The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

No. 3:20-cv-06145-RJB

PLAINTIFFS' CONSOLIDATED MOTION TO EXCLUDE EXPERT TESTIMONY OF MICHAEL LAIDLAW, M.D., LAWTON R. BURNS, PH.D., AND SCOTT CARR, PH.D.

Note on Motion Calendar: November 18, 2022

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I. INTRODUCTION[1]

Courts have an unwavering "gatekeeping obligation" to assess the admissibility of expert testimony in a case, whether it is before a jury, in a bench trial, or at the summary judgment stage. *United States v. Valencia-Lopez*, 971 F.3d 891, 898-899 (9th Cir. 2020). It "applies to all (not just scientific) expert testimony" to ensure that the testimony is "both reliable and relevant." *Id.,* at 899*, citing to Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 597 (1993).

Defendant Blue Cross Blue Shield of Illinois ("BCBSIL") has proffered "expert" testimony from three witnesses: Michael Laidlaw, M.D. (as rebuttal only), an endocrinologist with no experience in the diagnosing or treatment or gender dysphoria; Lawton R. Burns, Ph.D., a business theorist who offers no basis for his opinions other than his *ipse dixit*; and Scott Carr, Ph.D. (as rebuttal only), a belatedly disclosed engineer purporting to have expertise in economics and statistics. None of these "experts" offer more than their personal opinions—opinions that are wholly disconnected from the undisputed data and evidence and thus not relevant issues in this case.

All three experts should be excluded by the Court under *Daubert.*

II. FACTUAL BACKGROUND

On June 24, 2022, BCBSIL served Plaintiffs with expert witness disclosures only for Dr. Burns and Dr. Laidlaw. *See* Declaration of Eleanor Hamburger in support of Plaintiffs' Consolidated Motion to Exclude Expert Testimony of Michael Laidlaw, M.D., Lawton R. Burns, Ph.D., and Scott Carr, Ph.D., ("Hamburger Decl.") ¶2, *Exh. 1.* Dr. Burns was offered as a primary expert witness, and Dr. Laidlaw only in rebuttal. *Id.*

A. Dr. Laidlaw's Testimony.

BCBSIL retained Dr. Laidlaw to provide a rebuttal expert opinion in response to the expert reports of Randi C. Ettner, Ph.D., Dan H. Karasic, M.D., and Loren S. Schechter, M.D. Dkt. No.

[1] This consolidated motion to exclude expert testimony is less than the combined total page limit of 36 pages had three separate briefs been filed. *See* LCR 7(e)(3). Defendant consented to the filing of a consolidated motion of no more than 30 pages. *See* Hamburger Decl., *Exh. 16.*

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88-1, Exh. K ("Laidlaw Decl."), at ¶6.[2] In doing so, Dr. Laidlaw provides opinions on the causes, diagnosis, and treatment of gender dysphoria, including the use of puberty-delaying medication, hormone treatment, and surgery. *See generally* Laidlaw Decl. Although he never evaluated or treated Plaintiff C.P., Dr. Laidlaw also opines on the propriety of the physician-recommended treatment received by C.P. as well as on C.P.'s physical and mental health. *Id.,* at ¶¶179–240. Dr. Laidlaw's deposition was taken on September 2, 2022. At deposition, Dr. Laidlaw limited his opinions regarding gender-affirming care as applicable to just minors, not adults. Hamburger Decl., *Exh. 2* (hereinafter "Laidlaw Dep."), at 146:2-147:11. In sum, Dr. Laidlaw opines that "no person under the age of majority [should] be prescribed puberty blockers, hormones or surgery as treatment for gender dysphoria." *Id.,* at 136:1-137:9.

B. Dr. Burns' Testimony.

BCBSIL asked Dr. Burns to analyze the effect of BCBSIL's administration of gender-affirming care exclusions (the "Exclusions") and "to determine whether the elimination of BCBSIL's [ability] to administer plans with varying designs, including designs that exclude gender affirming care, will harm employers and consumers." Dkt. No. 88-1, Exh. B ("Burns Decl."), at ¶12-13.[3] Dr. Burns offered the following summary of his opinions:

I. Plan designs that contain various iterations of exclusion for gender affirming care are common;

II. These Plan designs allow greater economic flexibility for employers and further their ability to make health care coverage available at customized price-points;

III. Eliminating the ability to purchase health plans with gender-affirming care exclusions would be harmful to consumers.

IV. Individuals will ultimately bear the burden of price increases.

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[2] The expert declaration of Michael Laidlaw, M.D., served on August 5, 2022, can be found as Exhibit K to the Declaration of Gwendolyn C. Payton in support of Blue Cross Blue Shield of Illinois's Motion for Summary Judgment. *See* Dkt. No. 88-1, Exh. B. Docket No. 88-1 contains no internal pagination.

[3] The declaration of Lawton R. Burns, served on June 24, 2022, can be found as Exhibit B to the Declaration of Gwendolyn C. Payton in support of Blue Cross Blue Shield of Illinois's Motion for Summary Judgment. *See* Dkt. No. 88-1, Exh. B.

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Id., §III, at 6. Dr. Burns' deposition was taken on September 9, 2022. During the deposition, Dr. Burns admitted he has no experience related to coverage of gender affirming care. Hamburger Decl., *Exh. 3* (hereinafter "Burns Dep."), at 19:8-24:9. Nor did he review any data or research related to the impact of removing gender affirming care exclusions from self-funded health plans when preparing the report.[4] *Id.,* at 29:12-32:21; 41:19-42:10; 48:8-48:16; 50:3-50:11; 65:5-65:20. Dr. Burns spent only five hours preparing his report. Hamburger Decl., *Exh. 4*.

C. Dr. Carr's Testimony.

BCBSIL did not disclose Dr. Carr on June 24, 2022[5] nor at any time before it served his report on Plaintiffs' counsel on Friday, October 21, 2022. Hamburger Decl., ¶3; Dkt. No. 100-8. The dispositive motion cutoff was October 24, 2022. Dkt. No. 90. Plaintiffs had no opportunity to engage in any discovery related to Dr. Carr's Report, as the discovery cutoff occurred on August 5, 2022, although certain specified forms of discovery were authorized through August 12, 2022. Dkt. No. 73, at 2.

III. LAW AND ARGUMENT

A. Legal Standard for Admissibility of Expert Testimony.

"Before admitting expert testimony into evidence, the district court must perform a gatekeeping role of ensuring that the testimony is both relevant and reliable under Rule 702." *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188 (9th Cir. 2019) (cleaned up). "To satisfy its 'gatekeeping duty' under *Daubert*, the court must make an explicit reliability finding." *Id.*

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[4] Dr. Burns' declaration is also full of errors which appear to result from "cutting and pasting" this report from a previous report on a different topic. For example, the Burns declaration states that he relied upon depositions and documents in this litigation, but Dr. Burns testified that he reviewed no deposition transcripts, and the only document he could recall reviewing before writing the report was the Amended Complaint. Burns Dep., at 12:4-12:16; 15:6-15:17; 44:3-46:1. The Burns declaration further states that he relied upon rulings and advisories by the FTC (Federal Trade Commission) to reach his opinions, even though at deposition he conceded that he had not relied upon any specific FTC rulings or advisories for this matter (and FTC rulings have no bearing on any issue in this case). Burns Dep. at 46:2-47:2. Dr. Burns had given so little thought to the issues in this case that he could not describe what he meant by "gender affirming care" in his declaration. Burns Dep., at 17:14-19:7; 65:21-66:21.

[5] The general expert disclosure deadline fell on June 17, 2022, but the parties agreed to extend the deadline by one week for Defendant. Hamburger Decl., *Exh.* 9.

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(internal quotations omitted); *see also Valencia-Lopez*, 971 F.3d at 899. "It is the proponent of the expert who has the burden of proving admissibility," *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996), which "must be established by a preponderance of the evidence." *United States v. Cloud*, 576 F.Supp.3d 827, 838 (E.D. Wash. 2021); *see also Luttrell v. Novartis Pharms. Corp.*, 894 F.Supp.2d 1324, 1332 (E.D. Wash. 2012), *aff'd*, 555 F. App'x 710 (9th Cir. 2014).

"As an initial matter, the court must determine if a witness has the required expertise, whether it be 'knowledge, skill, experience, training, or education' under Rule 702(a)." *Luttrell*, 894 F.Supp.2d at 1332. "[C]are must be taken to assure that a proffered witness truly qualifies as an expert, and that such testimony meets the requirements of that Rule." *Cloud*, 576 F.Supp.3d at 837 (cleaned up). "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999); *see also Cloud*, 576 F.Supp.3d at 837 ("whether proffered expert testimony is admissible only arises if it is first established that the individual whose testimony is being proffered is an expert in a particular field" (cleaned up)).

