

HONORABLE JUDGE ROBERT J. BRYAN

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

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

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

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

**BLUE CROSS BLUE SHIELD OF
ILLINOIS'S MOTION TO EXCLUDE
PLAINTIFFS' EXPERTS UNDER
DAUBERT**

FILED UNDER SEAL

**NOTE ON MOTION CALENDAR:
NOVEMBER 18, 2022**

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I. INTRODUCTION

Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) hereby respectfully moves this Court to exclude Plaintiffs’ four experts. Plaintiffs disclosed the opinions of Dr. Randi C. Ettner, Dr. Loren S. Schechter, and Dr. Dan Karasic for the general contention that transgender-related services are medically necessary. Plaintiffs also disclosed the opinion of Dr. Frank G. Fox, who purports to estimate the number of transgender persons enrolled in each ERISA self-funded group health plan administered by BCBSIL.

The testimony of all of these experts is irrelevant and unreliable. Their opinions are based on incorrect assumptions; are irrelevant to the disputed issues in this case; and are unsupported by actual evidence. As such, their opinions are unhelpful and untenable and will only confuse the issues.

II. FACTUAL BACKGROUND

A. Plaintiffs’ Section 1557 Claim and BCBSIL’s Role as a Third-Party Administrator.

Plaintiffs’ Section 1557 claim – their sole claim in this case – turns entirely on whether BCBSIL discriminated on the basis of sex when it administered exclusions for transgender-related services in plans drafted by ERISA plan sponsors. Plaintiffs seek to certify a class based on the premise that BCBSIL discriminated on the basis of sex when, as the third-party administrator, it administered such exclusions at the direction of various ERISA self-funded plans.¹

HHS recently clarified its interpretation of Section 1557 and emphasized that third-party administrators (“TPAs”) like BCBSIL cannot be liable for a plan’s violation of the ACA or Title IX if, as here, the TPA is not the source of the plan design. *See* 29 U.S.C. § 1104(a)(1)(D) (stating benefit plan decisions are required to be made “in accordance with the documents and instruments governing

¹ Employers such as CHI often hire a TPA such as BCBSIL to administer their self-funded plans. “A self-insured employer bears the financial risk of paying its employees’ health-insurance claims rather than contracting with a separate insurance company to provide the coverage and bear the financial risk. A self-insured employer often hires a third-party administrator to manage administrative functions like processing claims.” *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 801 F.3d 927, 934 n.6 (8th Cir. 2015), *cert. granted, judgment vacated on other grounds sub nom. Dep’t. of HHS. v. CNS Int’l Ministries*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016) (unpublished opinion).

1 the plan”). In its 2022 Notice of Proposed Rulemaking on Section 1557, HHS stated that “third
2 party administrators [are] generally not responsible for the benefit designs of the self-insured group
3 health plans they administer and that enforcing Section 1557 against a third party administrator for
4 a group health plan with a discriminatory benefit design could result in holding a third party
5 administrator liable for plan designs over which it had no control.” Nondiscrimination in Health
6 and Health Education Programs or Activities, 87 Fed. Reg. 47,824, 47,876 (Aug. 4, 2022) (the
7 “2022 Proposed Rulemaking”).

8 Here, BCBSIL is not responsible for the design of the ERISA plans at issue, including the
9 CHI Plan for gender reassignment surgery. Payton Decl., Ex. A.

10 **B. Dr. Randi C. Ettner.**

11 Dr. Ettner is a psychologist who opines that transgender-related services are “medically
12 necessary for the treatment of gender dysphoria, and not experimental or cosmetic,” *see* Payton
13 Decl. ¶ 3, Ex. B (“Ettner Report”) ¶ 62. Dr. Ettner further opines that “gender affirming care is
14 medically necessary, non-experimental, and beneficial for transgender people with gender
15 dysphoria, while the denial of gender affirming care is harmful to transgender people.” *Id.* ¶ 84.

16 Drs. Ettner also opines that transgender-related services were medically necessary for the
17 named plaintiff, C.P. *Id.* ¶¶ 82-83. Dr. Ettner met briefly with C.P. for no more than two hours
18 via Zoom. Payton Decl. Ex. C (“Ettner Dep.”), at 42:7-17.

19 **C. Dr. Loren S. Schechter.**

20 Dr. Schechter is a plastic and reconstructive surgeon who opines that transgender-related
21 surgeries are “safe, effective, and medically necessary treatments for gender dysphoria in
22 transgender individuals.” Payton Decl. ¶ 4, Ex. D (“Schechter Report”) ¶ 44. Dr. Schechter opines
23 that the denial of transgender-related services “is likely to perpetuate gender dysphoria and create
24 or exacerbate other medical issues, such as depression and anxiety” *Id.* ¶ 45.

25 **D. Dr. Dan H. Karasic.**

26 Dr. Karasic is a psychiatrist who opines that “gender-affirming care” is “safe, effective,
27 and medically necessary to relieve gender dysphoria for transgender people.” Payton Decl. ¶ 5,

1 Ex. E (“Karasic Report”) ¶¶ 78, 80. Dr. Karasic opines that denying such care puts transgender
2 individuals “at risk of significant harm to their health and wellbeing.” *Id.* ¶ 81.

3 Dr. Karasic also opines that transgender-related services were medically necessary for the
4 named plaintiff, C.P. *Id.* ¶¶ 76-77. Like Dr. Ettner, Dr. Karasic met briefly with C.P. for no more
5 than two hours via Zoom. *Id.*; Payton Decl. Ex. F (“Karasic Dep.”) at 42:12-14.

