exclusion from state employee health benefits plans beginning in 2017” is vague and ambiguous. Subject to and without waiving that objection, the State Defendants respond as follows:

With respect to ETF, Robert Conlin (ETF Secretary), John Voelker (ETF Deputy Secretary), Pamela Henning (ETF Assistant Deputy Secretary), Lisa Ellinger (Director of the Office of Strategic Health Policy), Arlene Larson (Manager of Federal Health Programs & Policy), Tara Pray (Member Engagement and Communication Leadworker), Sara Brockman (GIB liaison), David Nispel (General Counsel), and Diana Felsmann (Attorney) have knowledge regarding the proposal to eliminate the coverage exclusion at issue in this case. ETF is aware that Department of Administration Secretary Scott Neitzel may also have knowledge responsive to this Interrogatory.

With respect to GIB, board members Michael Farrell, Stacey Rolston, Herschel Day, Terri Carlson, Bonnie Cyganek, Charles Grapentine, Michael Heifetz, Theodore Neitzke, Daniel Schwartz, Nancy Thompson, J.P. Wieske, and Bob Ziegelbauer have knowledge regarding the proposal to eliminate the coverage exclusion at issue in this case.

GIB is also aware that then-Deputy Attorney General Andrew Cook, in an August 10, 2016, memorandum, and Department of Justice Deputy Administrator Kevin Potter and Assistant Attorney General Colin Roth, at GIB meetings on December 13 and December 30, 2016, delivered legal analysis regarding the applicability of the Affordable Care Act and federal

regulations promulgated thereunder to the coverage exclusion at issue in this case.

With respect to the other State Defendants, they have no relevant knowledge regarding the proposal to eliminate the coverage exclusion at issue in this case.

INTERROGATORY NO. 14: Identify all persons with knowledge of the genesis, formulation and adoption of the proposal to reinstate the Gender Confirmation Treatment Exclusion in state employee health benefits plans beginning in February 2017.

RESPONSE TO INTERROGATORY NO. 14: The State Defendants object that the phrase “genesis, formulation and adoption of the proposal to reinstate the Gender Confirmation Treatment Exclusion in state employee health benefits plans beginning in February 2017” is vague and ambiguous. Subject to and without waiving that objection, the State Defendants respond as follows:

With respect to ETF, Robert Conlin (ETF Secretary), John Voelker (ETF Deputy Secretary), Pamela Henning (ETF Assistant Deputy Secretary), Lisa Ellinger (Director of the Office of Strategic Health Policy), Arlene Larson (Manager of Federal Health Programs & Policy), Tara Pray (Member Engagement and Communication Leadworker), Sara Brockman (GIB liaison), David Nispel (General Counsel), and Diana Felsmann (Attorney) have knowledge regarding the proposal to eliminate the coverage exclusion at

issue in this case. ETF is aware that Department of Administration Secretary Scott Neitzel may also have knowledge responsive to this Interrogatory.

With respect to GIB, board members Michael Farrell, Stacey Rolston, Herschel Day, Terri Carlson, Bonnie Cyganek, Charles Grapentine, Michael Heifetz, Theodore Neitzke, Daniel Schwartz, Nancy Thompson, J.P. Wieske, and Bob Ziegelbauer, as well as Waylon Hurlburt, a temporary GIB member by designee, have knowledge regarding the proposal to reinstate the coverage exclusion at issue in this case.

GIB is also aware that then-Deputy Attorney General Andrew Cook, in an August 10, 2016, memorandum, and Department of Justice Deputy Administrator Kevin Potter and Assistant Attorney General Colin Roth, at GIB meetings on December 13 and December 30, 2016, delivered legal analysis regarding the applicability of the Affordable Care Act and federal regulations promulgated thereunder to the coverage exclusion at issue in this case.

With respect to the other State Defendants, they have no relevant knowledge regarding the proposal to reinstate the coverage exclusion at issue in this case.

INTERROGATORY NO. 15: To the extent that any of Plaintiffs' Requests for Admission is denied or qualified in any way such that your answer is anything other than an unqualified admission, set forth in detail for each such denial or qualification all factual bases for the denial or qualification, and identify all documents that support in any way the refusal to admit unequivocally, together with the identity of the custodian(s) of any such document(s).

RESPONSE TO INTERROGATORY NO. 15:

Request for Admission No. 2: Under Wis. Stat. ch. 40, ETF is the state entity with the authority and responsibility to administer various benefits provided to state employees, including health insurance. The University of Wisconsin's human resources departments receive benefits information from ETF and provide that information to University employees. Those human resources departments also provide information related to employee benefits elections to ETF.

Request for Admission No. 4: See response to Request for Admission No. 2.

Request for Admission No. 5: See response to Request for Admission No. 2.

Request for Admission No. 6: Wisconsin Stat. ch. 36 does not assign any personal responsibility to the President of the University Wisconsin System, in either an individual or official capacity, to offer health insurance plans to University employees. Moreover, see response to Request for Admission No. 2.

Request for Admission No. 7: Wisconsin Stat. ch. 36 does not assign any personal responsibility to the Chancellor of a University Wisconsin

institution, in either an individual or official capacity, to offer health insurance plans to University employees. Moreover, see response to Request for Admission No. 2.

Request for Admission No. 8: See response to Request for Admission No. 2.

Request for Admission No. 9: Wisconsin Stat. ch. 36 does not assign any personal responsibility to the Dean of the University of Wisconsin School of Medicine and Public Health, in either an individual or official capacity, to offer health insurance plans to School of Medicine employees. Moreover, see response to Request for Admission No. 2.

Request for Admission No. 10: The University of Wisconsin is not a separate, suable entity under state law.

Request for Admission No. 11: The School of Medicine is not a separate, suable entity under state law.

Request for Admission No. 12: GIB is an “attached board” to ETF pursuant to Wis. Stat. §§ 15.03 and 15.165(2) and with the authority and responsibilities described in Wis. Stat. § 40.03(6).

Request for Admission No. 14: GIB has 11 board members, but they are not classified as employees. GIB is not an agent of ETF.

Request for Admission No. 16: The June 22, 2016, memorandum referenced in this Request for Admission speaks for itself. The characterization provided in this Request is not complete and accurate.

Request for Admission No. 18: GIB has statutory authority and responsibility with respect to state employees' group health insurance plans under Wis. Stat. ch. 40 including, for example, Wis. Stat. §§ 40.03(6), 40.51, and 40.52. Those statutes speak for themselves.

Request for Admission No. 19: See the response to Request for Admission No. 18.

Request for Admission No. 20: ETF and its Secretary's statutory authority and responsibility with respect to state employees' group health insurance plans is set forth in Wis. Stat. ch. 40 including, for example, Wis. Stat. §§ 40.03(1)–(2); those statutes speak for themselves.

Request for Admission No. 21: See the response to Request for Admission No. 20.

Request for Admission No. 22: See the response to Request for Admission No. 20.

Request for Admission No. 23: See the response to Request for Admission No. 20.

Request for Admission No. 25: Wisconsin Stat. § 40.03(6)(a)1. specifies that GIB, not ETF or its Secretary, “[m]ay, on behalf of the state, enter into a contract or contracts with one or more insurers authorized to transact insurance business in this state for the purpose of providing the group insurance plans provided for by this chapter.”

Request for Admission No. 26: The January 30, 2017, memorandum referenced in this Request speaks for itself. The characterization provided in this Request is not complete and accurate.

**SPECIFIC OBJECTIONS AND RESPONSES TO
REQUESTS FOR THE PRODUCTION OF DOCUMENTS**

The State Defendants hereby incorporate the General Objections described above into each response below, as if fully restated therein.

REQUEST FOR PRODUCTION NO. 1: Any and all documents that you contend support your answers to Plaintiffs' First Interrogatories or Plaintiffs' First Requests for Admission or that concern, refer or relate to those answers, including, but not limited to, any document referred to or relied upon in any answer.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law, (including Wis. Stat. §§ 51.30 and 146.82, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under the Family Educational Rights and Privacy Act (FERPA), or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 2: Any and all documents relating to Alina Boyden and Shannon Andrews, including, but not limited to, documents related to their employment by the University of Wisconsin,

their state employee health insurance coverage, and their requests for coverage for medical treatment for gender dysphoria and gender transition.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: The State Defendants object that this request is overbroad, unduly burdensome, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection, the State Defendants respond as follows:

The State Defendants will produce documents responsive to this Request that are also relevant to the coverage exclusion at issue in this case, and that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law, (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under the FERPA, or any other applicable privilege. Records containing private health care information and student records regarding the Plaintiffs will be produced upon receipt of an appropriate signed authorization. Further, the Board of Regents identifies the information located at <https://www.wisconsin.edu/ohrwd/benefits/health/>.