"Once a court makes the 'preliminary' determination … that a witness qualifies as an expert, the focus shifts to that witness' proffered testimony." *Cloud*, 576 F.Supp.3d at 837. This is a two-part inquiry: the expert testimony must be "not only relevant, but reliable." *Daubert*, 509 U.S. at 589.

First, the Court must consider the relevancy of any qualified expert's testimony as it is a precondition to admissibility. "Evidence is relevant … if the evidence will assist the trier of fact to understand or determine a fact in issue." *Cloud*, 576 F.Supp.3d at 837; *Cole v. Keystone RV Co.,* 2020 U.S. Dist. LEXIS 124134, **21–22 (W.D. Wash. July 14, 2020). "The gatekeeping inquiry must be tied to the facts of a particular case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (quotations omitted). "[I]f an opinion is not relevant to a fact at issue, *Daubert* requires that it be excluded." *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021).

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Second, the court must inquire if the opinion is reliable, meaning "the expert's testimony [must] have 'a reliable basis in the knowledge and experience of the relevant discipline.'" *Ruvalcaba-Garcia*, 923 F.3d at 1188–89 (quoting *Kumho Tire*, 526 U.S. at 149); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ("Since *Daubert II,* parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."). "[T]he party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology." *Chung v. Washington Interscholastic Activities Ass'n*, No. C19-5730-RSM, 2021 U.S. Dist. LEXIS 94474, at *4 (W.D. Wash. May 18, 2021) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ("*Daubert II*")). In other words, "[t]he district court must assess whether the reasoning or methodology underlying the testimony is scientifically valid and properly can be applied to the facts in issue, with the goal of ensuring that the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of ***an expert in the relevant field***." *Ruvalcaba-Garcia*, 923 F.3d at 1189 (cleaned up) (emphasis added). "In determining reliability, a court may consider a number of factors including: (1) whether the theory can be and has been tested; (2) whether it has been subjected to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or methodology employed is generally accepted in the relevant scientific community." *Cloud*, 576 F.Supp.3d at 838.

When an expert relies upon his experience and training, and not a specific methodology, the proponent of the expert testimony "must explain how that experience leads to the conclusions reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig.*, 978 F.Supp.2d 1053, 1067 (C.D. Cal. 2013) (cleaned up). In other words, expert opinions cannot be "connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

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The court's gatekeeping role and the test for admissibility of expert testimony are applicable even at a bench trial or at the summary judgment stage. *See*, *e.g.*, *Kadel v. Folwell*, No. 1:19CV272, 2022 U.S. Dist. LEXIS 103780, at **20–59 (M.D.N.C. Aug. 10, 2022) (granting motions to exclude in the context of summary judgment); *Lo v. United States*, No. 2:17-CV-01202-TL, 2022 U.S. Dist. LEXIS 63229, at *23 n.3, *36 (W.D. Wash. Apr. 5, 2022) (excluding unqualified expert evidence in the context of a bench trial); *Rodman v. Otsuka Am. Pharm., Inc.*, 564 F.Supp.3d 879, 891 (N.D. Cal. 2020) (granting motion to exclude in context of summary judgment), *reconsideration denied*, No. 18-CV-03732-WHO, 2020 U.S. Dist. LEXIS 129644 (N.D. Cal. July 22, 2020), *and aff'd*, No. 20-16646, 2021 U.S. App. LEXIS 36297 (9th Cir. Dec. 9, 2021), *cert. denied*, 142 S. Ct. 2712 (2022); *Diviero v. Uniroyal Goodrich Tire Co.*, 919 F.Supp. 1353, 1361 (D. Ariz. 1996) (granting motion to exclude in the context of summary judgment), *aff'd*, 114 F.3d 851 (9th Cir. 1997).

BCBSIL has failed to demonstrate that each expert's report or declaration meets the requirements of FRE 702, as well as reliability and relevance under *Daubert.*

B. Dr. Laidlaw's Testimony Should Be Excluded.

1. Dr. Laidlaw is not qualified to offer expert opinions this case under FRE 702.

When determining admissibility ,"[t]he court … must always assure that the subject matter of the expert witness's testimony relates to the expertise the witness brings to the courtroom." *Nelson v. F/V N. Cape*, No. C05-346JLR, 2006 WL 5159249, at *1 (W.D. Wash. May 4, 2006). Such "expertise must be coextensive with the particular scientific discipline." *Diviero*, 919 F.Supp. at 1357. "[Q]ualifications alone do not suffice." *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999); *see also Patel ex rel. Patel v. Menard, Inc.*, No. 1:09-CV-0360-TWP-DML, 2011 U.S. Dist. LEXIS 116219, at *15 (S.D. Ind. Oct. 6, 2011). Even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under … *Daubert*." *Clark*, 192 F.3d at 759 n.5.

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And because "some issues clearly require expertise in a particular field," *Diviero*, 919 F. Supp. at 1355, "an expert's qualifications must be within the same technical area as the subject matter of the expert's testimony." *Martinez v. Sakurai Graphic Sys. Corp.*, No. 04 C 1274, 2007 U.S. Dist. LEXIS 65132, at *7 (N.D. Ill. Aug. 30, 2007). "[I]n other words, a person with expertise may only testify as to matters within that person's expertise." *Id.*; *see also Lebron v. Sec. of Fla. Dept. of Children and Families*, 772 F.3d 1352, 1369 (11th Cir. 2014).

This is particularly true in medicine where "no medical doctor is automatically an expert in every medical issue merely because he or she has graduated from medical school or has achieved certification in a medical specialty." *O'Conner v. Commonwealth Edison Co.*, 807 F.Supp. 1376, 1390 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir. 1994); *see also*, *e.g.*, *Hartke v. McKelway*, 526 F.Supp. 97, 100-101 (D.D.C. 1981). As the court in *Diviero* explained, a clinical psychologist may not be necessarily qualified to testify about stress worsening a preexisting heart condition, and a pediatrician experienced as a children's accident preventionist may not be qualified to testify to the conduct of an adult driver. *Diviero*, 919 F.Supp. at 1355–56 (citing *Kloepfer v. Honda Motor Co.*, 898 F.2d 1452, 1458–59 (10th Cir. 1990), and *Edmonds v. Illinois Central Gulf Railroad*, 910 F.2d 1284, 1287 (5th Cir. 1990), as examples).

Here, Dr. Laidlaw, an adult endocrinologist,[6] is not qualified to render most of the opinions he proffers. The district court's decision in *Kadel v. Folwell* is most illustrative here. Like Dr. Laidlaw, the pediatric endocrinologist at issue in *Kadel* "offer[ed] a wide range of conclusions that fall into five main categories: mental healthcare, medical and surgical care, informed consent, criticism of medical associations, and political criticisms." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at *28. The *Kadel* court excluded most of the endocrinologist's proffered testimony and limited the testimony "to a discussion of the risks associated with prescribing hormone treatments to adolescents and adults," the only possible area of that endocrinologist's expertise. *Id.,* at *35.

[6] Fewer than 5% of Dr. Laidlaw's patients are under 18, all being older adolescents. Laidlaw Dep., at 43:1-7.

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In *Kadel*, the defendants' endocrinologist was "not qualified to offer expert opinions on the diagnosis of gender dysphoria, the DSM, gender dysphoria's potential causes, the likelihood that a patient will 'desist,' or the efficacy of mental health treatments." *Id.,* at *31. The *Kadel* court found that the endocrinologist was "not a psychiatrist, psychologist, or mental healthcare professional," and "ha[d] never diagnosed a patient with gender dysphoria, treated gender dysphoria, treated a transgender patient, conducted any original research about gender dysphoria diagnosis or its causes, or published any scientific, peer-reviewed literature on gender dysphoria." *Id.*

The Court should conclude the same for Dr. Laidlaw, who: (1) has never conducted any original, peer-reviewed research about gender identity, transgender people, or gender dysphoria, Laidlaw Dep., at 29:23-30:6; Hamburger Decl., *Exh. 5*. (hereinafter "*Dekker* Hrg. Tr."), at 10:15-11:13; (2) has not published any scientific, peer-reviewed literature on gender dysphoria or transgender people, Laidlaw Dep., at 42:10-42:22;[7] (3) has never diagnosed a patient with gender dysphoria, Laidlaw Dep., at 45:21-46:3; *Dekker* Hrg. Tr., at 11:19-11:21; (4) has only treated one patient with gender dysphoria (nearly two decades ago, prior to the existence of the DSM-5's gender dysphoria diagnosis), Laidlaw Dep., at 43:11-43:17; *Dekker* Hrg. Tr., at 12:13-12:16; and (5) is not a psychiatrist, a psychologist, nor mental health care provider of any kind qualified to diagnose gender dysphoria or to opine on the reliability of the American Psychiatric Association's

[7] Dr. Laidlaw's only publications relating to gender dysphoria in a peer-reviewed journal are letters to the editor not based on any original research or scientific study, and which he cannot confirm are subjected to peer-review. Laidlaw Dep., at 31:14-39:23; *Dekker* Hrg. Tr., at 9:21-11:18.

