

The Honorable Robert J. Bryan

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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’ OPPOSITION TO
BCBSIL’S MOTION TO EXCLUDE
PLAINTIFFS’ EXPERT TESTIMONY

**Note on Motion Calendar:
November 18, 2022**

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I. INTRODUCTION

BCBSIL moves to exclude the testimony of all four of Plaintiffs’ experts as “irrelevant and unreliable.” Dkt. No. 103 at 1. Each of the four witnesses offer relevant, reliable testimony.

Randi C. Ettner, Ph.D., a clinical psychologist; Dan H. Karasic, M.D., a psychiatrist; and Loren S. Schechter, M.D., a plastic surgeon (collectively, “Plaintiffs’ Medical Experts”), offer testimony about the recommended treatment guidelines for gender dysphoria and the necessity, safety, and efficacy of gender-affirming care in general, as well as the medical necessity of C.P.’s gender-affirming care in particular. Frank G. Fox, Ph.D., offers relevant, reliable testimony related to numerosity.

Because the testimony of each of Plaintiffs’ experts is relevant and reliable, the Court should deny BCBSIL’s motion to exclude their testimony.

II. FACTUAL BACKGROUND

13 Plaintiffs timely disclosed all of their experts on June 17, 2022. *See* Dkt. No. 100-6 (disclosing Dr. Fox but noting that his report could not be completed due to the ongoing discovery dispute); Hamburger Decl., *Exh. 1* (disclosing Drs. Ettner, Karasic and Schechter). Dr. Fox’s full expert disclosure occurred within a few days after BCBSIL produced the required discovery. *See* Dkt. Nos. 70, 100-1, 100-3. When Dr. Fox realized that data upon which he relied had been updated, he updated his report in an Addendum, which was timely provided to BCBSIL. *See id.* The update did not change any of Dr. Fox’s opinions but affected some of his calculations. *See* Dkt. No. 104, *Exhs. G–H*.

21 BCBSIL had the opportunity to depose all of the experts, including Dr. Fox, and had the opportunity to discuss the changes in Dr. Fox’s calculations as a result of the updated data. *See* Dkt. No. 100-7. BCBSIL did not request an additional deposition of Dr. Fox based upon the updated data, although it received his Addendum with plenty of time to do so. *Id.*, ¶2.

25 In stark contrast, defense counsel did not provide *any* timely disclosures on June 17, 2022. *Id.*, ¶3. Defense counsel claimed that its lead counsel was sick and needed an additional week for

1 the disclosures. *See* Dkt. No. 108-9. Plaintiffs’ counsel readily agreed. *Id.* Discovery demonstrates
 2 that defense counsel used the additional time to have its expert Dr. Burns *to begin drafting* his
 3 report. *See* Dkt. No. 108-4 (Dr. Burns’ timesheet shows that he did not commence work on his
 4 report until June 23, 2022). Although BCBSIL disclosed Dr. Burns and Dr. Laidlaw as experts on
 5 June 24, 2022, it did not produce Dr. Laidlaw’s report until August 5, 2022. Dkt. No. 108 at ¶2.
 6 Defense counsel did not disclose Dr. Carr or his report until October 21, 2022.

7 III. LAW AND ARGUMENT

8 A. Legal Standard for Admissibility of Expert Testimony.

9 “Federal Rule of Evidence 702 governs the admission of expert opinion testimony.” *United*
 10 *States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006). In order for expert testimony to
 11 be admissible, “a court must determine that the experts are qualified, that their opinions are
 12 reliable, and that their testimony fits the case.” *Allen v. Am. Cap. Ltd.*, 287 F.Supp.3d 763, 776 (D.
 13 Ariz. 2017). “This analysis is meant to be flexible.” *Id.*

14 “When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the
 15 expert may testify and the [factfinder] decides how much weight to give that testimony.” *Primiano*
 16 *v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010). “Reliable expert testimony need only be relevant, and
 17 need not establish every element that the plaintiff must prove, in order to be admissible.” *Id.*
 18 “Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the
 19 pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the
 20 knowledge and experience of the relevant discipline.” *Sandoval-Mendoza*, 472 F.3d at 654
 21 (cleaned up). And “[a] trial court should admit medical expert testimony if physicians would accept
 22 it as useful and reliable.” *Id.* at 655.

23 “A trial court has broad discretion in assessing the relevance and reliability of expert
 24 testimony.” *Houserman v. Comtech Telecommunications Corp.*, 509 F.Supp.3d 1301, 1303 (W.D.
 25 Wash. 2020) (quotation omitted). “When the court sits as trier of fact, it has much greater flexibility
 26 to admit expert testimony and give it the weight to which it is entitled.” *United States v. RSR Corp.*,

1 No. C00-890JLR, 2005 U.S. Dist. LEXIS 45989 at *4 (W.D. Wash. Oct. 4, 2005). “Shaky but
 2 admissible evidence is to be attacked by vigorous cross-examination, presentation of contrary
 3 evidence, and careful instruction on the burden of proof, not exclusion.” *Bluetooth SIG, Inc. v.*
 4 *FCA US LLC*, 468 F.Supp.3d 1342, 1345 (W.D. Wash. 2020) (cleaned up).