6 **E. Dr. Frank G. Fox’s Opinion.**

7 Dr. Fox concludes in his report, as amended by his addendum report, that “on average,”
8 “about 300 persons would have been expected to seek gender-affirming care each year” from
9 BCBSIL. *See* Payton Decl. Ex. G (“Fox Report”), ¶ 17 & Ex. H (“Fox Addendum Report”) ¶ 17.
10 Dr. Fox arrives at this conclusion based on estimates regarding the number of individuals who
11 “identify as transgender and gender diverse” and the number of individuals who were enrolled in
12 ERISA self-funded plans administered by BCBSIL between January 1, 2016, to December 31,
13 2021. *Id.* ¶ 1.

14 **III. ARGUMENT**

15 **A. Standard for Admissibility of Expert Opinions.**

16 Federal Rule of Evidence 702 provides that a witness “who is qualified as an expert by
17 knowledge, skill, experience, training, or education may testify in the form of an opinion or
18 otherwise” if:

- 19 1. the expert’s scientific, technical, or other specialized knowledge will help the
20 trier of fact to understand the evidence or to determine a fact in issue;
21 2. the testimony is based on sufficient facts or data;
22 3. the testimony is the product of reliable principles and methods; and
23 4. the expert has reliably applied the principles and methods to the facts of the
case.”

24 Fed. R. Evid. 702.

25 Under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92 (1993), the court must
26 find that an expert’s opinion is both reliable and relevant. “First, Rule 702 requires that the
27 evidence ‘assist the trier of fact,’ or in other words, that it be relevant.” *Guidroz-Brault v. Mo.*

1 *Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001) (quoting *Daubert*, 509 U.S. at 591). “What is
2 relevant depends on what must be proved” *Primiano v. Cook*, 598 F.3d 558, 567 (9th Cir.
3 2010). “Second, the rule demands that the evidence be reliable.” *Guidroz-Brault*, 254 F.3d at 829;
4 *see* Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (“If the expert purports to
5 apply principles and methods to the facts of the case, it is important that this application be
6 conducted reliably.”).

7 Rule 702 imposes a “special obligation” upon a trial judge to serve as a “gatekeeper”
8 against expert testimony that does not meet the admissibility standards. *Kumho Tire Co., Ltd. V.*
9 *Carmichael*, 526 U.S. 137, 147 (1999). Thus, the district court cannot “abdicate[] its gatekeeping
10 role” by making no reliability findings. *United States v. Holguin*, No. 19-50158, 2022 WL
11 7284304, at *4 (9th Cir. Oct. 13, 2022). The proponent of the expert bears the burden of proving
12 admissibility. *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).

13 **B. Dr. Ettner, Dr. Karasic, and Dr. Schechter Must Be Excluded Because Their Opinions**
14 **Are Irrelevant and They Selectively Rely on Medical Literature.**

15 **1. The Opinions of Drs. Ettner, Karasic, and Schechter Are Irrelevant Because**
16 **They Have No Bearing on Whether BCBSIL Violated Section 1557.**

17 Plaintiffs seek to certify a class based on the premise that BCBSIL discriminated on the
18 basis of sex when it administered exclusions on behalf of all ERISA self-funded plans containing
19 some form of an exclusion for transgender-related services.

20 Drs. Ettner, Karasic, and Schechter, on the other hand, all generally opine that transgender-
21 related services are medically necessary. These opinions are irrelevant. None of their opinions
22 shed any light on whether BCBSIL may be liable under Section 1557, and the Court cannot decide
23 medical necessity on a class-wide basis. Nor could Drs. Ettner, Karasic, or Schechter determine
24 medical necessity for the named Plaintiff C.P. because they have had minimal or no contact with
25 him and have not conducted any psychiatric evaluation of C.P.

26 Drs. Ettner, Karasic, and Schechter do not offer any opinion regarding whether BCBSIL is
27 allowed to administer plans containing exclusions under the law. Instead, they offer generalized

1 statements regarding the medical necessity for transgender services, statements which are simply
2 irrelevant and confuse the issues in this case. To certify a class, this Court would have to undertake
3 an individualized inquiry into medical necessity for each putative class member. *See* BCBSIL's
4 Opposition to Motion for Class Certification, Dkt. 93, at 11-14. Plaintiffs' experts have not, and
5 cannot, proffer any individualized opinion regarding medical necessity.

6 Drs. Ettner and Karasic also opine that transgender-related services were medically
7 necessary for the named plaintiff, C.P., despite the fact that they each only met briefly with C.P.
8 via Zoom for no more than two hours. Ettner Report ¶¶ 82-83; Karasic Report ¶¶ 76-77; Ettner
9 Dep. at 42:7-17; Karasic Dep. at 42:12-14. As Plaintiffs are well aware, however, BCBSIL does
10 not contest standing for named plaintiff C.P.

11 As a result, Drs. Ettner, Karasic, and Schechter's opinions regarding medical necessity for
12 the purported class as a whole and for C.P. in particular are simply not relevant to the claim
13 Plaintiffs have brought against BCBSIL. None of their opinions shed any light on whether
14 BCBSIL may be liable under Section 1557. Nor can these experts offer any opinion as to any
15 other issue in this case. As detailed in BCBSIL's Motion for Summary Judgment, Dkt. 87, and
16 Opposition to Motion for Class Certification, Dkt. 93, BCBSIL may administer such an exclusion
17 for a number of reasons. Those reasons include, but are not limited to, the fact that (1) some of
18 the plans BCBSIL administers have sincerely held religious beliefs that are protected by RFRA
19 and other legal defenses; and (2) some of the plans BCBSIL administers offer their employees
20 alternative plan designs without any transgender-related exclusion.