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Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5"), Laidlaw Dep. 47:16-47:17; *Dekker* Hrg. Tr., at 7:20-8:2.[8]

Like the defendants' endocrinologist in *Kadel*, Dr. Laidlaw "is not a surgeon and has no experience with surgery for gender dysphoria and, therefore, is not qualified to testify to the risks associated with surgery or the standard of care used by surgeons for obtaining informed consent for surgery." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at *33; *see also* Laidlaw Dep., at 47:16-47:17; *Dekker* Hrg. Tr., at 87:8-87:9.[9]

Dr. Laidlaw bases his opinions solely on his review of literature over only the last four years. *See Dekker* Hrg. Tr., 15:24-16:2. Simply reading about these issues does not qualify Dr. Laidlaw as an expert, however. *See Dekker* Hrg. Tr., 18:20-18:25; FRE 702. "Merely reading literature in a scientific field does not qualify a witness—even an educated witness—as an expert." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at *31; *see also Lebron*, 772 F.3d at 1369; *Dura Auto. Sys. Of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) ("A scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty.").

In sum, Dr. Laidlaw is not qualified to serve as an expert on the diagnosis or treatment paradigms for gender dysphoria. He is "not qualified by background, training, or expertise to

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[8] Because he is not a mental health care provider of any kind, Dr. Laidlaw is unqualified to opine on the "assessment of the patient with gender dysphoria." *See*, *e.g.*, Laidlaw Decl., at ¶¶ 176–78. For the same reasons, he is unqualified to testify as to C.P.'s mental health. *See*, *e.g.*, Laidlaw Decl., at ¶¶ 183, 237–40. Not only is Dr. Laidlaw unqualified to testify on such matters, but such opinions are unreliable. Indeed, Dr. Laidlaw has never met with, spoken with, treated, or evaluated C.P. Laidlaw Dep., at 59:9-59:22. The Goldwater Rule establishes that it is "it is unethical for a psychiatrist to offer a professional opinion about an individual based on publicly available information without conducting an examination." Hamburger Decl., *Exh. 6.* (American Psychiatric Association Ethics Committee Opinion). When confronted with the American Psychiatric Association's Ethics Committee Opinion on this, Dr. Laidlaw simply responded: "I don't have an opinion on it." Laidlaw Dep., at 191:13-192:21.

[9] Notwithstanding that he is not a surgeon of any kind and has no clinical or research experience with treating gender dysphoria, Dr. Laidlaw opines broadly about surgery (*see*, *e.g.*, Laidlaw Decl., at ¶¶ 88–93, 114–21, 162–63) as well as more specifically about C.P.'s chest surgery (*see*, *e.g.*, *id.* at ¶¶ 181, 219–23). Such testimony is wholly unreliable given Dr. Laidlaw's lack of expertise, skill, and experience with surgery.

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opine" about any of the factual issues in this case. *Lebron*, 772 F.3d at 1369. At most, Dr. Laidlaw can testify only as "to the risks associated with puberty blocking medication and hormone therapy," which, as explained below, is not relevant here. *See Kadel*, 2022 U.S. Dist. LEXIS 103780, at *32.[10]

2. Dr. Laidlaw's opinions and testimony are not relevant to this case.

Dr. Laidlaw's opinions are not relevant to this inquiry as they will not help the "the trier of fact in understanding evidence or in determining a fact in issue." *Easton v. Asplundh Tree Experts, Co.*, No. C16-1694RSM, 2017 U.S. Dist. LEXIS 147508, at *12 (W.D. Wash. Sept. 12, 2017). His opinions do not "fit" this case because they are not sufficiently tied to the facts of the case so that they will aid a factfinder.

The crux of Dr. Laidlaw's testimony is that he objects to the provision of gender-affirming care specifically to minors. Laidlaw Dep., at 146:2-146:21. But the issue before this Court is ***not*** whether gender-affirming care, including surgery can be medically necessary for minors—***both BCBSIL and Plaintiffs agree that it can be***. *See* Dkt. No. 84-4, at 7; Hamburger Decl., *Exh. 15* (hereinafter "Reed Dep."), at 40:12-41:20. There is no dispute between the parties that (1) gender-affirming care in the form of puberty-delaying medications, hormone therapy, and chest surgery can be medically necessary for adolescents; and (2) C.P.'s treatment with Vantas implants and chest surgery met the medical necessity standard in BCBSIL's medical policy for coverage. Dkt. No. 84-1, at 52:19-53:9, 60:5-62:3. *See also* Dkt. No. 98-1 (Dr. Ettner's Expert Report), at ¶¶72-81; Dkt. No. 98-2 (Dr. Karasic's Expert Report), at ¶¶65-75; Dkt. No. 98-3 (Dr. Schechter's Expert Report), at ¶¶46-47. BCBSIL's Rule 30(b)(6) witness, Dr. Kim Reed, confirmed that C.P.'s Vantas implants (puberty-delaying medication) and chest surgery met the medical necessity criteria under the BCBSIL medical policy. Dkt. No. 84-1, at 52:19-53:9, 60:5-62:3.

[10] Dr. Laidlaw has no "experience with … WPATH … upon which to base his criticisms." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at *33. "He is therefore not qualified to testify about the credibility of th[at] organization[]." *Id.*; *see* Laidlaw Decl., at ¶¶ 22-29.

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BCBSIL is bound by Dr. Reed's Rule 30(b)(6) testimony. "[A] corporation generally cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative." 7 James Wm. Moore et al., *Moore's Federal Practice*, §30.25[3] (3d ed. 2016). As such, "courts have ruled that because a Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know." *Id.* Indeed, "Rule 30(b)(6) testimony can only be rebutted when there is an explanation for why the earlier testimony is mistaken." *Munoz v. Giumarra Vineyards Corp.*, No. 1:09-CV-0703 AWI JLT, 2015 U.S. Dist. LEXIS 122450, at *14 (E.D. Cal. Sep. 11, 2015).

Dr. Laidlaw's opinion that gender-affirming care for minors can never be medically necessary is irrelevant. *See* Laidlaw Decl., ¶180. ***First***, BCBSIL does not recant Dr. Reed's testimony—rather BCBSIL stands by it and continues to implement the BCBSIL medical policy that concludes that gender-affirming treatment can be medically necessary for minors. *See* BlueCross BlueShield of Illinois, Supporting LGBTQ Members, https://tinyurl.com/49ny5vrt (last visited 10/28/2022). ***Second,*** Dr. Laidlaw did not apply the BCBSIL Medical Policy to C.P.'s claims or even consider whether C.P.'s claims met the definition of "medical necessity" from C.P.'s health plan. *See* Laidlaw Dep., at 82:13-82:17, 193:5-193:9. Dr. Laidlaw's personal opinions about gender-affirming care for minors do not matter in this case. ***Third***, Dr. Laidlaw does not explain why he "disagrees" with Dr. Reed's testimony or the BCBSIL medical policy, other than that he falsely claims that they rely "exclusively" on WPATH. Laidlaw Dep., at 53:1-54:24.[11] Dr. Laidlaw's mere disagreement with BCBSIL's medical policy is insufficient to rebut BCBSIL's admissions or otherwise make his opinion relevant.

[11] On its face, BCBSIL's medical policy pertaining to "Gender Assignment Surgery and Gender Reassignment Surgery with Related Services" cites not only to the WPATH *Standards of Care* but also to over 20 other sources, including scientific literature and position statements of the American Psychiatric Association and American Academy of Pediatrics. Hamburger Decl., *Exh*. 7. "The most recent literature search was performed through July 2021." *Id.*

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BCBSIL may argue that Dr. Laidlaw's opinion could represent the opinions of one or more of the employers with whom it contracts. The problem with this argument is that BCBSIL never asks any employer why it wanted to exclude gender-affirming care from coverage. Dkt. No. 84-6, at 72:21-73:7; Dkt. No. 84-9, at 28:14-28:17. Even now, BCBSIL offers no evidence that any employer objectively and in good faith reviewed the research related to the efficacy and medical necessity of gender affirming care and found it to be lacking. *See id.* And, even if BCBSIL were to find an employer that claims to share Dr. Laidlaw's opinion, such a statement is still irrelevant. For one, it would very likely be a pretext for discrimination, because as Dr. Reed testified, "the clinical evidence is the evidence." Dkt. No. 84-1, at 39:15-39:19. For another, this case concerns BCBSIL's *own* independent liability as a third-party administrator and covered entity under the ACA—it does not concern any particular employers' liability for discriminatory acts or motives.[12]

3. Dr. Laidlaw's opinions and testimony are wholly unreliable.

An expert's testimony should only be admitted if it is sufficiently reliable. Here, Dr. Laidlaw's opinions fail all indicia of reliability. What is more, some of his opinions are patently false. "[P]roffered evidence that has a greater potential to mislead than to enlighten should be excluded." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 632 (4th Cir. 2018).

a. Dr. Laidlaw's opinions about treatment of adolescents with gender dysphoria is based solely on ipse dixit and are completely unreliable.