5 **B. Plaintiffs’ Medical Experts Are Highly Qualified.¹**

6 BCBSIL challenges the reliability of Plaintiffs’ Medical Experts to provide expert
 7 testimony because, according to BCBSIL, “they do not have any training or expertise in the
 8 treatment of minors receiving transgender-related services” (Dkt. No. 103 at 14), and because
 9 Dr. Schechter is purportedly not “qualified to opine on the efficacy of [gender-confirming]
 10 surgeries as treatment for the underlying mental health disorder of gender dysphoria” (*id.* at 12).
 11 Nothing could be further from the truth.

12 All three medical experts are extremely qualified and recognized experts within the field
 13 of transgender health and in their individual disciplines. Indeed, all three have co-authored the
 14 World Professional Association for Transgender Health (“WPATH”) *Standards of Care for the*
 15 *Health of Transgender and Gender Diverse People*, the clinical practice guidelines governing the
 16 provision of gender-affirming care accepted around the world. *See* Hamburger Decl., *Exhs.* 5–6.
 17 They have extensive experience providing gender-affirming care to transgender youth. Moreover,
 18 Plaintiffs’ Medical Experts based their opinions on their education and training, years of research
 19 and clinical experience in the field of transgender health, and their review of and familiarity with
 20 relevant peer-reviewed and authoritative literature in the field of transgender health. Dkt. No. 98-
 21 1 (“Ettner Report”) at ¶¶15–19; Dkt. No. 98-2 (“Karasic Report”) at ¶¶15–19; Dkt. No. 98-3
 22 (“Schechter Report”) at ¶19.

23 **1. Randi C. Ettner, Ph.D.**

24 Dr. Randi C. Ettner is a clinical and forensic psychologist with over 35 years of experience
 25 working in the field of transgender health, with extensive expertise concerning the diagnosis and
 26

¹ BCBSIL does not challenge the qualifications of Dr. Fox. *See generally* Dkt. No. 103.

1 treatment of gender dysphoria. Ettner Report at ¶3; *see also* Dkt. No. 98-1, *Exh. A* (“Ettner CV”).
 2 She has evaluated and/or treated over 3,000 individuals with gender dysphoria and mental health
 3 issues related to gender variance. Ettner Report at ¶5. Among 25-30% of her transgender patients
 4 have been minors. Hamburger Decl., *Exh. 2* (Excerpts of Transcript of the Deposition of Randi C.
 5 Ettner, Ph.D.) (hereinafter, “Ettner Dep.”) at 24:5–25:3. Dr. Ettner “has referred approximately
 6 300 patients for gender confirmation surgery.” *Edmo v. Idaho Dep’t of Correction*, 358 F.Supp.3d
 7 1103, 1113 (D. Idaho 2018); Hamburger Decl., *Exh. 7* at 43:24–44:1. Aside from her private
 8 practice, Dr. Ettner has served as the chief psychologist at the Chicago Gender Center from 2005
 9 to 2016, when it moved to the Weiss Memorial Hospital, and since that time, as a consultant to the
 10 Center for Gender Confirmation Surgery at Weiss Memorial Hospital. Ettner Report at ¶3.

11 A former board member of WPATH and member of WPATH’s scientific committee,
 12 Dr. Ettner is a co-author of Versions 7 and 8 of the *Standards of Care for the Health of*
 13 *Transgender and Gender Diverse People* published by WPATH. Ettner Report at ¶5; Ettner Dep.
 14 at 20:17–20:23; Hamburger Decl., *Exhs. 5–6*. Dr. Ettner is also the editor of both editions of the
 15 medical text *Principles of Transgender Medicine and Surgery*, in which she has authored or co-
 16 authored chapters like “Theories of the etiology of transgender identity” and “Surgery: General
 17 principles.” *See* Ettner Report at ¶6; Dkt. No. 98-1, *Exh. A* at 7–8. She has also authored book
 18 chapters in medical texts such as *Gender Confirmation Surgery: Principles and Techniques for*
 19 *an Emerging Field* and *Surgical Management of the Transgender Patient*, including a chapter
 20 titled “Pre-operative evaluation.” *Id.*

21 Dr. Ettner has also conducted extensive original research and been an instructor pertaining
 22 to transgender people and the etiology, diagnosis, and treatment of gender dysphoria. *See*
 23 *Sundstrom v. Frank*, 630 F.Supp.2d 974, 986 (E.D. Wis. 2007). This includes the publication of
 24 several peer-reviewed scientific articles. Ettner Report at ¶6.