REQUEST FOR PRODUCTION NO. 3: Any and all documents related to the state employee health plan's coverage of procedures, services, and supplies related to "surgery and sex hormones associated with gender reassignment."

RESPONSE TO REQUEST FOR PRODUCTION NO. 3: The State Defendants object that this request is overbroad, unduly burdensome,

disproportionate to the needs of the case, not reasonably calculated to lead to the discovery of admissible evidence, vague, and ambiguous. Subject to and without waiving this objection, the State Defendants respond as follows:

The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law, (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 4: Any and all documents related to the decision to exclude state employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.”

RESPONSE TO REQUEST FOR PRODUCTION NO. 4: The State Defendants object that this request is overbroad, unduly burdensome, disproportionate to the needs of the case, not reasonably calculated to lead to the discovery of admissible evidence, vague, and ambiguous. Subject to and without waiving this objection, the State Defendants respond as follows:

The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462

(codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 5: Any and all documents related to the decisions to re-evaluate, end, and reinstate the exclusion of state employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.”

RESPONSE TO REQUEST FOR PRODUCTION NO. 5: The State Defendants object that this request is overbroad, unduly burdensome, disproportionate to the needs of the case, not reasonably calculated to lead to the discovery of admissible evidence, vague, and ambiguous. Subject to and without waiving this objection, the State Defendants respond as follows:

The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege. Further information regarding GIB’s decision is available at http://etf.wi.gov/boards/agendas_gib.htm.

REQUEST FOR PRODUCTION NO. 6: Any and all documents relating to medical treatment for gender transition, gender dysphoria, gender identity disorder, and transsexualism, and the medical necessity of that treatment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6: The State Defendants object that this Request is overbroad, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence. The State Defendants further object that this Request calls for the production of private health care information that is confidential and cannot be disclosed under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)). Subject to and without waiving this object, the State Defendants respond as follows:

The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege. The defendants affiliated with the University of Wisconsin will not collect and produce documents created by University of Wisconsin professors, researchers, and other employees related to research on gender dysphoria.

REQUEST FOR PRODUCTION NO. 7: Any and all documents relating to requests for coverage by Wisconsin state employees for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.”

RESPONSE TO REQUEST FOR PRODUCTION NO. 7: The State Defendants object that this Request is overbroad, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence. The State Defendants further object that this Request calls for the production of private health care information that is confidential and cannot be disclosed under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)). Subject to and without waiving this object, the State Defendants respond as follows:

Responsive records containing private health care information and student records for Plaintiffs will be produced upon receipt of an appropriate signed medical authorization.

REQUEST FOR PRODUCTION NO. 8: Any and all documents relating to state employee insurance coverage for breast augmentation (augmentation mammoplasty), vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, perineoplasty, subcutaneous mastectomy, hysterectomy, ovariectomy, metoidioplasty, phalloplasty, vaginectomy, or scrotoplasty (or any medical services related to these procedures) for any medical conditions other than gender dysphoria or gender identity disorder or for a purpose other than “gender reassignment,” including, but not limited to, post-oncologic reconstruction, post-traumatic reconstruction, post-infectious reconstruction, or reconstruction of congenital defects or anomalies.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8: The State Defendants object that this Request is overbroad, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of

admissible evidence. The State Defendants further object that this Request calls for the production of private health care information that is confidential and cannot be disclosed under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)). Subject to and without waiving this object, the State Defendants respond as follows:

Responsive records containing private health care information and student records for Plaintiffs will be produced upon receipt of an appropriate signed medical authorization.

REQUEST FOR PRODUCTION NO. 9: Any and all documents relating to state employee insurance coverage for hormonal therapies or treatments for any medical conditions other than gender dysphoria or gender identity disorder, or for a purpose other than “gender reassignment,” including, but not limited to, cancer, post-menopausal conditions, and sexual dysfunction.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9: The State Defendants object that this Request is overbroad, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence. The State Defendants further object that this Request calls for the production of private health care information that is confidential and cannot be disclosed under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R.

pts. 160, 164)). Subject to and without waiving this object, the State Defendants respond as follows:

Responsive records containing private health care information and student records for Plaintiffs will be produced upon receipt of an appropriate signed medical authorization.

REQUEST FOR PRODUCTION NO. 10: Any and all documents relating to the relationship between ETF and GIB, including, but not limited to, all communications between ETF and GIB for the period between January 2012 and the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: ETF and GIB object that this Request is overbroad, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence. ETF and GIB further object that the phrase “the relationship between ETF and GIB” is vague and ambiguous. Subject to and without waiving these objections, the State Defendants respond as follows:

ETF and GIB will produce communications since January 1, 2016, related to the coverage exclusion at issue in this case that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 11: Any and all communications between ETF and GIB relating to insurance coverage for

gender dysphoria, gender identity disorder, gender transition, and “gender reassignment.”

RESPONSE TO REQUEST FOR PRODUCTION NO. 11: ETF and GIB will produce communications since January 1, 2016, responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 12: Any and all documents relating to ETF’s responsibility for health insurance coverage, including, but not limited to, its responsibility to provide oversight for all of ETF and to hear appeals from denials of coverage.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12: ETF objects that the phrase “ETF’s responsibility for health insurance coverage” is vague and ambiguous. Subject to and without waiving that objection, ETF responds as follows:

ETF hereby identifies the statutory and administrative provisions located at Wis. Stat. §§ 40.02(25)(b), 40.03(1)–(2), and 40.51, Wis. Admin. Code § ETF 10.20 and ch. 11, and the health insurance fact sheet available at <http://etf.wi.gov/publications/et8902.pdf>.

REQUEST FOR PRODUCTION NO. 13: Any and all documents relating to ETF’s role in studying, reviewing, administering, enforcing, facilitating, communicating, transmitting, or contracting related to the

exclusion of state employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment”; the decision to re-evaluate and end this exclusion; and the reinstatement of the exclusion in or about December 2016 and January 2017.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13: ETF will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege. Further, ETF identifies the information located at <https://etfonline.wi.gov/etf/internet/RFP/HealthBeneAdminRFP1/index.html>.

REQUEST FOR PRODUCTION NO. 14: Any and all documents relating to the ETF Secretary’s role related to the exclusion of state employee health insurance coverage for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment”; the decision to re-evaluate and end this exclusion; and the reinstatement of the exclusion in or about December 2016 and January 2017.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14: ETF and Secretary Conlin will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 15: Any and all documents relating to the relationship between the ETF Secretary and GIB, including, but not limited to, all communications between the ETF Secretary and GIB for the period between January 2012 and the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15: Secretary Conlin and GIB object that this Request is overbroad, disproportionate to the needs of the case, and not reasonably calculated to lead to the discovery of admissible evidence. Secretary Conlin and GIB further object that the phrase “the relationship between the ETF Secretary and GIB” is vague and ambiguous. Subject to and without waiving these objections, Secretary Conlin and GIB respond as follows:

Secretary Conlin and GIB will produce communications since January 1, 2016, related to the coverage exclusion at issue in this case that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 16: Any and all communications between the ETF Secretary and GIB relating to insurance coverage for gender dysphoria, gender identity disorder, gender transition, and “gender reassignment.”

RESPONSE TO REQUEST FOR PRODUCTION NO. 16: Secretary Conlin and GIB will produce communications since January 1, 2016, responsive to this Request that are not subject to the attorney-client

privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 17: Any and all documents relating to the ETF Secretary’s responsibility for health insurance coverage, including, but not limited to, the ETF Secretary’s responsibility to plan, direct, coordinate and execute the functions vested in the department; and to promulgate rules required for the administration of the group health insurance plans.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17: Secretary Conlin objects that the phrase “responsibility for health insurance coverage” is vague and ambiguous. Subject to and without waiving that objection, Secretary Conlin responds as follows:

Secretary Conlin hereby identifies the statutory provisions located at Wis. Stat. § 40.03(2), including Wis. Stat. § 40.03(2)(f).

REQUEST FOR PRODUCTION NO. 18: Any and all documents relating to the ETF Secretary’s responsibility and exercise of the ETF’s responsibility to determine whether there is any arbitrary discrimination in health insurance policies and take remedial action relating to it.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18: Secretary Conlin will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30

and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 19: Any and all documents relating to the role and responsibility of the Board of Regents, Cross, Blank, and Golden to provide health insurance coverage to state employees.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19: The Board of Regents, Raymond Cross, Rebecca Blank, and Robert Golden are not aware of any documents in their possession responsive to this request.