At his deposition, Dr. Laidlaw limited his opinions regarding gender-affirming care as applicable to only minors. Laidlaw Dep., at 146:2-147:11. Dr. Laidlaw opined that "no person under the age of majority [should] be prescribed puberty blockers, hormones or surgery as

[12] Dr. Laidlaw's opinions about "controversies" in other countries are similarly irrelevant. Laidlaw Decl., at ¶¶ 106-111. What other countries cover, exclude, or consider to be discrimination has no bearing on any of the material facts of this case. He also fails to disclose that each of the so-called reviews upon which he relied is not peer-reviewed, and that none of the identified countries wholly exclude coverage for gender-affirming care. Laidlaw Dep., at 106:2-108:5. *See also*, *e.g.*, Hamburger Decl., *Exh*. 8 (amicus brief of international groups); *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 671 (8th Cir. 2022).

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treatment for gender dysphoria." *Id.* at 136:1-137:9. Indeed, Dr. Laidlaw testified that "[p]retty much my whole declaration is in support of this model." *Id.* at 137:3-137:4. When asked if there was "any peer-reviewed article, clinical guideline, anything in scientific literature that recommends and describes this model," Dr. Laidlaw admitted, it was simply his personal opinion: "This would be ***an opinion of myself*** based on ***my*** clinical experience and research on the topic." *Id.* at 137:5-137:9 (emphasis added). Again, Dr. Laidlaw does not diagnose or treat gender dysphoria, has not conducted any original research on these matters, is not a mental health care provider of any kind, and has only read literature about these issues for the last four years. *See* Section III(B)(1), *supra*.

Dr. Laidlaw presented "reparative therapy" as if it were an accepted modality of treatment. *See* Laidlaw Decl., at ¶65 (describing "psychosocial treatment that helps the young person align their internal sense of gender with their physical sex" as a treatment approach to gender dysphoria); Laidlaw Dep., at 138:24-139:10.[13] Nothing could be further from the truth; in Washington state, it is ***outlawed*** for minors. *See* RCW 18.130.180(27); *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022). The provision of such "therapy" represents a fringe view far outside the mainstream medical and scientific community. As even Dr. Laidlaw acknowledged, the American Psychiatric Association and the American Psychological Association oppose "reparative therapy" or gender identity change efforts as unethical and harmful. Laidlaw Dep., at 139:22-145:17. So do the National Academies of Science, Engineering, and Medicine. Nat'l Acad. of Sciences, Engineering, and Medicine, *Understanding the Well-Being of LGBTQI+ Populations* (2020)

[13] In stating that a young person's gender identity might change, Dr. Laidlaw cavalierly compared transgender youth's gender identities to "think[ing] they're a butterfly for a while" or "the $6 million man for a little while." Laidlaw Dep., at 145:7-145:12. Aside from its offensive nature, such opinion is inadmissible and unreliable. Dr. Laidlaw could not offer any peer-reviewed literature in support of his opinion and only provided as its basis that "[i]t's just an observation that anyone would see, I think, with children." *Id.* at 145:14-145:17. But "[g]eneralized common sense does not rise to the level of expert opinion solely because it is offered by someone with an academic pedigree." *Fedor v. Freightliner, Inc.*, 193 F.Supp.2d 820, 832 (E.D. Pa. 2002); *cf. Nedeau v. Armstrong*, No. CV-09-0189-EFS, 2011 U.S. Dist. LEXIS 22976, at *11 (E.D. Wash. Mar. 8, 2011) ("However, expert testimony is unnecessary where the acts in question are within the common knowledge or experience of lay persons.").

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(hereinafter "*Nat'l Academies Report*"), at 368–70, https://bit.ly/3zf0slx. In Washington, it is prohibited in order to "protect[] its minors against exposure to serious harm caused by conversion therapy." *Tingley v. Ferguson*, 557 F.Supp.3d 1131, 1142 (W.D. Wash. 2021) (Bryan, J.), *aff'd*, 47 F.4th 1055. The same is true in California, where Dr. Laidlaw resides. *Id.*

Which leads to Dr. Laidlaw's most extraordinary opinion: He opposes affirmation of a transgender person's identity in any circumstances. *See*, *e.g.*, *Dekker* Hrg. Tr., 87:15-87:21; *id.* at 39:22-40:19. Dr. Laidlaw's repeated misgendering of Plaintiff C.P. and others is no accident. *See* Laidlaw Dep., at 13:19-14:6 (referring to a transgender young man with female pronouns); *id.* at 186:1-187:10 (referring to plaintiff, a transgender young man, as a "girl"); Hamburger Decl., *Exh. 10*, at 12 (referring to a "very troubling life of transgenderism"). He does so purposefully because of his non-scientific opposition to any treatment for gender dysphoria. *But see Karnoski v. Trump*, 926 F.3d 1180, 1188 (9th Cir. 2019) ("Living in a manner consistent with one's gender identity is a key aspect of treatment for gender dysphoria.").

Dr. Laidlaw's testimony about the modality of treatment for adolescents with gender dysphoria is the epitome of *ipse dixit* that courts routinely exclude as unreliable. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). This is one of those circumstances in which "there is simply too great an analytical gap between the data and the opinion proffered." *Id*.

In sum, Dr. Laidlaw's testimony about the modality of treatment appropriate for adolescents with gender dysphoria is simply *ipse dixit.* "The trial court's gate-keeping function requires more than simply taking the expert's word for it." *Whisnant v. United States,* No. C03-5121, 2006 U.S. Dist. LEXIS 76321, at *5 (W.D. Wash. Oct. 5, 2006), *citing to Daubert v. Merrell Dow Pharms., Inc., (Daubert II),* 43 F.3d 1311, 1319 (9th Cir. 1995).

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b. Dr. Laidlaw's opinions about desistance are unreliable and ultimately irrelevant.

Dr. Laidlaw spends considerable time on (and builds most of his testimony questioning the propriety of gender-affirming health care upon) antiquated studies showing that a majority of *preadolescent* children diagnosed with *gender identity disorder*—an outmoded diagnosis *distinct from gender dysphoria* with different diagnostic criteria—"desisted" from their gender nonconformity or cross-gender behavior. *See*, *e.g.*, Laidlaw Decl., at ¶¶ 36–47, 122, 132–33, 177, 216. Based on this evidence, Dr. Laidlaw states that, "[b]ecause the rate of desistance is so high, gender affirmative therapy will necessarily cause serious and irreversible harm to many children and adolescents who would naturally outgrow the condition if not affirmed." *Id.* at ¶41. Such opinions are based on faulty propositions.[14]

For one, absolutely no gender-affirming medical or surgical care is provided to ***prepubertal*** children. Dkt. No. 98-2, at ¶37. That is true for each of the recognized treatment paradigms Dr. Laidlaw discusses (apart from "conversion" or "reparative therapy"), a fact Dr. Laidlaw did not disclose. Laidlaw Dep., at 126:13-146:1.

Similarly, Dr. Laidlaw admits that the "desistance" studies on which he relies speak only to preadolescent youth who were diagnosed with *gender identity disorder* under the DSM-III or the DSM-IV, and do not pertain to "desistance" of youth diagnosed with *gender dysphoria* under the DSM-5. Laidlaw Dep., at 103:4-104:4.

Lastly, Dr. Laidlaw does not know of any studies documenting "desistance" among adolescents (people over the age of 12) or adults. *Id,.* at 109:2-109:14. The Court should find that Dr. Laidlaw, like one of the defendants' experts in *Kadel*, "is not qualified, however, to offer expert opinions on the rates of desistance and 'de-transitioning' among gender dysphoric patients." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at *46. And "anecdotal testimony concerning 'de-

[14] They are also irrelevant because not only do BCBSIL and Plaintiffs agree that gender-affirming care can be medically necessary, *see* Section III(B)(2), *supra*, but "a discussion of risks to prepubescent children is irrelevant to this case and would likely serve only to confuse." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at **32–33.

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transitioning' … is not a reliable basis for any broader opinion about the rates of desistance, the likelihood that gender dysphoric patients will later 'de-transition,' or the general efficacy of surgical treatment for gender dysphoria." *Id.,* at *47.

c. Dr. Laidlaw's musings about the causes of gender dysphoria are unreliable.