21 First, some of the plan sponsors on behalf of whom BCBSIL administers plans, including
22 the named Plaintiff C.P.'s employer CHI, have sincerely held religious beliefs protected by RFRA.
23 The courts and HHS agree that a TPA does not violate the ACA if it administers a plan exempted
24 from compliance with the ACA by RFRA. *See* Dkt. 87 at 7-12.

25 Second, some employers with exclusions offer their employees the option of choosing plan
26 designs without any transgender-related exclusion. Payton Decl., Ex. I. In other words, some of
27 the putative class members chose a plan with an exclusion over one that did not. This flexibility

1 allows employers to provide more affordable healthcare options and greater access. Payton Decl.,
2 Ex. J, ¶ 20. Absent class members who could have purchased coverage for transgender-related
3 services and chose not to cannot be victims of discrimination on the basis of sex. They have not
4 suffered discrimination on the basis of sex any more than an employee who opted out of the plan
5 altogether.

6 **2. The Opinions Offered by Ettner, Karasic, and Schechter Should Be**
7 **Excluded Because Their Methodology Is Unreliable.**

8 Drs. Ettner, Karasic, and Schechter should also be excluded as unreliable because they
9 engaged in a results-driven methodology in reaching their opinions. This is evident because they
10 selectively relied upon certain medical and scientific organizations and medical literature; failed
11 to consider the impacts of transgender-related services on fertility and other side effects; and
12 offered opinions not supported by their education and training, and consequently their expertise.
13 They each overlooked other available literature and guidelines from medical organizations that did
14 not align with their own opinions that they themselves recognize as authoritative.

15 This is unacceptable under *Daubert* and Rule 702. *See, e.g., Barber v. United Airlines,*
16 *Inc.*, 17 F. App'x 433, 437 (7th Cir. 2001) (“Because in formulating his opinion Dr. Hynes cherry-
17 picked the facts he considered to render an expert opinion, the district court correctly barred his
18 testimony because such a selective use of facts fails to satisfy the scientific method and
19 *Daubert*[.]”); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d
20 1166, 1176 (N.D. Cal. 2007) (excluding testimony where the expert “reache[d] his opinion by first
21 identifying his conclusion . . . and then cherry-picking observational studies that support his
22 conclusion and rejecting or ignoring the great weight of the evidence that contradicts his
23 conclusion”); *Fail-Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 889 (E.D. Wis. 2010)
24 (“[I]t is readily apparent that Dr. Keegan all but ‘cherry picked’ the data he wanted to use,
25 providing the court with another strong reason to conclude that the witness utilized an unreliable
26 methodology.”).

1 **a. Karasic, Ettner, and Schechter Selectively Rely on Scientific Authority**
 2 **and Ignore Authority Contrary to their Position.**

3 All three experts selectively rely on organizations supporting their position and ignore
 4 authority to the contrary. Among other deficiencies, they all fail to consider resources highlighting
 5 the risks associated with transgender-related services, particularly for minors.

6 First, all three experts rely almost exclusively on the WPATH Standards of Care for the
 7 Health of Transsexual, Transgender and Gender-Nonconforming People (“WPATH Standards of
 8 Care”) and fail to consider the guidelines propounded by other specialty scientific and medical
 9 organizations. *See* Ettner Report ¶¶ 33-34; Karasic Report ¶¶ 25-34, 43-44; Schechter Report ¶¶
 10 24-27. All three experts are intimately involved in drafting the WPATH Standards of Care and
 11 have served in various leadership roles for WPATH.²

12 Drs. Karasic, Ettner, and Schechter fail to consider the 2017 Endocrine Society Clinical
 13 Practice Guidelines on the Treatment of Gender-Dysphoric/Gender-Incongruent Persons (the
 14 “Endocrine Society Guidelines”). All three experts cite briefly to the Endocrine Society in their
 15 expert disclosures. *See* Ettner Report ¶ 54; Karasic Report ¶¶ 35-36; Schechter Report ¶ 26. And
 16 during their depositions, all three experts agreed with the Endocrine Society’s guidelines on mental
 17 health care; education for minors regarding the impacts of transgender-related services on fertility;
 18 and informed consent for minors and that those guidelines are authoritative. *See* Ettner Dep. at
 19 63:2-17, 75:10-76:9; Karasic Dep. at 51:23-53:2, 76:18-77:25, 85:21-86:13; Payton Decl. Ex. K
 20 (“Schechter Dep.”) at 46:6-47:6, 50:15-51:18.

21 Specifically, Plaintiffs’ three experts each agreed with the Endocrine Society Guidelines
 22 that “because of the psychological vulnerability of many individuals with [gender
 23 dysphoria]/gender incongruence,” a “[mental health professional] who has training/experience in
 24 child and adolescent gender development (as well as child and adolescent psychopathology)

25 ² Dr. Ettner is the immediate past Secretary for WPATH, has been a member of the Board of
 26 Directors for twelve years, and is an author of the WPATH Standards of Care. Ettner Report ¶ 7.
 27 Dr. Karasic previously sat on the Board of Directors of WPATH, is a member of the WPATH
 Global Education Initiative, and is an author of the WPATH Standards of Care. Karasic Report
 ¶¶ 8-9. Dr. Schechter is also a contributing author to the WPATH Standards of Care and has taught
 a number of courses through WPATH’s Gender Education Institute. Schechter Report ¶¶ 10,15.