25 Dr. Ettner has provided expert testimony in multiple federal court cases, including her
 26 appointment “by a federal court as an independent expert related to evaluation of an incarcerated
 patient for gender confirmation surgery.” *Edmo*, 358 F.Supp.3d at 1113. The following cases have

1 cited Dr. Ettner’s testimony at length: *Iglesias v. Fed. Bureau of Prisons*, No. 19-CV-415-NJR,
 2 2021 U.S. Dist. LEXIS 245517 (S.D. Ill. Dec. 27, 2021), modified, No. 19-CV-415-NJR, 2022
 3 U.S. Dist. LEXIS 71002 (S.D. Ill. Apr. 18, 2022); *Eller v. Prince George’s Cnty. Pub. Sch.*, 580
 4 F.Supp.3d 154 (D. Md. 2022); *Monroe v. Baldwin*, 424 F.Supp.3d 526 (S.D. Ill. 2019); *Edmo v.*
 5 *Idaho Dep’t of Correction*, 358 F.Supp.3d 1103 (D. Idaho 2018); *Hicklin v. Precynthe*, No. 4:16-
 6 CV-01357-NCC, 2018 U.S. Dist. LEXIS 21516 (E.D. Mo. Feb. 9, 2018); *Norsworthy v. Beard*, 87
 7 F.Supp.3d 1164, 1177 (N.D. Cal. 2015); *Fields v. Smith*, 712 F.Supp.2d 830 (E.D. Wis. 2010),
 8 supplemented (July 9, 2010), *aff’d*, 653 F.3d 550 (7th Cir. 2011); *Sundstrom v. Frank*, 630
 9 F.Supp.2d 974 (E.D. Wis. 2007).

10 **2. Dan H. Karasic, M.D.**

11 Dr. Dan H. Karasic is a board-certified psychiatrist with over 30 years of experience
 12 working with patients with gender dysphoria. Karasic Report at ¶3; *see also* Dkt. No. 98-2, *Exh. A*
 13 (“Karasic CV”). Over the past 30 years, Dr. Karasic has diagnosed and provided care to thousands
 14 of transgender patients. Karasic Report at ¶7; Hamburger Decl., *Exh. 8* at 23:11–23:14, 26:16–
 15 26:19. Dr. Karasic has treated hundreds of adolescents with gender dysphoria. *Id.* at 23:15–23:20.
 16 Indeed, one third of his patients (*i.e.*, half of his transgender patients) are minors. *Id.*, *Exh. 3*
 17 (Excerpts of Transcript of the Deposition of Dan H. Karasic, M.D.) (hereinafter, “Karasic Dep.”)
 18 at 35:25–36:14. In addition, Dr. Karasic was the co-lead and co-founder of the UCSF Alliance
 19 Health Project’s transgender health practice in 2011, and the psychiatrist for the Dimensions Clinic
 20 for transgender youth in San Francisco for 17 years. Karasic Report at ¶11; Karasic Dep. at 26:6–
 21 26:15; Dkt. No. 98-2, *Exh. A* at 2.

22 A former board member of WPATH, Dr. Karasic is a co-author of Versions 7 and 8 of the
 23 WPATH *Standards of Care*, including serving as the lead author of Version 8’s chapter on Mental
 24 Health. Karasic Report at ¶8; Karasic Dep. at 27:11–27:13, 28:17–28:19; Hamburger Decl.,
 25 *Exhs. 5–6*. Dr. Karasic also co-authored the mental health section for both editions of the
 26 *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary*

1 *People* published by the UCSF Center of Excellence for Transgender Care. Karasic Report at ¶9.
 2 Dr. Karasic edited the book *Sexual and Gender Diagnoses of the Diagnostic and Statistical*
 3 *Manual (DSM): A Reevaluation*. Karasic Report at ¶12. Finally, Dr. Karasic has also published
 4 over a dozen peer-reviewed articles, including multiple focused on the diagnosis and treatment of
 5 gender dysphoria and on gender dysphoric adolescents. Dkt. No. 98-2, *Exh. A* at 16–17.

6 Dr. Karasic provided expert testimony in multiple cases involving gender-affirming care
 7 (*id.* at 19), including in support of the plaintiffs’ successful motions for summary judgment in
 8 *Kadel v. Folwell*, No. 1:19CV272, 2022 U.S. Dist. LEXIS 103780 (M.D.N.C. June 10, 2022) (as
 9 corrected Aug. 10, 2022); and *Fain v. Crouch*, No. CV 3:20-0740, 2022 U.S. Dist. LEXIS 137084
 10 (S.D.W. Va. Aug. 2, 2022), where the court cited him extensively. Dr. Karasic provided expert
 11 testimony at trial in *Brandt v. Rutledge*, 551 F.Supp.3d 882 (E.D. Ark. 2021), *aff’d*, 47 F.4th 661
 12 (8th Cir. 2022), before the U.S. District Court for the Eastern District of Arkansas (*e.g.*, Hamburger
 13 Decl., *Exh. 8*), a case involving access to gender-affirming treatment for adolescents.