REQUEST FOR PRODUCTION NO. 20: Any and all documents relating to the role and responsibility of ETF and GIB to provide health insurance to the employees of the Board of Regents.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20: ETF and GIB object that the phrase “role and responsibility of ETF and GIB to provide health insurance to the employees of the Board of Regents” is vague and ambiguous. Subject to and without waiving this objection, ETF and GIB respond as follows:

ETF and GIB hereby identify the statutory and administrative provisions located at Wis. Stat. §§ 40.02(25)(b), 40.03(1)–(2), and 40.51, Wis. Admin. Code § ETF 10.20 and ch. 11, and the health insurance fact sheet available at <http://etf.wi.gov/publications/et8902.pdf>.

REQUEST FOR PRODUCTION NO. 21: Any and all documents tending to show what, if any, financial or economic effect the State of Wisconsin and/or its taxpayers would experience, both positive and negative, if the State of Wisconsin provided health insurance coverage to state

employees for “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.”

RESPONSE TO REQUEST FOR PRODUCTION NO. 21: The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 22: Any and all documents related to the number, or estimates of the number, of State of Wisconsin employees with gender dysphoria or gender identity disorder and the number of those employees who have sought or will seek State of Wisconsin insurance coverage for gender transition and/or for treatment of gender dysphoria or gender identity disorder.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22: The State Defendants object that this Request calls for the production of private health care information that is confidential and cannot be disclosed under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)). Subject to and without waiving this object, the State Defendants respond as follows:

Responsive records containing private health care information and student records for Plaintiffs will be produced upon receipt of an appropriate signed medical authorization.

REQUEST FOR PRODUCTION NO. 23: Any and all documents related to the number, or estimates of the number, of State of Wisconsin employees who are transgender and the number of those employees who have sought or will seek State of Wisconsin insurance coverage for treatment for gender transition, gender dysphoria or gender identity disorder.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23: The State Defendants object that this Request calls for the production of private health care information that is confidential and cannot be disclosed under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)). Subject to and without waiving this object, the State Defendants respond as follows:

The State Defendants are not aware of any documents in their possession responsive to this request.

REQUEST FOR PRODUCTION NO. 24: Any and all documents related to the cost of medical treatment for gender transition, gender dysphoria, or gender identity disorder.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24: The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

REQUEST FOR PRODUCTION NO. 25: Any and all documents concerning, referring, or relating to the State funds allocated for insurance coverage for state employees from 2012 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25: The State Defendants are not aware of any documents in their possession responsive to this request.

REQUEST FOR PRODUCTION NO. 26: Any and all documents concerning, referring, or relating to projections, budgets, and estimates related to insurance coverage for state employees from 2012 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 26: The State Defendants are not aware of any documents in their possession responsive to this request.

REQUEST FOR PRODUCTION NO. 27: Any and all documents concerning, referring, or relating to projections, budgets, and estimates related to insurance coverage for gender transition, gender dysphoria, or gender identity disorder from 2012 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 27: The State Defendants will produce documents responsive to this Request that are not subject to the attorney-client privilege, privileges related to private health care information under state and federal law (including Wis. Stat. §§ 51.30 and 146.82, HIPAA, and 65 Fed. Reg. 82, 462 (codified at 45 C.F.R. pts. 160, 164)), privileges under FERPA, or any other applicable privilege.

Dated January 16, 2018 (original responses), April 20, 2018 (supplemental response).

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/ Colin T. Roth
COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

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kilpatricksc@doj.state.wi.us
schmelzerjj@doj.state.wi.us

VERIFICATION OF INTERROGATORY RESPONSES

I, Robert J. Conlin, Secretary of the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 1, 4, 5, 10, 11, 12, 13, and 14 are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 01/22/2018



ROBERT J. CONLIN
Secretary, State of Wisconsin Department of
Employee Trust Funds

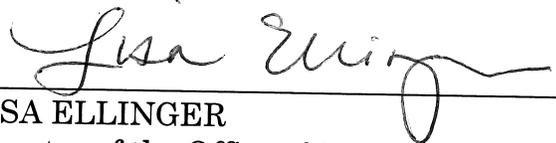
On his own behalf and on behalf of
Defendant State of Wisconsin Department of
Employee Trust Funds

VERIFICATION OF INTERROGATORY RESPONSES

I, Lisa Ellinger, Director of the Office of Strategic Health Policy for the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 12, 13, and 14 are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1/18/18



LISA ELLINGER
Director of the Office of Strategic Health
Policy, State of Wisconsin Department of
Employee Trust Funds

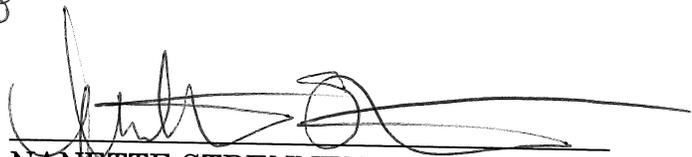
On behalf of Defendant State of Wisconsin
Department of Employee Trust Funds

VERIFICATION OF INTERROGATORY RESPONSES

I, Nanette Strennen, Financial Management Supervisor for the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing response regarding Interrogatory No. 7 is true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Jan. 18, 2018



NANETTE STRENNEN
Financial Management Supervisor, State of
Wisconsin Department of Employee Trust
Funds

On behalf of Defendant State of Wisconsin
Department of Employee Trust Funds

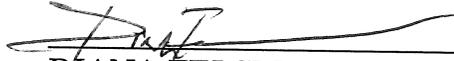
VERIFICATION OF INTERROGATORY RESPONSES

I, Diana Felsmann, Attorney for the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 10 and 11 are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on

4/18/18



DIANA FELSMANN

Attorney, State of Wisconsin Department of
Employee Trust Funds

On behalf of Defendant State of Wisconsin
Department of Employee Trust Funds

VERIFICATION OF INTERROGATORY RESPONSES

I, David Nispel, General Counsel for the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 10 and 11 are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1/18/18



DAVID NISPEL
General Counsel, State of Wisconsin
Department of Employee Trust Funds

On behalf of Defendant State of Wisconsin
Department of Employee Trust Funds

VERIFICATION OF INTERROGATORY RESPONSES

I, Daniel Hayes, Attorney for the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 8 and 9 are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 18, 2018



DANIEL HAYES

Attorney, State of Wisconsin Department of
Employee Trust Funds

On behalf of Defendant State of Wisconsin
Department of Employee Trust Funds

VERIFICATION OF INTERROGATORY RESPONSES

I, Arlene Larson, Manager of Federal Health Programs & Policy for the State of Wisconsin Department of Employee Trust Funds, believe based on reasonable inquiry that the foregoing response regarding Interrogatory No. 6 is true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1/18/18



ARLENE LARSON

Manager of Federal Health Programs &
Policy, State of Wisconsin Department of
Employee Trust Funds

On behalf of Defendant State of Wisconsin
Department of Employee Trust Funds

VERIFICATION OF INTERROGATORY RESPONSES

I, Raymond W. Cross, President of the University of Wisconsin System, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 2, 3, 8, 9, 12, 13, 14, and 15 (Requests for Admission 27 and 28) are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1-19-18



RAYMOND W. CROSS
President, University of Wisconsin
System

VERIFICATION OF INTERROGATORY RESPONSES

I, Jessica Lathrop, Executive Director and Corporate Secretary for the Board of Regents of the University of Wisconsin System, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 2, 3, 8, 9, 12, 13, 14, and 15 (Requests for Admission 27 and 28) are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 19, 2018



JESSICA LATHROP
Executive Director and Corporate Secretary,
Board of Regents of the University of
Wisconsin System

VERIFICATION OF INTERROGATORY RESPONSES

I, Rebecca M. Blank, Chancellor of the University of Wisconsin-Madison, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 2, 3, 8, 9, 12, 13, 14, and 15 (Requests for Admission 27 and 28) are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Jan 22, 2018

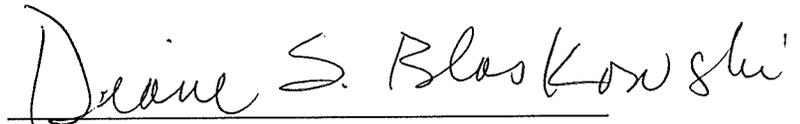

REBECCA M. BLANK
Chancellor of the University of Wisconsin-
Madison

VERIFICATION OF INTERROGATORY RESPONSES

I, Diane S. Blaskowski, Director of Employee Services for the University of Wisconsin–Madison, believe based on reasonable inquiry that the foregoing response regarding Interrogatory No. 15 (Request for Admission No. 2, second two sentences) is true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 4/19/2018