1 should make the diagnosis, because assessing GD/gender incongruence in children and adolescents
2 is often extremely complex.” Payton Decl. Ex. L; Ettner Dep. at 63:2-17; Karasic Dep. at 51:23-
3 53:2; Schechter Dep. at 46:6-47:6. Drs. Ettner, Karasic, and Schechter agreed with the Endocrine
4 Society Guidelines that minors with gender dysphoria should be diagnosed by a qualified mental
5 health professional with training and expertise in (1) child and adolescent gender development,
6 and (2) child and adolescent psychopathology.

7 Despite agreeing with the Endocrine Society’s Guidelines mandating that a minor be
8 diagnosed by a qualified mental health professional, Plaintiffs’ expert Dr. Ettner admitted that the
9 named Plaintiff, C.P., did not see any mental health professional prior to being diagnosed with
10 gender dysphoria at age 10; prior to starting puberty blockers at age 11; or prior to starting
11 testosterone treatment at age 11. Ettner Dep. 64:13-66:1.

12 In fact, C.P. never received any psychiatric evaluation associated with his diagnosis of
13 gender dysphoria at all, and Plaintiffs have produced no evaluation from any treating psychiatrist
14 concluding that the services for which Plaintiffs seek benefits were medically necessary or that
15 C.P. was a suitable candidate for a double mastectomy at age 14. C.P. was only examined briefly
16 for two hours by Sharon Booker, a mental health counselor. Payton Decl., Ex. M. Ms. Booker
17 never spoke with C.P.’s doctors or reviewed any medical records. *Id.* Ms. Booker repeatedly
18 admitted the only reason she met with C.P. was so Plaintiffs could secure a letter to support top
19 surgery. *Id.*, Exs. N-O. Ms. Booker has never declined to write such a letter. *Id.*, Ex. P. Ms.
20 Booker has not met with or spoken to C.P. since she wrote the letter or since C.P. received the top
21 surgery. *Id.*, Ex. M.

22 Based on the criteria established by the Endocrine Society – which Plaintiffs’ experts
23 agreed with – the mental health care C.P. received was wholly inadequate. Nonetheless, Drs.
24 Ettner and Karasic opine that C.P.’s transgender-related services were medically necessary. Ettner
25 Report ¶¶ 82-83; Karasic Report ¶¶ 76-77. Their failure to address lack of any psychiatric
26 evaluation is fatal to admissibility of their opinions also because Dr. Ettner’s report falsely stated
27 that “C.P. has never been diagnosed with any mental health issues,” despite the fact that C.P.

1 presented with depression. Ettner Report ¶ 80. When shown C.P.’s medical records during her
2 deposition, Dr. Ettner stated she “presumed” his depression was “attendant to the young man’s
3 gender dysphoria.” Ettner Dep. 69:18-71:11.

4 Because Plaintiffs’ three experts exclusively rely on the WPATH standards and overlook
5 the recommendations of the Endocrine Society on mental health care, diagnoses, and informed
6 consent, their opinions are unreliable and should be excluded.

7 **b. Ettner, Karasic, and Schechter Ignore Relevant Medical Literature**
8 **That Does Not Support Their Conclusions.**

9 Drs. Karasic, Ettner, and Schechter selectively relied upon medical literature to support
10 their conclusions. In doing so, they each failed to adequately consider other credible resources
11 highlighting the attendant risks and uncertainty associated with transgender-related services,
12 particularly for minors.

13 First, all three experts acknowledged they were aware of and had previously reviewed the
14 2016 Centers for Medicare and Medicaid Services (“CMS”) Decision Memo on gender
15 reassignment surgery for beneficiaries with gender dysphoria. Ettner Dep. 81:13-20; Karasic Dep.
16 100:24-102:4; Schechter Dep. 57:2-22. They were aware CMS reviewed thirty-three separate
17 studies on transgender-related services and declined to issue a National Coverage Determination
18 on gender reassignment surgery because “the clinical evidence is inconclusive for the Medicare
19 population.” *Id.*; Payton Decl., Ex. Q. Plaintiffs’ experts acknowledged that CMS reached this
20 conclusion because, of those thirty-three studies, the “four best designed and conducted studies . .
21 . did not demonstrate clinically significant changes or differences in psychometric test results after
22 [gender reassignment surgery].” *Id.* Dr. Ettner acknowledged she was familiar with at least two
23 of the four top studies CMS referenced and conceded that those studies were not specific to the
24 Medicare population, yet she failed to consider those studies or even reference the CMS Decision
25 Memo in her report. Ettner Dep. 85:10-86:25. Dr. Karasic simply “disagreed” with the CMS
26 Decision Memo. Karasic Dep. 103:4.

27 While Plaintiffs’ experts apparently disagreed with and disregarded the CMS Decision

1 Memo based on its focus on the Medicare population, they also acknowledged that the studies on
2 which the CMS Decision Memo relies are not limited to that population and that their opinions
3 proffered in this case on medical necessity are not limited to a specific population either. Ettner
4 Dep. 85:10-86:22; Karasic Dep. 104:24-105:25; Schechter Dep. 60:1-62:5. Drs. Karasic, Ettner,
5 and Schechter should have included the CMS Decision Memo in their reports, and their failure to
6 do so renders their opinions unreliable.