14 **3. Loren S. Schechter, M.D.**

15 Dr. Loren S. Schechter is a board-certified plastic surgeon with over 27 years of experience
 16 working in the field of transgender health who specializes in performing gender confirming
 17 surgeries. Schechter Report at ¶3; *see also* Dkt. No. 98-3, *Exh. A* (“Schechter CV”). Dr. Schechter
 18 currently serves as Professor of Surgery at Rush University Medical Center, where he is the
 19 Director of Gender Affirmation Surgery, and previously served as a Clinical Professor of Surgery
 20 at the University of Illinois at Chicago. Schechter Report at ¶8; Schechter CV at 2. Dr. Schechter
 21 also maintains a clinical practice in plastic surgery in Illinois where he treats patients from around
 22 the country, as well as from around the world, and served as Director of the Center for Gender
 23 Confirmation Surgery at Louis A. Weiss Memorial Hospital. Schechter Report at ¶8; Schechter
 24 CV at 3. Dr. Schechter has performed over 1,500 gender confirmation surgeries during his medical
 25 career, and approximately 90 percent of the patients in his clinical practice are transgender
 26 individuals seeking gender confirmation surgeries. Schechter Report at ¶9. Between 10 to 20

1 percent” of Dr. Schechter’s patients are minors, and he performs gender-confirming surgeries on
 2 about 10 to 25 transgender adolescents per year. Hamburger Decl., *Exh. 4* (Excerpts of transcript
 3 of the Deposition of Loren S. Schechter, M.D.) (hereinafter, “Schechter Dep.”) at 23:24–24:2,
 4 24:17–24:23.

5 Dr. Schechter served as the author of the WPATH *Standard of Care* section focused on the
 6 relationship of the surgeon with the treating mental health professional and the physician
 7 prescribing hormone therapy in Version 7, and the co-lead author of Version 8’s chapter on
 8 surgical and postoperative care. Schechter Report at ¶10; Schechter Dep. at 29:17–30:4;
 9 Hamburger Decl., *Exhs. 5–6*. Dr. Schechter has also published the medical books *Surgical*
 10 *Management of the Transgender Patient*, the first surgical atlas dedicated to gender confirming
 11 surgeries, in 2016 and *Gender Confirmation Surgery: Principles and Techniques for an Emerging*
 12 *Field* in 2020. In addition, Dr. Schechter has conducted extensive research and published over 60
 13 peer-reviewed publications, the majority of which are focused on the provision of gender-
 14 confirming surgery as treatment for gender dysphoria. *See* Schechter CV at 10–16. Dr. Schechter
 15 has written the seminal text on “The Surgeon’s Relationship with the Physician Prescribing
 16 Hormones and the Mental Health Professional.” *See* Schechter Report at ¶10; Schechter CV at 11.

17 Dr. Schechter has provided expert testimony in multiple cases involving gender-affirming
 18 care, including in support of the plaintiffs’ successful motions for summary judgment in *Kadel*,
 19 2022 U.S. Dist. LEXIS 103780, and *Fain*, 2022 U.S. Dist. LEXIS 137084. Dr. Schechter also
 20 provided expert testimony and was cited by the courts in *Flack v. Wis. Dep’t of Health Servs.*, 328
 21 F.Supp.3d 931 (W.D. Wis. 2018), and *Boyden v. Conlin*, 341 F.Supp.3d 979 (W.D. Wis. 2018).

22 * * *

23 Based on the foregoing, BCBSIL’s contention that Plaintiffs’ Medical Experts “do not have
 24 training or expertise in the treatment of minors receiving transgender-related services” (Dkt. No.
 25 103 at 14) is wholly unfounded. Plaintiffs’ Medical Experts have extensive expertise, skill, and
 26 training in the field of transgender health, and qualify as experts based on their decades of practical
 experience. Each has extensive clinical experience providing gender-affirming care and has

1 provided such care to hundreds of adolescents with gender dysphoria. “A witness can qualify as
 2 an expert through practical experience in a particular field, not just through academic training.”
 3 *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991).

4 BCBSIL’s contention that Dr. Schechter is not “qualified to opine on the efficacy of
 5 [gender-confirming] surgeries as treatment for the underlying mental health disorder of gender
 6 dysphoria” because gender dysphoria is a mental health condition and Dr. Schechter is not a mental
 7 health professional is baseless. Dkt. No. 103 at 12.