Dr. Laidlaw opines that gender dysphoria *may be* caused by social pressures. Laidlaw Rep. at ¶44. He offers no studies or evidence to back this claim up. *See id.* But whether gender dysphoria is caused by social pressure is both wholly unsupported, as described below, and irrelevant to the case at hand. It is undisputed that gender dysphoria is a recognized medical condition that necessitates medical treatment. *See*, *e.g.*, Laidlaw Dep., at 87:11-87:21; *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) ("Gender dysphoria is a serious medical condition that causes clinically significant distress—distress that impairs or severely limits an individual's ability to function in a meaningful way." (citing the DSM-5)).

d. Dr. Laidlaw's opinions about WPATH are unreliable.

Dr. Laidlaw opines that WPATH is not a scientific organization, because it engages in advocacy. Laidlaw Rep. ¶¶ 16, 23–24. When pressed on the basis for his opinion, Dr. Laidlaw did not cite any literature, study, or publication but rather stated that it was based on his opinion that "one would expect them [WPATH] not to exclusively follow one, say, politically based point of view," and that (again, in his opinion) "WPATH is not" "open to a variety of points of view." Laidlaw Dep., at 89:7-89:17. When pressed further for his basis for this opinion, Dr. Laidlaw simply stated that his opinion is based on a conversation with one psychologist and the fact that WPATH published the *Standards of Care*. *Id.,* at 92:2-92:12.

Dr. Laidlaw is not privy to the actual internal conversations of WPATH, has not participated in WPATH conferences, is not a member of WPATH, and has not participated in any of its internal discussions. *Id,.* at 90:1-90:16. This is another circumstance in which Dr. Laidlaw's opinion is based solely on his mere say-so and speculation. Dr. Laidlaw therefore lacks knowledge "of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture

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or speculation." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988). And such opinions based on "subjective belief or unsupported speculation not validated by any known facts or inferences presented to the court and are [] unreliable and inadmissible under the *Daubert* standard." *Trail v. Civ. Eng'r Corps., U.S. Navy, Naval Facilities Eng'g Command*, 849 F.Supp. 766, 768 (W.D. Wash. 1994); *cf. Kadel*, 2022 U.S. Dist. LEXIS 103780, at *34, *38–39. Dr. Laidlaw does not have "any experience with … WPATH … upon which to base his criticisms." *Kadel*, 2022 U.S. Dist. LEXIS 103780, at *33. He is therefore not qualified to testify about the credibility of WPATH. *Id.*

e. Dr. Laidlaw's opinions about the medical consensus surrounding gender-affirming care are unreliable.

General acceptance in the relevant scientific community is an important element to the reliability inquiry. *See Carnegie Mellon Univ. v. Hoffmann-LaRoche, Inc.*, 55 F.Supp.2d 1024, 1031–32 (N.D. Cal. 1999). Not only is widespread acceptance an important factor in assessing the reliability of an expert's opinions, but the fact that a known theory "has been able to attract only minimal support within the community may properly be viewed with skepticism." *Daubert*, 509 U.S. at 594. Here, Dr. Laidlaw's opinions about the effectiveness and propriety of gender-affirming care are far outside the mainstream of medical and scientific opinion and have been explicitly rejected by every relevant scientific and medical community.

Dr. Laidlaw falsely testifies that "there is no 'professional consensus' on these issues in the medical community at this time." Laidlaw Decl., at ¶ 22; *see also id.* at ¶¶14, 244. In reality, all the major medical organizations in the United States, as well as the National Academies of Science, Engineering, and Medicine agree that gender-affirming care is safe, effective, and medically necessary. *See*, *e.g.*, Dkt. Nos. 98-1, at ¶¶34, 42, 54; 98-2, at ¶¶ 30, 43; 98-3, at ¶27; *Nat'l Academies Report*, at 361 ("A major success of these guidelines has been identifying evidence and ***establishing expert consensus that gender-affirming care is medically necessary*** and, further, that withholding this care is not a neutral option. A number of professional medical organizations have joined WPATH in recognizing that gender-affirming care is medically

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necessary for transgender people because it reduces distress and promotes well-being, while withholding care increases distress and decreases well-being." (emphasis added) (citations omitted)); *see also Edmo*, 935 F.3d at 769.[15] Even Dr. Laidlaw acknowledges that his "opposition to gender-affirming care for the treatment of gender dysphoria in youth and adults is contrary to the vast majority of medical associations' recommendations." *Dekker* Hrg. Tr., at 25:22-26:1. This includes the following: American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, Pediatric Endocrine Society, American Academy of Pediatrics, American Academy of Family Physicians, American College of Obstetricians and Gynecologists, American College of Physicians. *Dekker* Hrg. Tr., at 29:16-36:18.

The Ninth Circuit recognizes that the provision of gender-affirming care, consistent with the WPATH Standards of Care, represents "the ***broad medical consensus*** in the area of transgender health care," which "requires providers to individually diagnose, assess, and treat individuals' gender dysphoria," including "GCS [gender confirming surgery] when medically necessary." *Edmo*, 935 F.3d at 771; *see also Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422, 427–28 (4th Cir. 2021), as amended (Dec. 2, 2021) (noting the WPATH Standards of Care "have been adopted by health organizations across the country" and that gender-affirming treatments, including hormone therapy and surgical care, "are safe, effective, and often medically necessary"), *cert. denied*, 142 S. Ct. 861 (2022); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020), as amended (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Brandt v. Rutledge*, 551 F.Supp.3d 882, 890 (E.D. Ark. 2021) ("The ***consensus*** recommendation of medical organizations is that the only effective treatment for individuals at

[15] The National Academies' report "document[s] the evidence-based consensus on the study's statement of task by an authoring committee of experts," was "subjected to a rigorous and independent peer-review process," and "represents the position of the National Academies." *See Nat'l Academies Report*, at iv. As a publication issued by a public authority the National Academies' report is self-authenticating, Fed. R. Evid. 902(5), and is appropriate for judicial notice, *Harbers v. Eddie Bauer, LLC*, 415 F.Supp.3d 999, 1007 n.5 (W.D. Wash. 2019).

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risk of or suffering from gender dysphoria is to provide gender-affirming care.") (emphasis added), *aff'd*, 47 F.4th at 671; *Flack v. Wisconsin Dep't of Health Servs.*, 395 F.Supp.3d 1001, 1018 (W.D. Wis. 2019).

In sum, Dr. Laidlaw's opinions are wholly outside the mainstream, and he can cite to no authoritative sources in support of his opinion. His opinions are therefore unreliable and should be excluded. The Court should not permit him any platform for his unreliable, extremist and ultimately irrelevant opinions.

C. Dr. Burns' Testimony is Neither Relevant nor Reliable.

1. Dr. Burns's testimony is irrelevant.

The thrust of Dr. Burns's testimony is that should this Court determine that BCBSIL is prohibited from administering gender-affirming care exclusions, some unidentified economic costs will befall the employers and consumers in BCBSIL-administered self-funded plans. Burns Decl., at ¶ 27. Even if this were true (and it is not), it is irrelevant. Long-standing anti-discrimination law does not permit courts to consider the "costs" involved with avoiding sex discrimination.

The ACA unequivocally prohibits the administration of discriminatory benefits by a covered entity, with no exception related to the cost of any required changes. *See* 42 U.S.C. §18116(a). When claims of financial impact are offered in anti-discrimination cases, they may "perpetuate[ ] unwarranted assumptions" that those who seek the disputed service are unworthy of the costs involved. *See, e.g., Olmstead v. L.C. by Zimring,* 527 U.S. 581, 600 (1999) (isolation of disabled individuals in institutions implies that they are unworthy of participating in community life). Objections based on cost lend themselves to implementing discrimination by another name. Anti-discrimination law is meant to "replace such reflexive reactions" with "actions based on reasoned and medically sound judgments." *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284-85 (1987) (referring to "irrational fears" about HIV as a form of discrimination); *see, e.g.*, *EEOC v. Puget Sound Log Scaling & Grading Bureau,* 752 F.2d 1389, 1394 (9th Cir. 1985).

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In *Puget Sound Log Scaling,* the EEOC challenged a pregnancy exclusion for dependents in an employer self-funded group health plan. *Id.,* at 1390. After concluding that the exclusion constituted unlawful discrimination under Title VII and should be corrected retroactively, the Ninth Circuit addressed the defendant employer's claim that such a decision "will lead to rising costs for employer-sponsored health insurance … some of which the employees will ultimately bear." *Id.,* at 1394. The Ninth Circuit concluded that claims about the cost of eliminating sex discrimination were irrelevant: "[O]ur decision should not be affected by the prospective financial impact [of requiring non-discriminatory coverage]." *Id.* For the same reason, Dr. Burns' testimony has no relevance in this case.