DIANE S. BLASKOWSKI
Director of Employee Services, University of
Wisconsin–Madison

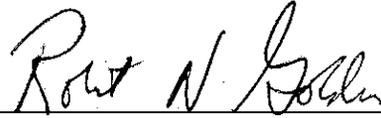
On behalf of Defendant Board of Regents

VERIFICATION OF INTERROGATORY RESPONSES

I, Robert N. Golden, M.D., Dean of the University of Wisconsin School of Medicine and Public Health, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 2, 3, 8, 9, 12, 13, 14, and 15 (Requests for Admission 27 and 28) are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 1/22/18



ROBERT N. GOLDEN, M.D.
Dean, University of Wisconsin School of
Medicine and Public Health

VERIFICATION OF INTERROGATORY RESPONSES

I, Michael S. Farrell, Chairperson of the State of Wisconsin Group Insurance Board, believe based on reasonable inquiry that the foregoing responses regarding Interrogatories Nos. 1, 2, 3, 8, 9, 12, 13, and 14 are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 23, 2018



MICHAEL S. FARRELL
Chairperson, State of Wisconsin Group
Insurance Board

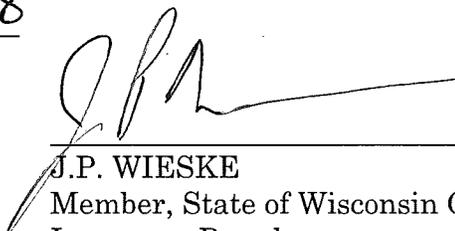
On behalf of Defendant State of Wisconsin
Group Insurance Board

VERIFICATION OF INTERROGATORY RESPONSE

I, J.P. Wieske, a member of the State of Wisconsin Group Insurance Board, believe based on reasonable inquiry that the foregoing supplemental response regarding Interrogatory No. 2 is true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 20th 2018



J.P. WIESKE
Member, State of Wisconsin Group
Insurance Board

On behalf of Defendant State of Wisconsin
Group Insurance Board

Exhibit C



State of Wisconsin
Department of Employee Trust Funds
Robert J. Conlin
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931

1-877-533-5020 (toll free)
Fax 608-267-4549
etf.wi.gov

Correspondence Memorandum

Date: January 30, 2017
To: Group Insurance Board
From: Robert J. Conlin, Secretary
Subject: 2017 Uniform Benefits and Services Related to Gender Reassignment

This memo is for informational purposes only. No Board action is required.

At the December 30, 2017 Group Insurance Board (Board) meeting, the Board approved reinstating the exclusion of health benefits and services based on gender identity after certain contingencies were met. The contingencies included:

1. A court ruling or an administrative action that enjoins, rescinds or invalidates the rules set by the federal Department of Health and Human Services (HHS);
2. Compliance with state law, Section 40.03 (6)(c);
3. Renegotiation of contracts that maintain or reduce premium costs for the state; and
4. A final opinion of the Wisconsin Department of Justice that the action taken does not constitute a breach of the Board's fiduciary duties.

Contingency #1: On December 31, 2016, a federal judge in Texas issued an injunction barring enforcement of the Affordable Care Act provisions that extend anti-discrimination protections to transgender health services.

Contingency #2: On January 23, 2017, the Board's consulting actuary produced a memo (Attachment A), confirming that reinstating the exclusion would not increase program costs, thereby confirming compliance with Wis. Stat. 40.03 (6)(c).

Contingency #4: On January 13, 2017, the Wisconsin Department of Justice provided an opinion to the Board confirming that the action taken does not constitute a breach of the Board's fiduciary duties.

Upon consultation with the Board Chair that contingencies 1, 2 and 4 were addressed, ETF issued a 2017 health plan contract amendment to all participating health plans to reinstate the benefit exclusion, effective February 1, 2017 (Attachment B). This completes **Contingency #3**.

Staff will be at the Board meeting to answer any questions.

Attachment A: Segal Memorandum - Transgender Cost Estimate

Attachment B: 2017 Contract to Participate Under Group Health Benefit Program And Uniform Benefits – Reinstatement of Benefit Exclusion Concerning Gender Reassignment

Reviewed and approved by Lisa Ellinger, Director, Office of Strategic Health Policy

Electronically Signed 1/30/17

Board	Mtg Date	Item #
GIB	2.8.17	4

Attachment A



2018 Powers Ferry Road SE Suite 850 Atlanta, GA 30339-7200
T 678.306.3100 www.segalco.com

MEMORANDUM

To: Lisa Ellinger
From: Kirsten R. Schatten, ASA, MAAA
Kenneth C. Vieira, FSA, MAAA
Date: January 23, 2017
Re: Transgender Cost Estimate

Section 1557 of the ACA prohibits group health plans from discriminating on the basis of race, color, national origin, sex, age, or disability in health programs, consistent with existing federal laws, including Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975; and Sections 504 and 508 of the Rehabilitation Act of 1973; and the Americans with Disabilities Act of 1990 (ADA). Group health plans and employers that accept federal funding from HHS are covered entities under the law.

The Section 1557 regulations defined discrimination on the basis of “sex” to include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity. This interpretation was challenged by the plaintiffs as being an impermissible definition of the term “sex.”

In *Franciscan Alliance, Inc. v Burwell, et al*, several plaintiffs challenged regulations issued by the Department of Health and Human Services (HHS) implementing Section 1557 of the Affordable Care Act (ACA). Plaintiffs included eight states (Texas, Wisconsin, Nebraska, Kansas, Louisiana, Arizona, Mississippi, and the Commonwealth of Kentucky) and three private health care providers. On December 31, 2016, Judge Reed O’Connor of the US District Court for the Northern District of Texas issued a nationwide preliminary injunction enjoining HHS from enforcing the regulation’s prohibition against discrimination on the basis of gender identity or termination of pregnancy.

This brief memo is focused on the calculation of potential cost impact to the State of Wisconsin Group Health Insurance Plan for adding transgender dysphoria benefits in 2017. Please note that there is a lack of information and data to provide specific information on estimated cost to the Plan. Therefore, we have provided a range of estimates based on potential utilization information gathered from research and treatment cost estimates from BCBS. Please also note there are wide variations in some of these studies, and past experience from various counties that have provided coverage long enough to have data to review have shown the prior estimates to be overstated.

Lisa Ellinger
Page 2

Key Assumptions

Three key assumptions drive our cost estimates: prevalence of transgender members, percentage of those who seek benefits (including surgery) and the cost of the various treatment options.

Prevalence – According to the Centers for Disease Control and Prevention (CDC) 2015 Behavioral Risk Factor Surveillance System (BRFSS), approximately 0.58% of adults in the United States self-identify as transgender. This has increased slightly from 2014 & 2013.

The Williams Institute in June of 2016 published a paper entitled "How Many Adults Identify as Transgender in the United States?" which goes a little further by drilling down on prevalence by state and also providing ranges. This paper estimated a prevalence range of 0.31% to 0.62% for Wisconsin adults ages 18-64.

Percentage Who Seek Benefits – The number of transgender people seeking benefits is difficult to predict since a new benefit may alter past patterns. One study was published by Olyslager, F. & Conway, L. (September 2007) entitled "On the Calculation of the Prevalence of Transsexualism." This paper was presented at the WPATH 20th International Symposium, Chicago, Illinois. This study from 2007 estimates that, of those who identify as transgender, between 0.1% and 0.5% have taken some steps to transition from one gender to another.

The State of Wisconsin Group Health Insurance Plan membership from age 18 through 64 is approximately 159,000. Applying the prevalence and utilization assumptions above, we would expect 2 to 5 members to use transgender benefits.

For those who seek benefits, the vast majority of cost comes from members choosing to have gender reassignment surgery. There are a couple of sources we found (Mohammed A. Memon, MD; February 22, 2016; "Gender Dysphoria and Transgenderism: Epidemiology" Medscape, as well as HealthResearchFunding.Org) that site prevalence rates for adults seeking reassignment surgery of 1 in 30,000 for males and 1 in 100,000 for females. Using these statistics, we would expect 3 males and 1 female in our expected scenario, and we have applied a range of +/- 50% to get a range of 2-5 adults in total.