8 **First**, gender dysphoria is not a mental health condition that can be treated with
 9 psychotherapy alone. Ettner Report at ¶38. It is a serious **medical** condition characterized by
 10 distress arising out of the incongruence between a transgender person’s body and their gender
 11 identity. Schechter Report at ¶21; Ettner Report at ¶27. “While Gender Dysphoria (GD) is still
 12 considered a mental health condition in the Diagnostic and Statistical Manual of Mental Disorders,
 13 (DSM-5-TR) of the American Psychiatric Association[, g]ender incongruence is no longer seen as
 14 pathological or a mental disorder in the world health community.” Hamburger Decl., *Exh. 6* at S7.
 15 Indeed, “[g]ender incongruence has been moved out of the ‘Mental and behavioural disorders’
 16 chapter [in the International Statistical Classification of Diseases and Related Health Problems
 17 (ICD-11)] and into the new ‘Conditions related to sexual health’ chapter” in order to “reflect[]
 18 current knowledge that trans-related and gender diverse identities are not conditions of mental ill-
 19 health, and that classifying them as such can cause enormous stigma.” Hamburger Decl., *Exh. 9*
 20 (cited in Karasic Report, ¶31(d)); *see also* Ettner Report at ¶29 (“[G]ender incongruence is not a
 21 mental illness, but rather a serious, treatable medical condition that creates significant distress.”).
 22 The treatment of gender dysphoria is multifaceted and includes the provision of medical
 23 interventions such as hormone treatment and surgical procedures. Schechter Report at ¶22
 24 (“Appropriate medical care, including ... hormone therapy, and gender confirmation surgeries[,]
 25 can help alleviate gender dysphoria. Gender confirmation surgeries, which bring a person’s body
 26 into better alignment with their gender identity, have been shown to be an effective treatment for
 gender dysphoria.”); *id.* at ¶32 (“Gender confirming surgeries ... are clinically indicated to treat

1 the underlying *medical condition of gender dysphoria*.” (emphasis added)); *see also* Ettner Report
 2 at ¶49; Karasic Report at ¶36. Indeed, “the overarching goal of [gender-affirming] treatment is to
 3 eliminate the distress of gender dysphoria *by aligning an individual patient’s body and*
 4 *presentation with their internal sense of self*.” Karasic Report at ¶32 (emphasis added); *see also*
 5 Ettner Report at ¶65.

6 **Second**, Dr. Schechter is qualified to testify as to the efficacy of gender-confirming
 7 surgeries because he has routinely provided such care for over 27 years; he has extensively studied
 8 such care; he is intimately familiar with the scientific literature, to which he has contributed
 9 extensively, on this subject as part of his work; and he is a co-author of Versions 7 and 8 of the
 10 WPATH *Standards of Care*. Moreover, “[m]ental health care is a part of medical education,” and
 11 Dr. Schechter “routinely teach[es] and attend[s] and lecture[s] at multidisciplinary conferences
 12 which involve and include an interdisciplinary and multidisciplinary team, which involves mental
 13 health and behavioral health professionals.” Schechter Dep. at 19:7–19:13. As noted above, he has
 14 authored the key text on the relationship between surgeons and mental health providers when
 15 delivering gender-affirming care. Schechter Report at ¶10; Schechter Dep. 30:1–30:4, 34:13–
 16 34:16.

17 **Third**, courts have relied on Dr. Schechter’s expert testimony on the very issue that
 18 BCBSIL contends he cannot opine. For example, the court in *Fain* extensively cited
 19 Dr. Schechter’s expert testimony for the propositions that: gender-affirming surgical “procedures
 20 are clinically indicated to treat the underlying medical condition of gender dysphoria,” and “that
 21 the prevailing consensus of the medical community recognizes that procedures used to treat gender
 22 dysphoria are reconstructive, not experimental, and are medically necessary.” *Fain*, 2022 U.S.
 23 Dist. LEXIS 137084 at *31 (cleaned up).

24 **C. Plaintiffs’ Medical Experts’ Testimony Is Relevant.**

25 “Expert opinion testimony is relevant if the knowledge underlying it has a valid connection
 26 to the pertinent inquiry.” *Primiano*, 598 F.3d at 565. In order to be “relevant to the task at hand,”

1 the proposed expert testimony need only “logically advance[] a material aspect of the proposing
2 party’s case.” *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995)
3 (“*Daubert IP*”). Here, the proposed expert testimony of Dr. Ettner, a clinical psychologist;
4 Dr. Karasic, a psychiatrist; and Dr. Schechter, a plastic surgeon, goes to the fact that (1) gender-
5 affirming care is safe, effective, and can be medically necessary for a patient, and (2) the gender-
6 affirming care provided to C.P. was consistent with the established clinical practice guidelines,
7 appropriate, and medically necessary for C.P. This testimony is necessary and relevant to rebut
8 asserted defenses by BCBSIL.

9 **First**, BCBSIL challenges the relevance of the testimony of Plaintiffs’ Medical Experts
10 because, according to BCBSIL, they “do not offer any opinion on whether BCBSIL is allowed to
11 administer plans containing exclusions under the law.” Dkt. No. 103 at 4. BCBSIL misses the
12 mark. BCBSIL’s defense is that a purported lack of “medical consensus regarding gender-
13 affirming treatment” demonstrates that BCBSIL is not discriminating on the basis of sex when
14 administering the Exclusions. *See* Dkt. No. 87 at 16. BCBSIL’s contention is wrong on the law
15 (*see* Dkt. No. 96 at 21–25) as well as on the facts.² Accordingly, the testimony from Plaintiffs’
16 Medical Experts, who provide expert opinions on the scientific basis, safety, efficacy, and medical
17 necessity of gender-affirming care as well as the medical consensus surrounding it, is highly
18 relevant to the case at hand and would assist any trier of fact in assessing BCBSIL’s contention
19 that it has no liability under Section 1557 based on a purported lack of consensus.