2. Dr. Burns' testimony about "choices" available to plan enrollees is unreliable.

Dr. Burns opines that "[e]liminating the ability to purchase health plans with gender-affirming care exclusions would be harmful to consumers." Burns Decl., at 6. But Dr. Burns's opinion is based on the incorrect assumption that employees who are enrolled in self-funded plans had a choice to enroll in a health plan that included gender affirming care and chose not to do so. Burns Dep., at 37:11-38:5, 93:13-93:20. Dr. Burns points to no data supporting this assumption, and he reviewed no data indicating that any class members have such a choice. *Id.* at 85:16-86:10. To be sure, Plaintiff C.P. did not have such a choice. Burns Dep. at 55:18-55:22. In addition, Dr. Burns did not ask BCBSIL for any data related to the self-insured plans that removed gender-affirming care exclusions and the impact of such removal. Burns Dep., at 47:24-48:24, 50:3-11. "[T]o the extent an expert makes inferences based on the facts presented to him, the court must ensure that those inferences were derived using scientific or other valid methods." *Sardis*, 10 F.4th at 281 (cleaned up). Because Dr. Burns' opinion in this regard is based solely on speculation, it is unreliable.

3. Dr. Burn's testimony is otherwise unreliable.

The Court should also reject Dr. Burns' testimony because (1) he has no expertise related to gender-affirming care, and conducted no research related to its associated costs; (2) his opinion

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is not based upon readily available facts and data; instead, his opinion runs counter to the existing studies of the financial impact of covering gender-affirming care services and the specific data in this case; and (3) to the extent he testified regarding his "methodology," he did not follow it to reach his conclusions, which appear to be nothing more than his personal opinions that adding any benefit for coverage is always harmful.

a. Dr. Burns has no expertise and conducted no research related to gender-affirming care.

Dr. Burns readily admits he has no background experience regarding gender-affirming care, its costs, and the effects of its exclusion or coverage by health plans. Burns Dep., at 19:8-24:9. Dr. Burns appears to have written extensively on healthcare integration. Burns Decl., at ¶10, n.3. However, "none of those books and articles and book chapters address gender-affirming care." Burns Dep., at 24:1-9. *See also, id.,* at 19:12-19:14 (Burns has written no articles related to gender-affirming care); *id.,* at 23:13-23:25 (nothing in Burns' "two new books" listed in paragraph 10 of his declaration address gender-affirming care); *id.,* at 19:15-19:16 (Dr. Burns has never given any lectures related to gender-affirming care). Dr. Burns identified several subjects upon which he has "focused much of [his] attention," none of which address coverage of gender-affirming care. Burns Decl., at ¶¶6-8; Burns Dep., at 21:7-22:19.

Nor did Dr. Burns research gender-affirming care or any issues related to it, when taking on this project. He failed to review any studies regarding the cost and benefits of covering gender-affirming care, the frequency of providing or excluding such coverage, or the results of covering such care (of which there are plenty). *See*, *e.g.*, *id.,* 29:12–29:15, 31:4-31:20, 70:09-71:16, 79:19-81:22, 86:22-87:7. At most, he stated that he had "come across" unidentified articles in the past but did not "refer to them in any way when developing his opinions in this case." Burns Dep., 19:18-20:4; 30:23-30:25. None of those articles, apparently, addressed the cost and benefits of coverage gender-affirming care. *Id.,* at 31:21-31:24.

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b. Dr. Burns ignored evidence and research studies showing there are de minimis costs and significant benefits for covering gender-affirming care.

Dr. Burns did ***no research*** related to the costs and benefits of adding gender-affirming care coverage. As a result, he missed study after study that shows that employers and consumers experience little to no financial impact from adding the coverage, while benefits are achieved by avoiding other, more costly treatment.

For example, Dr. Burns did not know of the seminal cost-effectiveness study regarding the addition of gender-affirming care services. Burns Dep., at 79:16-83:3 (discussing Padula, William V., et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, hereinafter "Societal Implications" or "the Padula study," J. Gen. Intern. Med., pp. 394-401 (2016); *see* Hamburger Decl., *Exh. 11*). Nor did Dr. Burns review the 2016 analysis by the Rand Corporation that supported the inclusion of coverage for GCS in military health benefits. *See* Burns Dep. Tr., 70:9-75:6 (discussing Schaefer, Agnes Gereben et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, hereinafter "RAND Study," RAND Corp. (2016), available at: https://tinyurl.com/4u798f8t (last visited Oct. 27, 2022); *see* Hamburger Decl., *Exh. 13*). And Dr. Burns was unaware of a survey of employers by the Williams Institute at UCLA School of Law, which found that most of the employers surveyed reported no increased costs when they added gender-affirming care coverage. Burns Dep. Tr. 88:13-89:20 (discussing Herman, Jody L., *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans: Findings from a survey of employers*, Williams Institute, September 2013, available at: https://tinyurl.com/39tut589 (last visited Oct. 27, 2022)). Dr. Burns appears to not have reviewed various financial analyses conducted by state governmental entities when considering the addition of gender-affirming care coverage. *See*, *e.g.*, Dep't of Ins., State of California, *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance*, Reg. File No. REG-2011-00023 (Apr. 13, 2012), available at: https://tinyurl.com/3jhe5kry (last visited Oct. 27, 2022) (concluding that "the impact on costs or increases in premiums due to the adoption

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of the proposed regulation would be immaterial"); Memorandum from Segal Consulting to Mona Moon re: *Transgender Cost Estimate* (Nov. 19, 2016), available at: https://tinyurl.com/2n8fnd38 (last visited Oct. 27, 2022) (providing financial estimate of impact on the North Carolina State Health Plan of removing gender-affirming care exclusion).

Importantly, these financial analyses all come to the same conclusion: there is little or no financial harm to third-party payors or consumers when gender-affirming care is covered. Burns Dep., at 73:18-73:23, 74:1-75:1,76:8-77:12. At most, the anticipated cost increase is just pennies per person per month. *See, e.g., id.,* at 80:10-81:22. This is likely consistent with BCBSIL's experience.

Significantly, BCBSIL has within its possession evidence that would confirm or dispute the studies found by Plaintiffs' counsel. BCBSIL removed its gender-affirming care exclusion from its insured plans and those self-funded plans with no specific gender-affirming exclusion in 2015. Dkt. No. 84-1, at 33:7-33:18, 35:15-35:23. It could have supplied data to Dr. Burns that would reveal if BCBSIL's costs changed measurably as a result of removing gender-affirming care exclusions and whether there was any impact on employer coverage, premiums, deductibles, or other cost-sharing. BCBSIL did not supply the data, however, and Dr. Burns did not ask for it. Burns Dep., at 50:3–50:11.

Plaintiffs obtained some evidence related to employer and consumer potential costs, should gender-affirming care exclusions be removed from all of the self-funded plans that BCBSIL administers. In written discovery, BCBSIL stated that 505 individuals across 398 self-funded group health plans (representing a total population of approximately 400,000 enrollees) received denials based on the Exclusions during the class period, with claims totaling $1.3 million. Hamburger Decl., *Exh. 12*, at 4-5 (responses to Interrogatory No. 6), 6-7 (responses to Interrogatory No. 8); Burns Dep., at 66:24–70:2. No expert is needed to calculate that if the additional cost for gender-affirming care denied claims of $1.3 million is spread across 400,000 people, the cost comes to ***approximately $0.07 per person, per month***, consistent with the findings of the RAND Corporation. in 2016. *Id.* Burns Dep., at 78:20-78:24; *see also* Padula study

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(coverage of gender-affirming care increased costs by 1.6 cents per member per month). Hamburger Decl., *Exh. 11,* p. 394. Dr. Burns was not supplied this undisputed evidence of the likely *de minimis* impact of the removal of gender-affirming care exclusions on actual BCBSIL enrollees, probably because these facts do not support the opinion that BCBSIL wanted. *See* Burns Dep., at 82:15–83:6.

In sum, Dr. Burns evinced a lack of knowledge "of facts which [would] enable him to ***express a reasonably accurate conclusion*** as opposed to conjecture or speculation." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988) (emphasis added). His testimony should be excluded as unreliable.

c. Dr. Burns did not follow any "methodology" when drafting his report.

Dr. Burns typically utilizes a cost-benefit approach when appearing as an expert witness in other cases, such as for the FTC and U.S. Department of Justice. *See* Burns Decl., ¶4 (in these cases, Dr. Burns "opined on whether there was sufficient economic and/or clinical integration benefits to potentially offset the consumer welfare loss from consolidation and reduced competition"). Here, Dr. Burns eschewed any cost-benefit analysis. No mention of potential benefits of eliminating BCBSIL's ability to administer the Exclusion is contained in Dr. Burns report, much less any balancing of such benefits against purported costs. Burns Dep., at 32:2-32:7. ("Q: You weren't thinking about the cost-benefit analysis when you wrote your report? … A: I don't know if I was thinking about it but I didn't write about it in my report."). Dr. Burns did not himself perform a cost-benefit analysis. *Id.,* at 32:8-32:18; *see also, id.,* at 73:13–73:17. And Dr. Burns admitted that he did not review "any data related to the costs and benefits of administering such an exclusion." *Id.,* at 29:12–29:15. He claims he was not asked to perform that analysis. *Id.,* at 32:19–32:21.