7 Plaintiffs' experts also failed to sufficiently consider medical literature specifically focused
8 on transgender-related services for minors. For example, all three experts acknowledged that they
9 were aware of the Council for Choices in Health Care in Finland ("COHERE Finland")'s recent
10 recommendations on medical treatment methods for gender dysphoria in minors. Ettner Dep. 87:1-
11 89:17; Karasic Dep. 106:19-107:3; Schechter Dep. 62:6-12. In 2020, COHERE Finland found
12 that "research data on the treatment of gender dysphoria due to gender identity conflicts in minors
13 is limited" and concluded that surgical treatments should not be "part of the treatment methods for
14 dysphoria caused by gender-related conflicts in minors" and that hormonal treatments should only
15 be provided in a clinical setting. *Id.* Yet none of Plaintiffs' experts reference the COHERE Finland
16 recommendations in their reports. While they dismissed the committee's recent findings as "not
17 peer reviewed" and "not original research," they also acknowledged that their own reports cite to
18 non-peer reviewed studies and analyze other committee position statements. Ettner Dep. 89:2-15;
19 Karasic Dep. 109:18-110:18.

20 Plaintiffs' three experts took the same selective approach regarding the 2021 Karolinska
21 Guidelines from Swedish Astrid Lindgren Children's Hospital. In 2021, a large adolescent gender
22 clinic in Sweden announced that it would no longer prescribe puberty blockers or cross-sex
23 hormones to minors under the age of 18 outside of clinical trials. Despite being aware of and
24 familiar with this decision,³ none of Plaintiffs' experts reference the Karolinska Guidelines in their
25 respective reports.

26 Plaintiffs' three experts of course do not need to agree with the conclusions reached by

27 ³ See Ettner Dep. 89:1-25; Karasic Dep. 111:7-112:11.

1 CMS, COHERE Finland, and Swedish Astrid Lindgren Children’s Hospital. But their reports
2 should at least address the ample evidence in the medical community questioning the necessity,
3 value, safety, and long-term effects of transgender-related services. They should at least address
4 the consensus even shared by WPATH that these issues should be addressed separately for each
5 individual patient and not asserted generally as to all patients experiencing gender dysphoria.

6 As BCBSIL’s expert Michael K. Laidlaw has opined, there is ongoing debate and study in
7 the medical community regarding transgender-related services. Payton Decl., Ex. R, (“Laidlaw
8 Decl.”) ¶ 14. The reports offered by Plaintiffs’ three experts, however, give the impression that
9 there is no evidence to the contrary. Drs. Karasic, Ettner, and Schechter’s expert reports selectively
10 rely on literature to support their opinions, ignore literature that conflicts with their opinions, and
11 should be excluded as unreliable.

12 **c. Karasic, Ettner, and Schechter Fail to Account for the Impact of**
13 **Side Effects.**

14 Plaintiffs’ expert reports are also unreliable because they fail to assess the often-irreversible
15 side effects associated with transgender-related treatments. After failing to acknowledge in their
16 reports that hormone treatments can impact fertility, for example, Plaintiffs’ experts each conceded
17 this fact in their sworn depositions. Dr. Ettner conceded that testosterone treatments can have “an
18 irreversible effect on fertility” and further explained “that’s why individuals need to be counseled
19 about fertility and harvesting of eggs and other means of reproduction prior to undergoing any
20 kind of hormonal treatment.” Ettner Dep. 61:15-21. Dr. Karasic likewise conceded in deposition
21 that when an individual is planning to use puberty blockers or undertake hormone treatments,
22 “there should be a process of informed consent about that treatment and the impacts on fertility.”
23 Karasic Dep. 74:23-76:12; *see also* Schechter Dep. 50:21-51:18 (agreeing with the Endocrine
24 Society Guidelines stating that individuals “need adequate information . . . about fertility effects
25 of hormone treatment in particular.”). Plaintiffs’ experts should address the impact that hormone
26 treatments can have on fertility in their reports but fail to do so; in fact, none of their reports
27 mention fertility at all.

1 Those same reports also make no mention of other serious side effects, including the impact
2 on bone density and adolescent brain development. Puberty blockers, for example, can negatively
3 affect bone density; as Dr. Karasic later conceded during deposition, “[t]here is concern if someone
4 is on puberty blockers for too long that can affect bone density.” Karasic Dep. 80:5-7; *see also id.*
5 80:14-17 (“So there is concern with bone density, and particularly concern if people are on puberty
6 blockers for a very long time. And there’s concern in adults for people who have hormone-
7 blocking without cross-sex hormones.”). Dr. Karasic also acknowledged during his deposition
8 that more research is needed on the long-term impacts on brain development, despite failing to
9 mention any effect on bone density or brain development in his report. Karasic Dep. 83:23-84:10.
10 By failing to adequately account for long-term or irreversible side effects in their reports, the
11 opinions offered by Drs. Ettner, Karasic, and Schechter are unreliable.

12 **d. Dr. Schechter’s Opinion Regarding the Treatment of Gender**
13 **Dysphoria is Unreliable Because He Is Not Qualified to Opine on**
14 **Mental Health Conditions.**

15 Dr. Schechter opines that gender confirming surgery “is effective in alleviating gender
16 dysphoria.” Schechter Decl. ¶ 39. Dr. Schechter is an expert in plastic and reconstructive surgery.
17 While he may have expertise in those surgical fields, he is not qualified to diagnose gender
18 dysphoria, nor has he ever done so in his practice. Schechter Dep. at 22:14-16. Nor is he qualified
19 to opine on the efficacy of those surgeries as treatment for the underlying mental health disorder
20 of gender dysphoria. Dr. Schechter does not have the requisite knowledge, skill, experience,
21 training, or education to opine that gender confirming surgical treatments are effective in treating
22 gender dysphoria—a mental health condition.