20 **Second**, although BCBSIL does not contest Plaintiffs’ standing, BCBSIL has critiqued the
21 propriety of the gender-affirming care provided to C.P. by his medical providers and cited to *Doe*
22 *v. Snyder*, 28 F.4th 103, to question the medical necessity of C.P.’s care. Dkt. No. 87 at 25–26.

23
24 ² In support for its contention, BCBSIL misleadingly quotes the Ninth Circuit as stating that “WPATH’s
25 Standards of Care are not universally endorsed and questioning whether there have been any high-quality
26 studies showing that male chest reconstruction surgery is safe, effective, or optimal for treating gender
dysphoria.” Dkt. No. 87 at 21 (quoting *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022)). The Ninth Circuit was
merely describing the testimony of the defendant’s expert. BCBSIL intentionally eliminated the preceding
clause: “Defendant proffered competing expert testimony that” *Doe*, 28 F.4th at 112. BCBSIL’s
contention is also wrong. *See* Dkt. No. 96 at 22-23.

1 But C.P.’s care has been entirely consistent with the established clinical practice guidelines for the
2 treatment of gender dysphoria. *See* Ettner Report at ¶¶77, 81; Karasic Report at ¶75; Ettner Dep.,
3 65:4–65:20; Karasic Dep., 55:7–55:21; Section III(D)(1), *infra*. C.P. was diagnosed with gender
4 dysphoria by Dr. Hatfield, a physician board-certified in family medicine, and the diagnosis was
5 independently corroborated by Sharon Booker, a licensed mental health counselor. Karasic Dep.
6 at 54:2–54:7; *cf.* Ettner Dep., 65:12–65:13. And, both Dr. Hatfield and Ms. Booker agreed that
7 chest surgery was medically necessary to treat C.P.’s gender dysphoria. *See* Dkt. Nos. 97-3, 97-4,
8 97-5. The WPATH *Standards of Care* only require that an adolescent like C.P. be assessed by a
9 qualified mental health provider, and both Dr. Hatfield and Ms. Booker are such. *See* Section
10 III(D)(1), *infra*. Indeed, C.P.’s case is consistent with BCBSIL’s own Medical Policy. *See* Dkt.
11 No. 84-4 at 7; Dkt. No. 108-15 at 40:12–41:20. BCBSIL’s Rule 30(b)(6) witness, Dr. Kim Reed,
12 conceded as much. *Id.* at 52:19–53:9, 60:5–62:3.

13 Ignoring the above, BCBSIL cites to *Doe*’s observation that the plaintiff did not provide to
14 the district court “a declaration from any psychiatrist *or* medical doctor who is treating him that
15 attested to the necessity and suitability of the surgery in his particular case,” and argues that
16 “[h]ere, Plaintiffs likewise offered no testimony from a *psychiatrist* who treated C.P. or who was
17 part of the team recommending surgery.” Dkt. No. 87 at 21 (quoting *Doe*, 28 F.4th at 112, internal
18 quotations omitted) (emphasis added). ***BCBSIL intentionally omits the phrase “medical doctor,”***
19 which Dr. Hatfield clearly is and the Ninth Circuit mentions. It also omits the Ninth Circuit’s
20 mention that in *Doe*, an “expert psychiatrist had not opined as to whether *Doe* himself is a suitable
21 candidate for surgery and had not met or examined *Doe*.” *Doe*, 28 F.4th at 112–13. Here, Plaintiffs
22 retained Dr. Ettner, a clinical psychologist, and Dr. Karasic, a psychiatrist, to do exactly that—
23 opine as of the propriety of C.P.’s course of treatment from a mental health perspective based on
24 their review of C.P.’s medical records and after meeting with C.P. Dr. Schechter’s testimony
25 further sheds light on the safety, efficacy, and medical consensus about that care. Therefore,
26 Plaintiffs’ Medical Experts’ testimony is highly relevant to the case at hand because it provides

1 helpful information and context that rebuts BCBSIL’s unfounded contention that C.P.’s medical
2 care was not medically necessary.

3 Plaintiffs’ Medical Experts’ testimony is thus relevant because it “will assist the trier of
4 fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702; *see also Siring*
5 *v. Oregon State Bd. of Higher Educ.*, 927 F.Supp.2d 1069, 1078 (D. Or. 2013).