When asked directly about his methodology for this report, Dr. Burns was, at best, opaque in his response:

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> Well, I don't have an empirical knowledge of that. But I've learned over time that there are lots of stakeholders and all of the decisions are made in healthcare, both upstream and downstream, with whoever is making the decision. And I've just learned over time through extensive experience that you have to kind of do a 360 degree analysis of who's affected by these things and which issues are important to them. So if there's a methodology it's trying to do that …
>
> I've spent the last 25, 30 years studying what I call the healthcare value chain, which is basically all the upstream and downstream relationships that every party in the healthcare ecosystem has. You know, you might consider that more simply as who are your buyers, who are your suppliers, who are your competitors. And I've learned to do that for most of the healthcare players in the healthcare ecosystem. And so in this case I was using that sort of general approach for Blue Cross Blue Shield of Illinois.

Id., at 28:11-29:11. To the extent one may parse this testimony, it appears that his "methodology" consisted of identifying the relevant "stakeholders" and applying his "general knowledge" (Burns Dep., at 44:23-44:24) to deduce the "upstream and downstream relationships that every party" has related to gender-affirming care services. However, there is no place in Dr. Burns' report where he follows that methodology. Rather, Dr. Burns eschews any "360 degree analysis" regarding the "effect" of ending BCBSIL's ability to administer discriminatory exclusions. For example, on the face of the Report, Dr. Burns only considers potential "economic harm" without considering benefits. Burns Dep., at 57:24–58:8. Specifically, he did not consider whether a separate harm is suffered when transgender individuals are subjected to discriminatory denial of coverage for gender-affirming care, or if they receive a benefit when gender-affirming care is covered. *Id.* And Dr. Burns can hardly claim to have engaged in a "360 degree analysis" of the financial harms when he did not consider any of the relevant research regarding the financial impact of gender-affirming care exclusions. *See* Section III(C)(2)(b), *supra*.

For example, Dr. Burns suggested that requiring coverage of gender-affirming care would result in various negative economic consequences to employers and consumers including: 1) employers choosing to stop offering health coverage as a benefit; 2) increases in premiums; and 3) increases in cost-sharing; and 4) lowering wages. Burns Decl. ¶22. However, these conclusions were broadly based on his general position that "this is what happens when the costs of healthcare in employer plans go up." Burns Dep., at 63:15–63:19. As detailed in the 2016 RAND study,

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none of these consequences actually occurred when the public and private employers in various studies added coverage of gender-affirming care. *See* RAND Study, at 34, Hamburger Decl., *Exh. 13* ("[W]e estimate that extending insurance coverage to transgender individuals would increase health care spending by 0.038 percent"). Indeed, RAND noted that this cost estimate is very small compared to the spending on mental health care for that same population. *Id.,* at 36-37. As noted in *Karnoski*, the cost impact of adding gender-affirming care is so low, it is "budget dust." *Karnowski v. Trump,* 2017 U.S. Dist. LEXIS 203481, at *25 (W.D. Wash. Dec. 11, 2017).

Dr. Burns's testimony is, at best (and being charitable), an "inspired hunch." *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 826 (7th Cir. 2010). Dr. Burns did not use any recognized scientific method or actually perform any analysis based on data to reach his conclusions. His testimony amounts to pure guesswork unmoored from any scientific evidence, and it will serve (by apparent design) to confound, rather than aid, a factfinder.

D. Dr. Carr's Testimony Must Be Excluded.

1. Dr. Carr's testimony was untimely disclosed and should be excluded.

"Federal Rule of Civil Procedure 26(a)(2)(D) requires parties to make their expert witness disclosures 'at the times and in the sequence that the court orders.'" *Affiliated FM Ins. Co. v. LTK Consulting Serv.*, 2014 U.S. Dist. LEXIS 53211, *31 (W.D. Wash. Apr. 16, 2014) (quoting Fed. R. Civ. P. 26(a)(2)(D)). "Compliance with the disclosure requirements of Rule 26 is 'mandatory.'" *Am. Safety Cas. Ins. Co. v. Happy Acres Enters. Co.*, 2017 U.S. Dist. LEXIS 8285, *10 (W.D. Wash. Jan 20, 2017) (quoting *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 (9th Cir. 2014)). "[Federal] Rule [of Civil Procedure] 37(c)(1) gives teeth to th[is] requirement[] by forbidding the use … of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir. 2001). A court has broad discretion in fashioning an appropriate sanction for a violation of Fed. R. Civ. P. 26(a)'s witness disclosure requirements. *Id.* Such sanctions may include charging the dilatory discloser with reasonable attorneys fees and costs. *See Bentley v. Wells Fargo Bank, N.A.,*

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2019 U.S. Dist. LEXIS 57745, *6 (W.D. Wash. Apr. 2, 2019). The Court's discretion to impose sanctions is "particularly wide when it comes to excluding witnesses under Rule 37(c)(1)." *Am. Safety Cas. Ins. Co.*, 2017 U.S. Dist. LEXIS 8285, *10; *see also Ollier v. Sweetwater Union High Sch. Dist.,* 768 F.3d 843, 859 (9th Cir. 2014). The party facing sanctions bears the burden of proving substantial justification or harmlessness to avoid having the untimely disclosed evidence or witness stricken. *Yeti,* 259 F.3d. at 1107.

On October 21, 2022, Defendant for the first time, and without prior notice to Plaintiffs, disclosed Dr. Carr as an expert witness "responding to the report and addendum offered by Frank G. Fox." Hamburger Decl. ¶3; Dkt. No. 100-8. By any standard, the disclosure of Dr. Carr's expert rebuttal report was untimely. The final expert disclosure deadline established by the Court was June 17, 2022. Dkt. No. 48. Even if that deadline was waived or inapplicable to rebuttal witnesses, the default deadline for producing a rebuttal disclosure is 30 days after the production of the report it is offered to rebut. Fed. R. Civ. P. 26(a)(2)(D)(ii). Dr. Fox was first disclosed as a witness on June 17, 2022, and his report produced on August 19, 2022.[16] Any expert offered to rebut Dr. Fox's opinions in that report was thus required to be disclosed with their report by September 19, 2022. *Id.*, LCR 6.

Dr. Fox submitted an Addendum to his report on September 29, 2022, applying the same methodology employed in his original report to new figures. Dkt. No. 94-3, Exh. T, p. 73, Hamburger Decl., *Exh. 14* (Fox Dep.), at 44:21–45:17. BCBSIL will likely seek to avoid Fed. R. Civ. P. 37(c)'s presumptive suppression of belatedly disclosed evidence by claiming they sought only to rebut Fox's Addendum. *See*, *e.g.*, Dkt. No. 100-3 at 3. However, Defense counsel and Dr. Carr admit that Dr. Fox's primary report was their quarrel. *See, e.g.,* Dkt. 94-3, Exh. U (expert rebuttal report of Scott Carr, Ph.D.), pp. 3-4 (summarized opinions attack Fox's primary report's

[16] As explained in Plaintiffs' separate motion to strike subjoined to their Reply on Motion for Class Certification (Dkt. No. 99), the date for the production of Dr. Fox's report is due entirely to Defendant BCBSIL's failure to produce timely discovery, which necessitated a motion to compel that this Court granted. *See* Dkt. Nos. 52, 70.

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methodology and underlying assumptions); Dkt. No. 100-8 (Defense counsel states that Carr report was "***responding to the report*** and addendum offered by Frank G. Fox.").

Defendant cannot bear their burden of proving either substantial justification or harmlessness of their dilatory disclosures. *See Yeti,* 259 F.3d at 1107; *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) (disruption to court schedule is not harmless).

Defendant's untimely and improper disclosure of Dr. Carr is not harmless. The disclosure here occurred ***months*** after the close of fact discovery, just three (3) days before BCBSIL's opposition to Plaintiffs' motion for class certification was due, and just seven (7) days prior to the deadline for Plaintiffs' reply in support of their motion for class certification. Plaintiffs could not depose Dr. Carr without the Court's authorization and it was too late to depose Dr. Carr before moving for class certification or summary judgment.

Accordingly, and for the reasons articulated in Plaintiffs' separate motion to strike (Dkt. No. 99, at 12), the Court should exclude Dr. Carr's testimony. *See* Fed. R. Civ. P. 37(c); *Bentley,* 2019 U.S. Dist. LEXIS 57745, *6.