Cost of Treatment – Information was provided at a very high level from a national medical vendor. Their pricing analysis was based entirely on external studies and sources:

- For male to female surgery they assumed roughly \$28K, with \$3,600 in hormonal therapy
- For female to male surgery they assumed about \$56K, with \$7,200 in hormonal therapy

They also noted that there would be fairly substantial counseling costs associated with the surgery—roughly \$10K in a given year.

Lisa Ellinger
Page 3

Financial Impact

Using the above, we have estimated the annual cost to range from \$100,000 to \$250,000. The costs are highly variable based on the assumptions described above. Below is brief summary;

		Prevalence		Estimated Cost (per Treatment)	Cost Estimate	
		Low	High		Low	High
Surgical Benefits	Male	1.26	3.79	\$ 41,600	\$ 52,569	\$ 157,706
	Female	0.42	1.13	\$ 73,200	\$ 30,460	\$ 82,738
	Total	1.68	4.92		\$ 83,028	\$ 240,443
Non-Surgical Benefits	Male	0.61	0.02	\$ 17,200	\$ 10,525	\$ 370
	Female	0.14	-	\$ 13,600	\$ 1,903	\$ -
	Total	0.75	0.02		\$ 12,428	\$ 370
Total Using Benefits	Male	1.88	3.81	\$ 58,800	\$ 63,094	\$ 158,076
	Female	0.56	1.13	\$ 86,800	\$ 32,363	\$ 82,738
	Total	2.43	4.94		\$ 95,456	\$ 240,814
Adult Members (18-64)					159,043	
Total PMPM					\$ 0.05	\$ 0.13

There are a few other sources we found and reviewed that provide similar information and would bring us to a similar range of cost estimates. Based on approximately \$1.3 billion of non-Medicare premiums, the cost for the State of Wisconsin Group Health Insurance Plan is estimated to be 0.007% to 0.018% of premium.

The cost to cover services related to transgender dysphoria was not anticipated during rate development and negotiations for 2017; therefore, the 2017 premiums were not changed to reflect potential transgender claims. Also note that many vendors' increases were capped at 5%, leaving no margin to add additional benefits within their current contractual rates. Reinstating the exclusion for coverage of transgender services should have no impact on program costs for 2017.



State of Wisconsin
Department of Employee Trust Funds
Robert J. Conlin
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931
1-877-533-5020 (toll free)
Fax 608-267-4549
etf.wi.gov

Date: January 31, 2017
To: All Health Plans
RE: 2017 Contract To Participate Under Group Health Benefit Program And Uniform Benefits:
Reinstatement of Benefit Exclusion Concerning Gender Reassignment

Pursuant to action taken by the Group Insurance Board on December 30, 2016, the following Exclusion is reinstated in Section IV. Exclusions and Limitations in the 2017 Uniform Benefits:

- 1. Surgical Services
 - c. Procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.

Health Plan must acknowledge receipt of the amendment referenced above by providing the required information below. We request that an official with authority to bind the Plan sign this form and return it to the Department of Employee Trust Funds. With receipt of this amendment, the contingency to negotiate this contract change is satisfied and the above-noted benefit no longer is part of Uniform Benefits. This rescission of the benefit is effective February 1, 2017.