23 Because Dr. Schechter lacks the necessary training and qualifications to reach a conclusion
24 regarding the proper treatment for gender dysphoria and has not used reliable methodology in
25 reaching his conclusion, he should not be qualified as an expert in this case. *See Sedberry v. U.S.*,
26 No. SA-08-CA-367-FB, 2009 WL 10699467, at *12 (W.D. Tex. Mar. 26, 2009) (excluding
27 psychiatrist from testifying on non-psychiatric treatment areas), *report and recommendation*
adopted, No. SA-08-CA-0367-FB, 2009 WL 10699488 (W.D. Tex. Aug. 24, 2009); *Krizek v.*

1 *Queen’s Med. Ctr.*, No. 18-00293, 2020 WL 5633848, at *6 (D. Haw. Sept. 21, 2020) (slip copy)
2 (excluding pulmonary and critical care doctor’s opinion regarding emergency medicine as
3 unreliable, given his “lack of actual expertise in emergency medicine, let alone experience related
4 to the prevention and/or treatment of Wernicke’s encephalopathy”); *Cherry v. U.S.*, No. CV-15-
5 00236-PHX-ROS, 2019 WL 1505862, at *4 (D. Ariz. Apr. 5, 2019) (excluding internal medicine
6 doctor from testifying regarding dermatology and urology). In short, Dr. Schechter neither has the
7 proper experience or training, nor has he used accepted methodology, to offer reliable opinions
8 regarding effective mental health treatment.

9 Dr. Schechter supports his purported expert opinion simply by referencing the opinions of
10 mental health professionals and the medical community in general. Schechter Decl. ¶¶ 23, 27-28.
11 But he cannot qualify as an expert by solely relying on the opinions of others. *See Gopalratnam*
12 *v. Hewlett-Packard Co.*, 877 F.3d 771, 789 (7th Cir. 2017) (finding an “expert is not entitled to
13 testify to opinions that rely on the opinion of another expert, simply because the other is an expert.”
14 (quoting *Mooring Cap. Fund, LLC v. Knight*, 388 F. App’x 814, 820 (10th Cir. 2010))).

15 Dr. Schechter bases his opinions on his 27 years of performing transgender-related
16 surgeries. Schechter Report ¶ 27. BCBSIL does not dispute that Dr. Schechter is and has been a
17 board-certified plastic and reconstructive surgeon. However, his experience is limited to
18 performing surgeries – he is not a psychiatrist, psychologist, or counselor of any kind, and he has
19 no specialized education or training in the field of mental health disorders, let alone gender
20 dysphoria. Schechter Dep. at 18:22-19:13. Indeed, Dr. Schechter does not even diagnose gender
21 dysphoria in his practice. *Id.* at 22:14-16. The fact that Dr. Schechter is qualified “in one specialty
22 does not by itself qualify [him] as an expert in another. Instead, in exercising the gatekeeping
23 function courts must ask whether an expert is qualified to provide a specific opinion—‘we must
24 look at each of the conclusions [the expert] draws individually to see if he has the adequate
25 education, skill, and training to reach them.’” *Krizek*, 2020 WL 5633848, at *5 (citing *Gayton v.*
26 *McCoy*, 593 F.3d 610, 617 (7th Cir. 2010)).

27 Dr. Schechter may be an expert in the field of plastic surgery, but he is not qualified to

1 provide expert witness testimony on the medical efficacy of gender confirming surgical treatments
 2 on transgender persons suffering from gender dysphoria. All such opinion testimony from Dr.
 3 Schechter should be excluded at trial.

4 **e. None of Plaintiffs' Experts Have Any Training or Expertise in the**
 5 **Treatment of Minors Seeking Transgender-Related Services.**

6 The opinions offered by Plaintiffs' experts are particularly unreliable because they do not
 7 have any training or expertise in the treatment of minors receiving transgender-related services. A
 8 number of the ERISA self-funded plans BCBSIL administers cover transgender-related services
 9 for adults but not for minors:

10 Example A	"Benefit is provided to associates only. All of the following criteria must be met: - Associate is at least 18 years old"
11 Example B	"Benefits will be provided for the gender reassignment surgery for persons age 18 and over with a Gender Identity Disorder, undergone a minimum of 12 months of 12 continuous hormonal therapy when recommended by a mental health professional and provided under the supervision of a physician. Benefits for gender reassignment 13 will be limited to a lifetime maximum of \$75,000."

14 *See Payton Decl., Ex. I (Addendum A).* Plaintiffs' experts are not qualified to opine as to whether
 15 transgender-related services for minors are medically necessary or whether BCBSIL acted in a
 16 discriminatory manner when administering those plans.

17 As BCBSIL's expert Dr. Laidlaw has explained, any treatment altering biological
 18 development in children should be used with extreme caution and regarded as a last resort. *Id.* ¶
 19 11. Despite the particular caution that must be taken when treating minors, medical professionals
 20 remain concerned regarding the quality of medical care received by minors who undergo
 21 irreversible transgender-related services. *Id.* ¶ 16.

22 None of Plaintiffs' experts are qualified to opine regarding the medical necessity of
 23 transgender-related treatments for minors. Drs. Karasic, Ettner, and Schechter have not received
 24 any specialized degrees, certifications, or training concerning transgender minors – or minors at
 25 all, for that matter. *See Karasic Report at 24-42; Ettner Report at 27-36; Schechter Report at 20-*
 26 *74.* While 10-20% of Dr. Schechter's transgender patients are minors, he has not conducted any
 27 clinical research or authored any articles or studies addressing treatment for minors experiencing

1 gender dysphoria. Schechter Dep. 32:19-33:15. Though Dr. Ettner’s practice at one point included
2 some minors, she no longer sees any minor transgender patients. Ettner Dep. 24:4-9.