6 **D. The Testimony of Plaintiffs’ Medical Experts Is Reliable.**

7 BCBSIL further argues that Plaintiffs’ Medical Experts’ testimony should be excluded as
8 unreliable because (1) they supposedly rely on organizations supporting their position and ignore
9 authority to the contrary, namely, the Endocrine Society Guidelines; (2) they allegedly ignore
10 medical literature that does not support their conclusions; and (3) they purportedly fail to account
11 for the impact of side effects. Dkt. No. 103 at 7–12. Each contention is without merit.

12 All three of Plaintiffs’ Medical Experts based their opinions on their education and training,
13 years of research and clinical experience in the field of transgender health, and their review of and
14 familiarity with relevant peer-reviewed and authoritative literature in the field of transgender
15 health. Ettner Report at ¶¶15–19; Karasic Report at ¶¶15–19; Schechter Report at ¶19.
16 Additionally, Dr. Ettner and Dr. Karasic reviewed C.P.’s medical records and met with C.P. and
17 his parents. Ettner Report at ¶17; Karasic Report at ¶17. Thus, “[t]he doctors employed sound
18 methodologies to reach their conclusions.” *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1234
19 (9th Cir. 2017) (finding reliable medical expert’s opinions that were based “on medical records as
20 well as his education, training and experience, knowledge of the pertinent medical literature and
21 his knowledge of the epidemiology, diagnosis and natural history of [the condition]” (alterations
22 omitted)). “[C]onsidering the liberal inclusion of expert testimony, a liberality that is only
23 enhanced in the context of a bench trial,” exclusion of Plaintiffs’ Medical Experts’ testimony
24 would not be appropriate. *Fed. Trade Comm’n v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL
25 1221654 at *2 (W.D. Wash. Mar. 29, 2016).

1 **1. Plaintiffs’ Medical Experts’ Testimony Relies On and Is Consistent**
 2 **with both WPATH *Standards of Care* and the Endocrine Society**
 3 **Guidelines.**

4 BCBSIL concocts a false narrative that C.P. was not properly assessed for gender dysphoria
 5 because he was not assessed by a psychiatrist prior to initiating medical treatment for his gender
 6 dysphoria, and therefore Dr. Ettner and Dr. Karasic are not reliable when they opine that C.P.’s
 7 gender-affirming medical care was medically necessary. Dkt. No. 103 at 8. BCBSIL misconstrues
 8 the reports by Dr. Ettner and Dr. Karasic, as well as the clinical practice guidelines for the
 9 treatment of gender dysphoria.

10 **First**, both Dr. Ettner and Dr. Karasic cite to, reference, and rely on both the WPATH
 11 *Standards of Care* and the Endocrine Society Guidelines for the “Endocrine Treatment of Gender-
 12 Dysphoric/ Gender-Incongruent Persons,” as well as their clinical experience and the medical and
 13 scientific literature. *See, e.g.*, Ettner Report at ¶¶34, 41, 53, 77; Karasic Report at ¶¶27, 30, 35, 36,
 14 43; *see also* Schechter Report at ¶26. Indeed, the Endocrine Society Guidelines are consistent with
 15 and cite to the WPATH *Standards of Care*. Karasic Report at ¶27; Dkt. No. 104-1, *Exh. L*
 16 (hereinafter “ES Guidelines”) at 3877–78 (citing to the WPATH *Standards of Care* for the criteria
 17 for treatment for adolescents and adults with gender dysphoria); *see also* Ettner Report at ¶34.
 18 BCBSIL’s efforts to create daylight between the WPATH *Standards of Care* and Endocrine
 19 Society Guidelines has no basis in fact. As Dr. Ettner testified, C.P.’s course of medical care was
 20 provided “consistent with the recommendations of *The Endocrine Society*, the American Medical
 21 Association, the American Academy of Pediatricians, and *WPATH*.” Ettner Report at ¶77
 22 (emphasis added).

23 **Second**, BCBSIL’s argument misapprehends the nature of the clinical practice guidelines
 24 for the treatment of gender dysphoria. No well-established clinical practice guideline “mandates”
 25 that a transgender minor receive a psychiatric evaluation for the diagnosis of gender dysphoria, as
 26 BCBSIL argues. Dkt. No. 103 at 8. Rather, the generally accepted clinical practice guidelines
 establish that all treatment should be provided on an individualized basis to each patient. Neither
 the WPATH *Standards of Care* nor the Endocrine Society Guidelines are meant to be interpreted

1 as straightjackets. *See* Hamburger Decl., *Exh. 5* at 2 (“The SOC are intended to be flexible in order
2 to meet the diverse health care needs of transsexual, transgender, and gender nonconforming
3 people.”); *Exh. 6* at S5 (“The SOC-8 has 18 chapters containing **recommendations** for health care
4 professionals working with TGD people.” (emphasis added)); *id.* at S6 (“The SOC-8 guidelines
5 are intended to be flexible to meet the diverse health care needs of TGD people globally.”); ES
6 Guidelines at 3895 (“The Endocrine Society’s clinical practice guidelines are developed to be of
7 assistance to endocrinologists by **providing guidance and recommendations** for particular areas
8 of practice.” (emphasis added)).