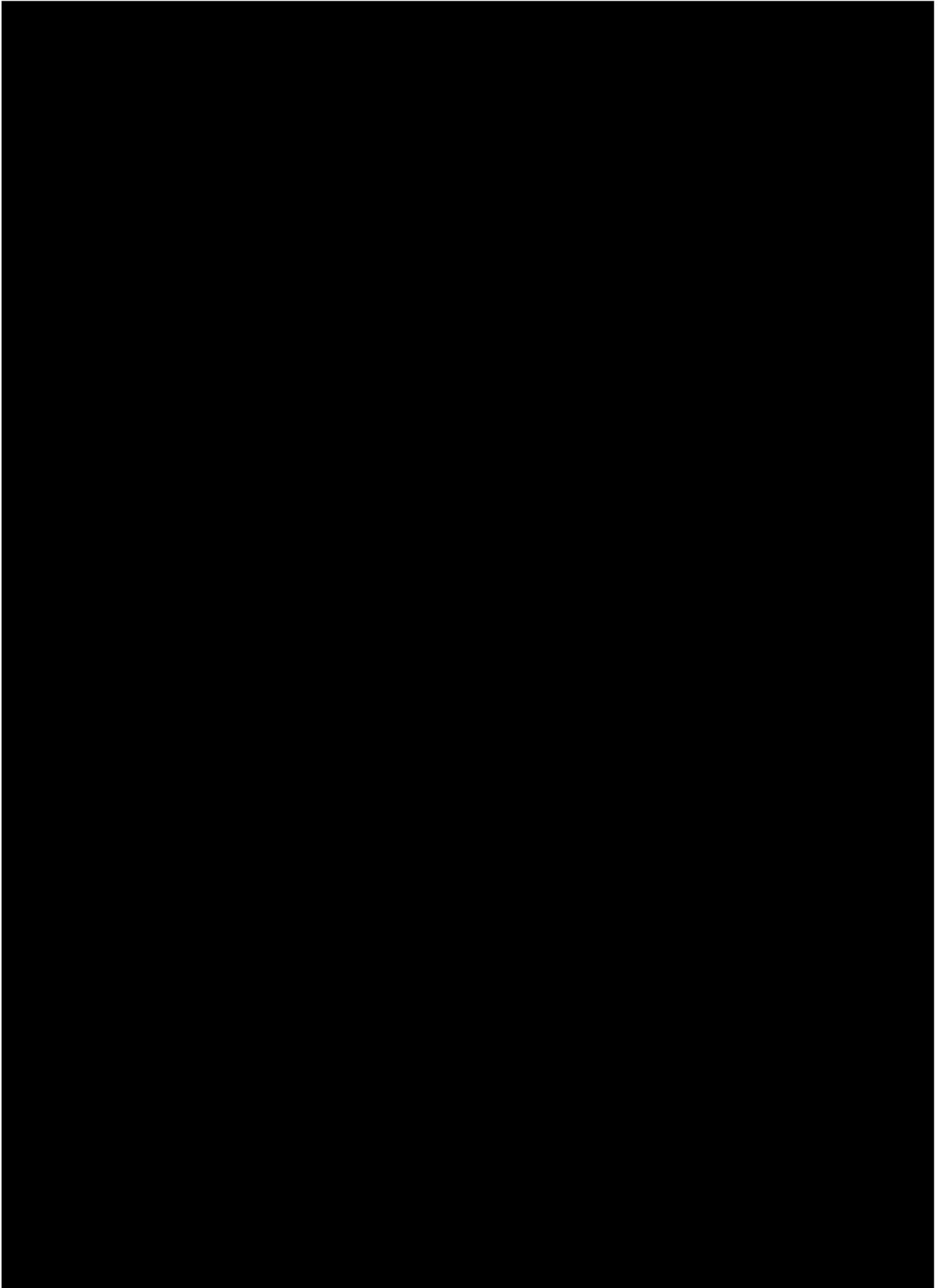
Name of Health Plan

Authorized Printed Name

Authorized Signature

Date

Exhibit D



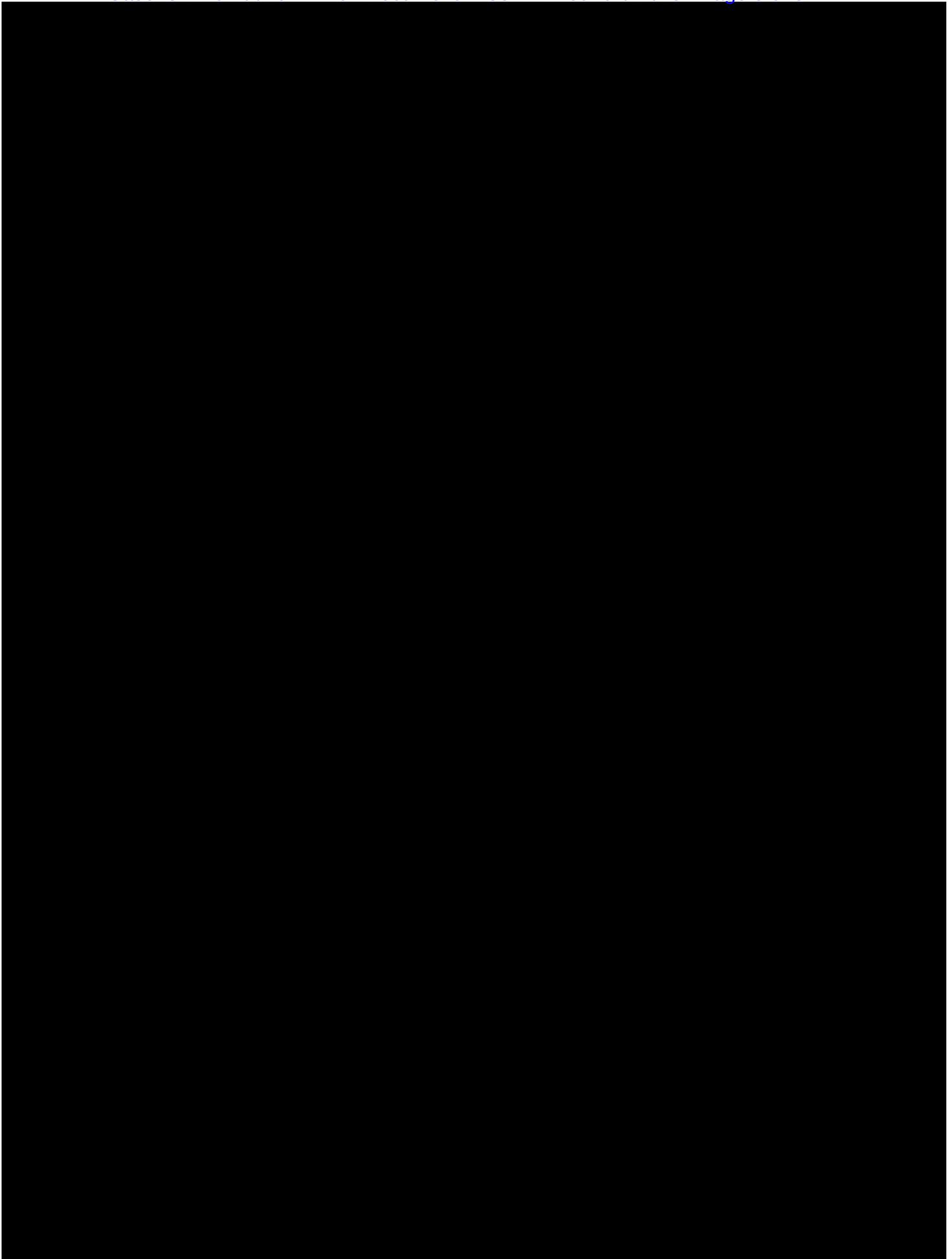
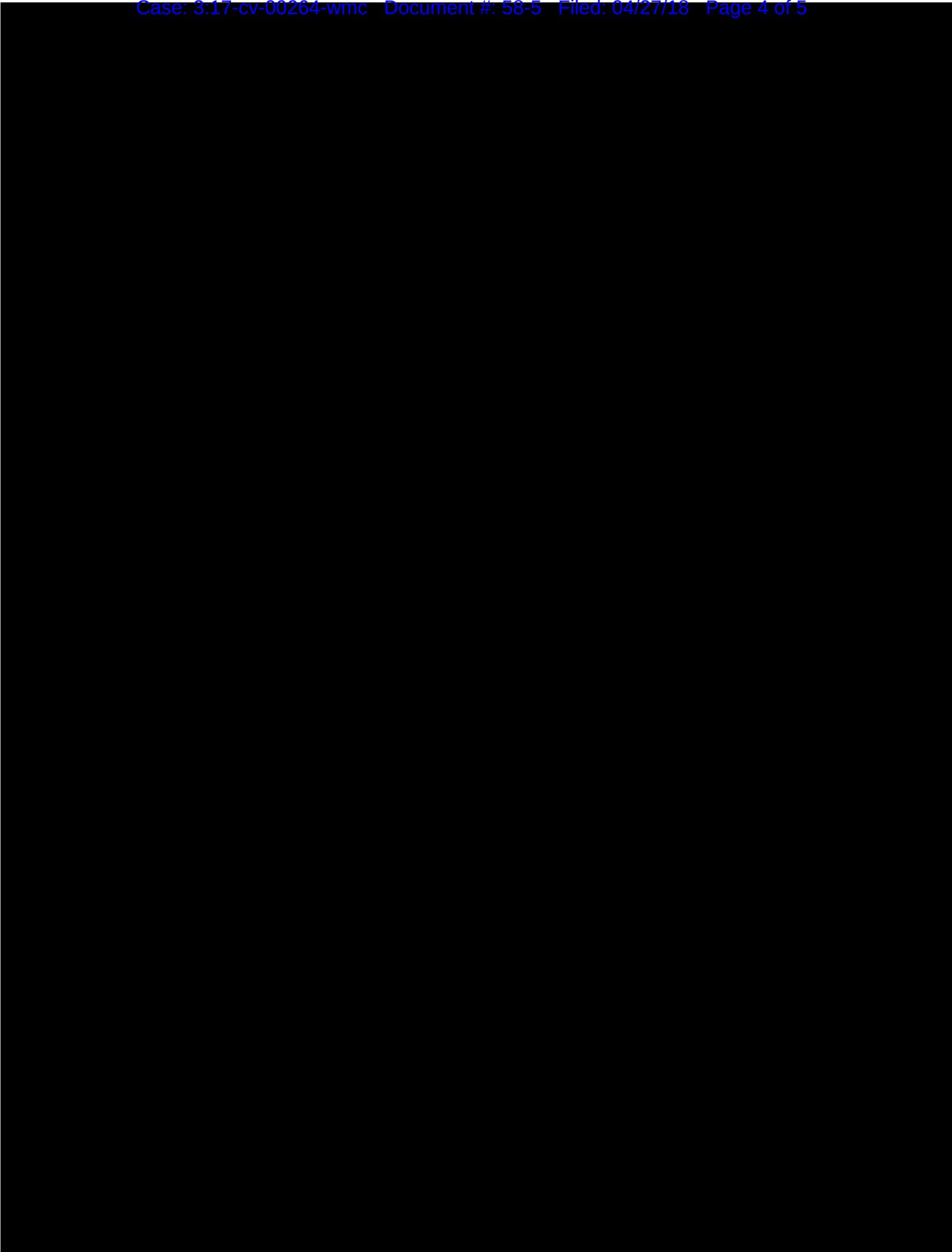