2. Dr. Carr offers no relevant testimony.

Regardless of the untimeliness of Dr. Carr's disclosure, his testimony should also be excluded because it is not relevant.

In the first instance, BCBSIL's proffer of Dr. Carr to contest Dr. Fox's testimony on numerosity is irrelevant because "BCBSIL does not contest numerosity" as they admit that "[t]here are at least 40 people who may fit the class definition found at paragraph 91 of the Amended Complaint." Dkt. No. 93 at 24; *see also* Dkt. No. 93-1 at 103 of 139 (Answer to Interrogatory No. 8 stating, in relevant part, "BCBSIL preliminarily states that of the ERISA self-funded group health plans BCBSIL administers, there are approximately 505 unique members of 200 plans who

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have received a denial based on such an exclusion."). Given BCBSIL's numerosity concession, the purpose of Dr. Carr's testimony boggles the mind.[17]

Second, Dr. Carr offers no conclusions that would reasonably help a factfinder since Dr. Carr ***offers no*** opinions of his own on numerosity. *See generally* Dkt. 94-3, Exh. U (Rebuttal Report of Scott Carr). Dr. Carr's untimely report is therefore entirely devoted to critiquing Dr. Fox's testimony while conceding that Dr. Fox's numerosity conclusion is correct. *See* Dkt. No. 94-3 at 104 of 166 (Table 6).

In sum, because Dr. Carr offers no affirmative opinions that will assist a factfinder and his testimony does not "fit" with the facts at issue, it should be excluded as irrelevant.

E. The Opinions of Dr. Laidlaw, Dr. Burns, and Dr. Carr Lack Probative Value and Are Therefore Inadmissible Under Federal Rule of Evidence 403.

Finally, the Court should exclude the opinions and testimony of Dr. Laidlaw, Dr. Burns, and Dr. Carr because the introduction of their opinion testimony will result in unfair prejudice, confusion of the issues, or in misleading testimony. Fed. R. Evid. 403. As articulated above, Dr. Laidlaw, Dr. Burns, and Dr. Carr offer no opinions relevant to the issues in this case, and, in any event, the opinions they offer are irrelevant, speculative, and unreliable. Their testimony would also result in prejudice, as the testimony seeks to sow confusion about the propriety of gender-confirming care based on speculation, irrelevant, misleading, and, in Dr. Laidlaw's case, biased opinions.

IV. CONCLUSION

For the foregoing reasons, the Court should exclude the reports, opinions, and testimony of Dr. Laidlaw, Dr. Burns, and Dr. Carr.

[17] Conversely, Dr. Fox's testimony is relevant because the burden of proof on numerosity falls on Plaintiffs.

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DATED: October 31, 2022.

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Attorneys for Plaintiffs

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard; and PATRICIA PRITCHARD, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF ILLINOIS, Defendant.	NO. 3:20-cv-06145-RJB [PROPOSED] ORDER GRANTING PLAINTIFFS' CONSOLIDATED MOTION TO EXCLUDE TESTIMONY FROM MICHAEL LAIDLAW, M.D., LAWTON R. BURNS, PH.D., AND SCOTT CARR, PH.D.

This matter came before the Court on Plaintiff C.P.'s Consolidated Motion to Exclude Expert Testimony from Michael Laidlaw, M.D., Lawton R. Burns, Ph.D., and Scott Carr, Ph.D. Plaintiff C.P., by and through his parents, Patricia Pritchard and Nolle Pritchard, were represented by Eleanor Hamburger and Daniel S. Gross of Sirianni Youtz Spoonemore Hamburger PLLC, and Omar Gonzalez-Pagan and Jennifer C. Pizer of Lambda Legal Defense and Education Fund, Inc. Defendant Blue Cross Blue Shield of Illinois was represented by its counsel, Gwendolyn C. Payton, John R. Neeleman and Stephanie N. Bedard of Kilpatrick Townsend & Stockton LLP.

The Court reviewed and considered the pleadings and record herein, including:

- Plaintiff C.P.'s Consolidated Motion to Exclude Testimony from Michael Laidlaw, M.D., Lawton R. Burns, Ph.D., and Scott Carr, Ph.D.;
- Declaration of Eleanor Hamburger and all exhibits in Support of Motion;

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- BCBSIL's Opposition to Plaintiff C.P.'s Consolidated Motion to Exclude Testimony from Michael Laidlaw, M.D., Lawton R. Burns, Ph.D., and Scott Carr, Ph.D., and all declarations and exhibits in opposition to the Motion;
- Plaintiff C.P.'s reply brief and all declarations and exhibits in support of Plaintiff's reply brief, if any;
- The files and records in this case, and
- _____
- _____.

Based upon the foregoing, and for good cause shown, the Court hereby FINDS:

1. The proposed testimony of BCBSIL's proposed expert witnesses, Michael Laidlaw, M.D., Lawton R. Burns, Ph.D., and Scott Carr, Ph.D., as outlined in their expert declarations and in other evidence provided to and considered by the court, as listed above, fails to fulfill the requirements for reliability and relevance imposed by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

2. This test for a proposed expert testimony's relevance under Fed. R. Evid. 702, *Daubert*, and *Kumho Tire* is more stringent than the traditional relevance standard set out in Fed. R. Evid. 401. However, even if it were not, the testimony of these three proposed experts fails to satisfy the basic relevance requirement applicable to all evidence and would be admissible under Fed. R. Evid. 401 and 402. Moreover, to the extent that any of the testimony of the proposed experts could be viewed as minimally relevant, such relevance would be outweighed by the likely prejudice engendered by its admission, rendering it inadmissible under Fed. R. Evid. 403.

3. ***Sufficient Facts or Data.*** The proposed experts' testimony, based in large part on personal opinion, further fails to satisfy the requirements Fed. R. Evid. 702(b) and 703 that admissible expert opinion be based on sufficient facts or data.

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4. ***Untimely Disclosure of Scott Carr, Ph.D.*** Defendant BCBSIL failed to timely disclose Scott Carr, Ph.D. as an expert witness to rebut the testimony of proposed Plaintiffs' expert witness Frank Fox, Ph.D., pursuant to Fed. R. Civ. P. 26(a)(2)(D)(ii) and LCR 6, including but not limited to because of the foregoing reasons:

(a) Plaintiffs timely disclosed Frank Fox, Ph.D. as a witness on June 17, 2022, the expert witness disclosure deadline directed by the court (Dkt. No. 48); Plaintiffs further timely disclosed Dr. Fox's report to BCBSIL on August 19, 2022, any delay in the production of which is attributable to Defendant and was harmless.

(b) The last day on which Defendant could have timely disclosed a witness to rebut Dr. Fox's report was September 19, 2022. Fed. R. Civ. P. 26(a)(2)(D)(ii), LCR 6.

(c) Dr. Fox properly completed an updated Addendum to his initial report, which was timely disclosed to Defendant on September 29, 2022, in which Dr. Fox applied the methodology employed and explained in his initial report to updated data from a source on which he relied in his initial report.

(d) On October 21, 2022, Defendant disclosed to Plaintiffs Scott Carr, Ph.D. and his report as expert witness/testimony in order to rebut both Dr. Fox's Addendum and his initial report. Pursuant to Fed. R. Civ. 26(a)(2)(D) and LCR 6, Dr. Carr and his report were not timely disclosed to Plaintiffs to rebut Dr. Fox's initial report.

(e) BCBSIL failed to carry its burden of demonstrating that its late disclosure of Dr. Carr and his report were substantially justified or harmless. BCBSIL fails to demonstrate any reasonable justification for this delay. Further, coming after the discovery cutoff, after the discovery motion filing deadline, one business day before the dispositive motion filing deadline, after Plaintiffs had filed their motion for class certification, and shortly before the deadline for Plaintiffs' Reply on their class certification motion prejudices, the late disclosure of Dr. Carr and his report was harmful to Plaintiffs.

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For the foregoing reasons, this Court exercises its discretion and GRANTS Plaintiffs' motions to exclude the testimony of Michael Laidlaw, M.D., Lawton R. Burns, Ph.D. and Scott Carr, Ph.D.

NOW, THEREFORE, IT IS HEREBY ORDERED that the testimony of Michael Laidlaw, M.D., Lawton R. Burns, Ph.D., and Scott Carr, Ph.D. and the reports they have completed shall not be considered in this matter. Further, the expert disclosure deadline, discovery cutoff, and deadline for discovery motions having passed, Defendant shall not disclose or make use the testimony or reports of any as yet undisclosed expert witnesses without prior authorization by the Court, which shall require extraordinary justification.

DATED this _____ day of _____, 2022.

ROBERT J. BRYAN
United States District Judge

Presented by:

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