3 Their lack of expertise in transgender-related issues for minors does not begin to support
4 the breadth of the opinions that Plaintiffs’ experts proffer, which are not limited to medical
5 necessity of transgender-related services for adults. Named plaintiff C.P. is a minor, and Drs.
6 Ettner and Karasic opine that the transgender-related services C.P. received were medically
7 necessary even though C.P. was only 10 years old when he was diagnosed with gender dysphoria
8 and 14 years old when he underwent “top” reconstruction surgery. Ettner Dep. 47:25-48:25. Drs.
9 Karasic, Ettner, and Schechter cannot offer reliable expert testimony regarding these plan
10 exclusions because they lack the necessary training and expertise on the medical necessity of
11 transgender-related services for minors as compared to adults.

12 **C. Dr. Fox’s Expert Opinion Is Irrelevant, Not Reliable, And Must Be Excluded.**

13 The opinions offered by Dr. Frank G. Fox are both irrelevant and unreliable and should be
14 excluded. Despite being well aware that BCBSIL does not contest numerosity for purposes of
15 class certification, Plaintiffs nonetheless offered Dr. Fox to opine regarding numerosity. For that
16 reason alone, Dr. Fox’s opinion should be excluded as simply irrelevant.

17 Dr. Fox’s opinion is also unreliable because his methodology and data analysis is flawed,
18 riddled with unsupported assumptions, and includes duplicate entries and irrelevant variables. His
19 opinion also fails to include a population analysis that encompasses the named plaintiff, C.P.

20 **1. Dr. Fox’s opinion does not meet the relevancy test under *Daubert*.**

21 BCBSIL does not contest numerosity. Dr. Fox himself understood this. Fox Dep. at 64:7-
22 9. Nonetheless, Plaintiffs still proffer Dr. Fox to opine that approximately “300 persons would
23 have been expected to seek gender-affirming care [from BCBSIL] each year.” Fox Addendum
24 Report, Ex. H, at ¶ 17. Plaintiffs represent that Dr. Fox’s sole purpose is to opine on the numerosity
25 element of Plaintiffs’ class action claim, but this is an uncontested issue in this case.

26 In *Top Notch Solutions, Inc. v. Crouse & Associates Ins. Brokers, Inc.*, No. C17-0827-JLR-
27 MAT, 2019 WL 4673563 (W.D. Wash. Sept. 25, 2019), for example, the plaintiffs retained Dr.

1 William Bradford to opine on the “reasonableness of the business practices of [the plaintiff].” *Id.*
2 at *3. However, the plaintiffs’ claims were for defamation, intentional interference, and a
3 Washington Consumer Protection Act violation—claims unrelated to the “reasonableness” of the
4 plaintiff’s business practices. *Id.* The Court held that Dr. Bradford’s opinion did not “advance a
5 material aspect” of the plaintiffs’ claims. *Id.* The Court excluded Dr. Bradford for this reason, in
6 addition to his inexperience in the industry and failure to explain his methodology. *Id.* at *4. Here,
7 as in *Top Notch*, Dr. Fox’s opinion does not advance a material aspect of Plaintiffs’ claims because
8 BCBSIL does not contest numerosity. Thus, the Court should exclude Dr. Fox because his opinion
9 and testimony are not relevant to Plaintiffs’ claims against BCBSIL.

10 **2. Dr. Fox’s methodology is fatally flawed.**

11 “[T]he test under *Daubert* is not the correctness of the expert’s conclusions but the
12 soundness of his methodology.” *Primiano*, 598 F.3d at 564 (citing *Daubert v. Merrell Dow*
13 *Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)). “A court may conclude that there is simply
14 too great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*,
15 522 U.S. 136, 146 (1997) (finding nothing in either *Daubert* or the Federal Rules of Evidence
16 requiring the admission of opinion evidence connected to existing data “only by the *ipse dixit* of
17 the expert”). Here, a vast analytical gap exists between Dr. Fox’s opinion and the data upon which
18 he purports to rely, and he should therefore be excluded.

19 First, Dr. Fox’s estimate of individuals who would have been expected to seek gender-
20 related care does not include C.P., the named plaintiff in this case. C.P. resides in the State of
21 Washington. Dr. Fox’s estimate is based on the state of Illinois’ age population proportions, and
22 he admits that he assumes that the “majority” of BCBSIL insureds live in Illinois. Fox Addendum
23 Report, Table 4 & n.17. For this reason alone, Dr. Fox’s opinion is unreliable, as his estimation
24 and conclusion do not include the class representative as a person who “would have been expected
25 to seek gender-affirming care each year.” *Id.* ¶ 17; Payton Decl. Ex. S (“Carr Rebuttal Report”)
26 at 10-11.

27 Second, Dr. Fox’s calculation of the estimated number of transgender enrollees in the

1 relevant group plans is flawed. Dr. Fox estimates that there are “about 1,740 TGD persons per
2 year” enrolled in one of the BCBSIL plans. Fox Addendum Report, ¶ 16, Table 4. However, the
3 Williams Institute Study (the “Williams Study”) that Dr. Fox relies on for this calculation indicates
4 that its values are merely estimates that may be inaccurate. Carr Rebuttal Report, at 7-8. The
5 Williams Study also provides for wide-ranging credible intervals, which represent the upper and
6 lower bounds for the percentage of individuals who identify as transgender in Illinois. *Id.* Had
7 Dr. Fox properly considered these large credible intervals, his estimate of transgender enrollees
8 could have been as low as 1,051 or as high as 2,816, compared to his actual estimate of 1,740. *Id.*
9 at 8. But Dr. Fox failed to acknowledge the uncertainty represented by the upper and lower bounds
10 of the population percentages in the Williams Study altogether.