Exhibit E



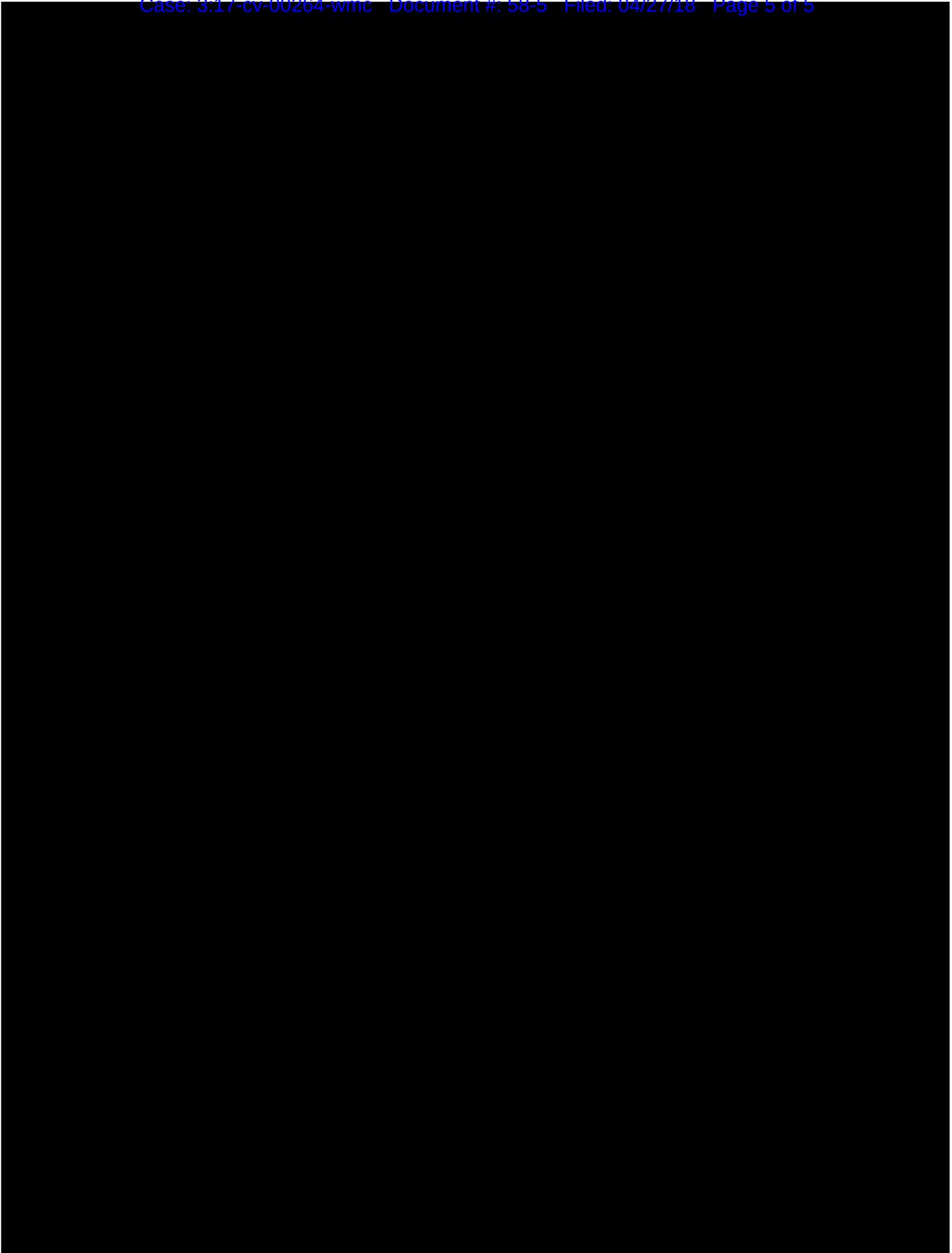


Exhibit F



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

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P.O. Box 7857
Madison, WI 53707-7857
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Colin T. Roth
Assistant Attorney General
608/264-6219
rothct@doj.state.wi.us
FAX 608/267-2223

March 16, 2018

VIA EMAIL (jknight@ACLU-il.org)

John Knight
American Civil Liberties Union Foundation
150 North Michigan Avenue, Suite 600
Chicago, IL 60601

Re: *Boyden, et al. v. ETF, et al.*, Case No. 17-CV-0264 –
Response to March 15, 2018, discovery letter and claw-back request

Dear Mr. Knight:

I write in response to your discovery letter of March 15, 2018, and to notify you of our request to “claw back” certain documents that were inadvertently produced.

Claw-back requests

Pursuant to Federal Rule of Civil Procedure 26(b)(5)(B) and General Objection Number 8 in the State Defendants’ Responses and Objections to Plaintiffs’ First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents and Things, the State Defendants request that all copies of the following documents in your possession be destroyed:

Attorney-client and attorney work product

- **GIB00797**: Contains privileged attorney-client communication and attorney work product regarding DOJ’s advice to GIB on its consideration of the coverage exclusion at issue. A redacted version of this communication was already produced as document ETF01897-REDACTED.
- **ETF00634**: Contains privileged attorney-client communications regarding the application of HHS regulations to ETF. A version of this document with the privileged information removed will be produced.

John Knight (jknight@ACLU-il.org)

March 16, 2018

Page 2

- **ETF01893**: The attachment “Memo to GIB re Fiduciary Duties [FINAL] is a privileged attorney-client communication regarding DOJ’s advice to GIB regarding its fiduciary duties. This email will be produced without this privileged attachment.
- **ETF01938**: Contains privileged attorney-client communication regarding ETF’s implementation of HHS’s Affordable Care Act non-discrimination rules. A redacted version of this communication was already produced as document ETF01939-REDACTED.
- **ETF02234**: Contains privileged attorney-client communication regarding ETF action in response to GIB vote to reinstate coverage exclusion at issue. A redacted version of this communication will be produced.
- **ETF02570**: Contains privileged attorney-client communication and attorney work product regarding DOJ’s advice to GIB on its consideration of the coverage exclusion at issue. A redacted version of this communication was already produced as document ETF02566-REDACTED.
- **ETF03007**: Privileged attorney-client communication regarding origin of coverage exclusion at issue.
- **ETF04417, ETF04419**: Contains privileged attorney-client communication and attorney work product regarding DOJ’s advice to GIB regarding its fiduciary duties. A redacted version of this communication will be produced.

Confidential third-party patient health information

- **ETF02265, ETF02440, ETF02768, ETF02769, ETF02775**: All these documents contain confidential personal health information regarding third-parties to this litigation who have not consented to release of this information. Moreover, none of the protective orders in this case authorize disclosure of third-party personal health information. This information was inadvertently disclosed and the documents on which it appears must be destroyed.

A version of ETF02265 will be produced, without the attachments that contain confidential third-party personal health information.

John Knight (jknight@ACLU-il.org)
March 16, 2018
Page 3

Responses to March 15, 2018, discovery letter

The State Defendants will supplement their written response to Plaintiffs' Interrogatory Number 2.

The State Defendants will produce the additional documents you request: the EEOC Position Statements for both Alina Boyden and Shannon Andrews; the "attached informational document (internal use only) on the state's 2017 Uniform Benefit change regarding the non-exclusion of benefits and services based on gender identity"; and the agendas and open meeting minutes for the July 12, 2016, and August 16, 2016, GIB meetings (the closed meeting minutes do not contain responsive information and therefore will not be produced).

Responsive, non-privileged emails from the search of GIB members' accounts were produced in response to the requests for production.

Both emails and documents in custodians' computer directories were searched; responsive, non-privileged documents in both categories were produced.

The State Defendants have concerns about the proposed additional custodians and search terms. We request a meet and confer to discuss those issues. We would also like to discuss the topics for David Nispel's deposition, as I mentioned in my email to you and counsel on March 14. Our team is available any time on Monday, Tuesday (except for 1-2 p.m.), Wednesday from 9-10 a.m. or after 3:00 p.m., Thursday after 1:00 p.m., or Friday before 1:30 p.m.

Sincerely,

A handwritten signature in blue ink that reads "Colin T. Roth". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Colin T. Roth
Assistant Attorney General

CTR:jrs

Exhibit G

April 3, 2018

Via Electronic Mail

Colin T. Roth (rothct@doj.state.wi.us)
Jody J. Schmelzer (schmelzerjj@doj.state.wi.us)
Steven C. Kilpatrick (kilpatricksc@doj.state.wi.us)
Assistant Attorneys General
17 W. Main St.
PO Box 7857
Madison, WI 53707-7857

Re: *Boyden v. Wis. Dep't of Employee Trust Funds*
Response to claw-back and request to meet and confer.

Dear Mr. Roth, Ms. Schmelzer, and Mr. Kilpatrick:

We write in response to your request to “claw back” certain documents that were produced by the Defendants. As we discussed last week on the phone, we disagree that Federal Rule of Civil Procedure 26(b)(5)(B) requires destruction of the documents now in our possession over which privilege is being asserted. However, per the Rule, we have sequestered all documents and will not use or disclose the information until we reach a resolution on the issue. Moreover, there are three documents in particular that we contest the assertion of privilege over and believe are not subject to protection under the attorney-client privilege.

ETF00634

Defendants assert that the attorney-client privilege protects a portion of this production. Defendants later produced BoydenProd6_00115, a redacted version of ETF00634. While the redacted version eliminates a large portion of comments from that particular e-mail chain, Defendants did not assert privilege over a memorandum, ETF2065, that provides the same information. In addition, Defendant ETF publicly disclosed the same opinions – that that ETF is a covered entity under the Affordable Care Act – on its website. Accordingly, the redacted communication in ETF00634 is not subject to privilege because Defendants waived privilege by providing the same information in other documents.

Defendants may not assert selective privilege over particular communications related to the topic of this production and withhold the remainder. *Milwaukee Elec. Tool Corp. v. Chevron N. Am. Inc.*, No.14-CV-1289-JPS, 2017 WL 2929522, at *2 (E.D. Wis. July 10, 2017) (citing *Matter of Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984)). Partial disclosure of privileged material waives the privilege as to all other communications on the same subject matter. *Matter of Continental Ill. Sec. Litig.*, 732 F.2d at 1315.



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Wisconsin

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Milwaukee, WI 53202
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aclu-wi.org



ETF01983

Defendants assert privilege over the attachment “Memo to GIB re Fiduciary Duties [FINAL].” The redacted version BoydenProd6_000037 removes the attachment and leaves only the cover e-mail message. However, the conclusion of the attached memorandum has appeared in numerous documents published on the ETF website. Any privilege that may have attached to the memorandum is waived due to the subsequent public disclosure of the memorandum’s conclusions. Again, partial disclosure of privileged material waives privilege as to all other communications on the same subject matter. *Matter of Continental Ill. Sec. Litig.*, 732 F.2d at 1315.

ETF02234

Defendants assert privilege over a portion of this e-mail chain and produced BoydenProd7_000003 to replace ETF02234. The redacted version omits statements that were not seeking legal advice but were solely statements regarding policy. Those statements are not protected by the attorney-client privilege. The scope of privilege in this case does not extend to policy or political advice, but only extends to true legal advice. *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *see also In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). The comments made in ETF02234 are not subject to attorney-client privilege because they were not expressed by an attorney and not expressed for the purpose of, or even in the context of, obtaining legal advice.

Please advise us of the Defendants’ position on our response to the request for claw-back. To the extent that Defendants disagree, we ask for dates next week to meet and confer by telephone for further discussion.

Sincerely,



Asma Kadri
Staff Attorney*
ACLU of Wisconsin Foundation
207 E. Buffalo St., #325
Milwaukee, WI 53202

*Admitted in the Eastern and Western Districts of Wisconsin and the Commonwealth of Virginia.

Exhibit H



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
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Colin T. Roth
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608/264-6219
rothct@doj.state.wi.us
FAX 608/267-2223

April 6, 2018

Asma Kadri
ACLU of Wisconsin Foundation
207 East Buffalo Street, #325
Milwaukee, WI 53202

Re: *Boyden, et al. v. Wis. Dep't of Employee Trust Funds, et al.*
Response to April 3, 2018, discovery letter

Dear Ms. Kadri:

I write in response to your April 3, 2018, letter regarding Defendants' claw-back requests. Thank you for agreeing to sequester the documents at issue. Defendants' position follows below on the three documents regarding which you challenge the privilege assertion.

ETF01983 (attachment)

This attachment is a privileged attorney-client communication between GIB and its attorneys at DOJ and is also confidential attorney work product prepared in anticipation of litigation. You assert that any such privileges were waived, since "the conclusion of the attached memorandum has appeared in numerous documents published on the ETF website." (You do not specify those "numerous documents," but I will assume you mean documents such as the one found at this link: <http://etf.wi.gov/boards/agenda-items-2017/gib0208/item4.pdf>. If you mean others with materially different information, please advise.)

We disagree that the privileges protecting this document have been waived. The line of cases that controls here begins with *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987). In *Bulow*, a book disclosed certain attorney-client communications that had taken place during a criminal trial. In a subsequent civil action, the plaintiffs sought disclosure of all attorney-client communications related to those contained in the book, arguing that any privilege over the subject matter had been waived.

Asma Kadri
April 6, 2018
Page 2

But the Second Circuit declined to find a waiver, reasoning that “the extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary’s prejudice—does not waive the privilege as to the undisclosed portions of the communication.” *Id.* at 102. Similarly, it declined to find a broad subject-matter waiver, explaining that “where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed.” *Id.* at 103.

Other cases hold similarly that no broad subject-matter waiver automatically occurs through extrajudicial disclosures that are not used in later litigation. *See In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24–25 (1st Cir. 2003) (“[T]he extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter.”); *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1373 (Fed. Cir. 2012) (“[W]e conclude that the district court erred by rejecting considerations of fairness—i.e., whether LG would be unfairly prejudiced by Wi-LAN’s assertion of privilege against discovery into attorney-client communications beyond the four corners of the Townsend letter—when assessing the scope of waiver here.”); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (“Pennzoil’s waiver with respect to information disclosed to the auditor did not constitute waiver as to all communications concerning the hoped for tax deferral.”).

Here, GIB disclosed on its website only that “the Wisconsin Department of Justice provided an opinion to the Board confirming that the action taken does not constitute a breach of the Board’s fiduciary duties.” GIB has not tried to use that statement to your clients’ prejudice in this litigation or otherwise put it at issue. Therefore, like the undisclosed attorney-client communications at issue in *Bulow*, the attorney-client communication and attorney work product underlying GIB’s extrajudicial disclosure remains privileged.

You rely on *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir. 1984), yet you overstate the case’s holding. It did not hold that “[p]artial disclosure of privileged material waives the privilege as to all other communications on the same subject matter,” as you assert. Instead, the Seventh Circuit merely noted a “general rule that protection from disclosure is available only when the party asserting a privilege has maintained confidentiality.” *Id.* at 1314. In support, the court cited *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) and *Joy v.*

Asma Kadri
April 6, 2018
Page 3

North, 692 F.2d 880, 893 (2d Cir. 1982), but neither of these cases nor *Matter of Continental* support your position. In short, your position on the broad scope of subject-matter waivers fails because, again, GIB has not put the memorandum at issue in this litigation—in the common parlance of waiver cases, GIB does not seek to use the memorandum as both a sword and a shield.

In *In re Sealed Case*, the D.C. Circuit explained that “[w]hen a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because ‘the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.’” 676 F.3d at 818 (emphasis added) (citation omitted). In that case, a company seeking to avoid civil and criminal liability “attempted to manipulate its privilege, by withholding vital documents while making a great pretense of full disclosure of their contents.” *Id.* at 825. Since the company sought to use a report as a sword to defend itself against fraud charges, it could not use privilege as a shield to prevent discovery into the bases of that report.

Both *Joy* and *Matter of Continental* also addressed situations in which the material sought to be shielded from discovery was also used offensively in litigation. In both cases, companies sought to dismiss shareholder derivative actions using independent committees’ reports that found no evidence of wrongdoing. In *Joy*, the court reasoned that “if the special litigation committee recommends termination [of the derivative suit] and a motion for judgment follows, the committee must disclose to the court and the parties not only its report but all underlying data.” *Id.* at 893. *Matter of Continental* reached the same conclusion, where the report was used as evidence in the derivative litigation. *Id.* at 1314–15.

The facts in *Milwaukee Electric Tool Corporation v. Chevron North America Inc.*, No.14-CV-1289-JPS, 2017 WL 2929522 (E.D. Wis. July 10, 2017), which you cite, are also dissimilar from this case. There, the plaintiffs sought to establish a key fact in their patent infringement litigation—the date of invention—using an attorney’s declaration. The court found that no privilege attached to facts and analysis underlying that declaration, since the attorney could not “draw the legal conclusion that his conversations with his client and his other work constituted conception of the invention and reduction to practice and yet withhold the substance of those communications—that is, the facts that underlay his legal opinion.” *Id.* at *4.

Asma Kadri
April 6, 2018
Page 4

In all these cases, the rule is that one may not use material in litigation, either offensively or defensively, yet shield evidence underlying that material from discovery with the attorney-client or work product privileges. GIB's receipt in confidence of the memorandum at issue here does not implicate this waiver rule. GIB's compliance with its fiduciary duties is irrelevant to the elements of your clients' claims; likewise, GIB has not indicated any intention to rely on the memorandum (or its conclusions) to defend against liability in this case. Therefore, GIB's privilege has not been waived.

ETF00634

This OneNote file contains an email from ETF attorney Diana Felsmann to Lisa Ellinger titled "Application of ACA Regulations to ETF" that is a privileged attorney-client communication and confidential attorney work product. You contend that this information has already been disclosed in ETF02065 and thus that any privilege has been waived. We disagree.¹

First, it is unclear why you have cited ETF02065, as the memorandum attached to that email addresses a different subject than Ms. Felsmann's email in ETF00634. I will assume, however, that you intended to reference ETF's memorandum to GIB dated June 22, 2016, found at <http://etf.wi.gov/boards/agenda-items-2016/gib0712/item3a.pdf>; this memorandum addresses the same "covered entity" issue discussed in Ms. Felsmann's email.

For the same reasons discussed above, ETF's extrajudicial disclosure of its conclusions in the June 22, 2016, memorandum does not waive the privilege over all related attorney communications and analyses. ETF has not disputed in this litigation that it is a "covered entity." To the contrary, ETF admitted Plaintiffs' Request For Admission No. 15, which addressed this very issue. Therefore, the *In re Bulow* line of cases applies and precludes any privilege waiver beyond the memorandum publicly disclosed on ETF's website.

¹ I assume you do not intend to dispute ETF's privilege assertion regarding the "FW: Benefits Alert: EEOC Wellness Incentive Rules Finalized" email contained in ETF00634. That email was simply deleted from BoydenProd6_00115 because it is not possible to redact emails within OneNote. A redacted version of this email was separately produced as ETF01939-REDACTED.

Asma Kadri
April 6, 2018
Page 5

ETF02234

We agree to abandon the privilege assertion over this document.

Sincerely,

A handwritten signature in black ink, appearing to read "Colin T. Roth", followed by a long horizontal line extending to the right.

Colin T. Roth
Assistant Attorney General