11 Third, Dr. Fox assumes that the prevalence of transgender persons in the relevant BCBSIL
12 plans is identical to the prevalence of transgender persons in the general population. *Id.* This is
13 not true because transgender adults are twice as likely as cisgender adults to be unemployed and
14 uninsured. *Id.*⁴ Additionally, many individuals have a choice of health insurance plans with
15 varying coverages, and if given the choice between two healthcare plans, one containing an
16 exclusion for gender-related care and the other not containing this exclusion, transgender persons
17 would likely choose the latter. *Id.* at 8-9.

18 Fourth, Dr. Fox includes duplicate enrollees in his enrollment counts, which improperly
19 inflates his estimated number of enrollees. *Id.* at 12-13. Using BCBSIL’s data, Dr. Fox failed to
20 remove the duplicate entries because he used the group names, instead of the correct group
21 numbers, to identify unique group plans in a given year. *Id.* at 12. Thus, Dr. Fox overstates his
22 enrollment counts by between 8,299 to 13,461 enrollees per year. *Id.* at 13.

23 Fifth, Dr. Fox includes meaningless variables in his calculations. Dr. Fox describes his

24 _____
25 ⁴ See David Baboolall et al., “*Being transgender at work*,” McKinsey Quarterly, Nov. 10, 2021,
26 <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work>;
27 *see also* Wyatt Koma et al., “Demographics, Insurance Coverage, and Access to Care Among
Transgender Adults,” KFF (Kaiser Family Foundation) (Oct. 21, 2020),
<https://www.kff.org/health-reform/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults/>.

1 mathematical analysis as a “two-stage model” where the first stage involved estimating “the
2 prevalence of transgender persons” and the second stage involved estimating “which proportion
3 of them utilized some sort of medically necessary care.” *Id.* at 14; Fox Dep. at 75:8-12. However,
4 this calculation is only a multiplication of two variables: enrollment counts and population
5 proportion, both of which are inaccurate figures. Carr Rebuttal Report, at 15. Thus, Table 4 of
6 Dr. Fox’s analysis contains meaningless variables that only appear to help bolster his simple
7 multiplication. *Id.* at 15-16. This data is both irrelevant and unreliable.

8 Sixth, Dr. Fox’s assumption that 0.075 percent of enrollees in relevant BCBSIL plans seek
9 gender-related care *annually* is misleading. *Id.* at 18-19. Dr. Fox relies on a study by Virginia P.
10 Quinn titled “Chort profile: Study of Transition, Outcomes and gender (STRONG) to assess health
11 status of transgender people” (the “Quinn Study”) for this proposition. Fox Addendum Report,
12 pp. 4, 8-9. However, the Quinn Study actually measures the number of transgender enrollees, not
13 the frequency of care these enrollees sought. Carr Rebuttal Report at 19.

14 Seventh, Dr. Fox’s estimates are biased upwards. Dr. Fox incorrectly assumes that every
15 transgender person in the Quinn Study actually received gender-related care (despite the study
16 explicitly stating that there was “no evidence” of such care for 37% of the enrollees), and he fails
17 to account for duplicate entries in the data he processed, as discussed above. *Id.* at 20-22.

18 Finally, Dr. Fox improperly cherry-picked percentages in the Quinn Study for the
19 prevalence of transgender people. The Quinn Study reports the following estimated percentages
20 of transgender enrollees in the Kaiser Permanente health plans studied: (1) 0.075 percent in
21 Northern California, (2) 0.044 percent in Southern California, and (3) 0.038 percent in Georgia.
22 Rather than take into account all three percentages – by averaging them out or by using the median
23 number of .044 percent, for example – Dr. Fox relies only on the highest value for the Northern
24 California Kaiser Permanente plan (0.075 percent). In doing so, he simply ignores the values for
25 the Southern California plan (0.044 percent) and the Georgia plan (0.038 percent), which are much
26 lower. Carr Rebuttal Report at 22-24.

27 During his deposition, Dr. Fox claimed that the Northern California plan had the “largest

1 sample size” and therefore the “highest level of confidence.” *Id.* As explained in the Carr Rebuttal
2 Report, however, Dr. Fox is wrong – the sample size for Northern California is smaller than for
3 Southern California. *Id.* Dr. Fox’s selective use of the Northern California data renders his opinion
4 unreliable. *See Barber*, 17 F. App’x at 437 (“Because in formulating his opinion Dr. Hynes cherry-
5 picked the facts he considered to render an expert opinion, the district court correctly barred his
6 testimony because such a selective use of facts fails to satisfy the scientific method and *Daubert.*”);
7 *Fail-Safe, L.L.C.*, 744 F. Supp. 2d at 889 (“[I]t is readily apparent that Dr. Keegan all but ‘cherry
8 picked’ the data he wanted to use, providing the court with another strong reason to conclude that
9 the witness utilized an unreliable methodology.”).

10 There is an analytical gap between Dr. Fox’s ultimate opinion and the data he used in
11 forming this opinion. Because Dr. Fox’s methodology and opinion are unreliable, the Court should
12 exclude Dr. Fox as an expert in this case.

13 CONCLUSION

14 For these reasons, BCBSIL respectfully requests that the Court fulfill its gatekeeper role
15 by excluding the expert opinions of Drs. Ettner, Schechter, Karasic, and Fox in their entirety.

16 Dated this 31st day of October, 2022.

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CERTIFICATE OF SERVICE

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

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