9 The Endocrine Society Guidelines, consistent with the WPATH *Standards of Care*,
10 recommend that “a mental health provider for adolescents” diagnose gender dysphoria in
11 adolescents. ES Guidelines at 3869, 3870 (Recommendation 1.2); *see also* Hamburger Decl.,
12 *Exh. 5* at 13 (WPATH recommends that those “who assess, refer, and offer therapy to ...
13 adolescents presenting with gender dysphoria,” among other things, “[m]eet the competency
14 requirements for mental health professionals working with adults”). Those competency
15 requirements establish that “[t]he training of mental health professionals competent to work with
16 gender dysphoric adults ... may occur within any discipline that prepares mental health
17 professionals for clinical practice, such as psychology, psychiatry, ... **mental health counseling**,
18 ... or **family medicine** ...” *Id.* at 22 (emphasis added). That is exactly what occurred in C.P.’s
19 treatment when he was evaluated for gender dysphoria by his family medicine provider,
20 Dr. Hatfield. *See id.*, *Exh. 11* at 56:3–56:7; *see also, e.g., id.*, *Exh. 10* at 2 (“Family physicians are
21 well-equipped to provide mental health services and are one of the primary sources for mental
22 health care in the U.S.”); *id.* at 3 (“[P]rimary care physicians are the main providers [of mental
23 health care] for the majority of patients.”); Ettner Dep. at 104:22–105:2; *id.* at 105:18–106:1
24 (stating that family physicians are “often the first people to diagnose gender dysphoria and they
25 work with the families. They see the family over a period of time, and so ... they provide a lot of
26 counseling and a lot of mental health.”); *id.* at 106:2–106:4.

1 Dr. Ettner and Dr. Karasic both testified that Dr. Hatfield—who is board certified in family
 2 medicine (Hamburger Decl., *Exh. 11* at 56:3–56:7), has approximately 20 years of experience
 3 working with transgender adolescent patients (*id.* at 56:3–56:7), and made C.P.’s initial gender
 4 dysphoria diagnosis (Karasic Dep. at 54:2)—is “very well qualified” to make an assessment of
 5 gender dysphoria in an adolescent. Ettner Dep. at 102:18–102:22, 105:11–105:14; Karasic Dep. at
 6 53:3–55:2. C.P.’s diagnosis was also later confirmed by Ms. Booker, a licensed mental health
 7 counselor. Karasic Dep. 54:2–54:3; Dkt. No. 97-4. BCBSIL cites to no authority or peer-reviewed
 8 literature in support of the proposition that gender dysphoria diagnosis can *only* be made by a
 9 psychiatrist. That is not surprising because there is none.

10 **Third**, BCBSIL makes the outrageous accusation that Dr. Ettner “falsely stated that ‘C.P.
 11 has never been diagnosed with any mental health issues,’ despite the fact C.P. presented with
 12 depression.” Dkt. No. 103 at 8–9. ***BCBSIL’s statement is verifiably false.*** C.P. has never been
 13 diagnosed with depression. BCBSIL bases its claim on the intake form for Ms. Booker, which
 14 “checkmarked that there was some symptoms of depression,” but Ms. Booker explained that C.P.
 15 did not have a diagnosis of depression and did not meet the criteria for such diagnosis. Rather,
 16 Ms. Booker concluded, the symptoms were attendant to C.P.’s gender dysphoria. Hamburger
 17 Decl., *Exh. 12* at 68:8–68:12 (“***No, I did not diagnose him with depression.*** You can see by the
 18 diagnosis, I did not. I checkmarked that there was some symptoms of depression, but they are more
 19 accounted for by dysphoria. Did not ... diagnose him with depression, did not meet ... those
 20 criteria.” (emphasis added)).

21 As Dr. Ettner explained, “It’s very common for people who have gender dysphoria to have
 22 attendant depression, anxiety, suicidal ideation or social issues that stem from the gender dysphoria
 23 and are attendant to it as explained in the DSM-5. But ... in those cases, that depression does not
 24 respond really to psychotropic medication because it’s a result of the gender dysphoria and not a
 25 distinct mood disorder.” Ettner Dep. at 31:1–32:8. Thus, Dr. Ettner testified that “[b]ased on the
 26 totality of the medical records that [she] reviewed, including Ms. Booker’s report and particularly
 the reports by Dr. Garza and Tutty, who did extensive psychological testing and found no evidence

1 of any mood disorder, any depression, any anxiety, nothing that reached clinical significance or
2 even close to the 60 T level cutoff, [she] presumed that the depression that this was indicating was
3 attendant to the young man’s gender dysphoria and would be remediated with the top surgery.” *Id.*
4 at 69:24–70:7.

5 * * *

6 In sum, there is no factual basis for BCBSIL’s argument that C.P. was not properly assessed
7 for gender dysphoria or to question the reliability of Dr. Ettner’s and Dr. Karasic’s expert
8 testimony that C.P.’s gender-affirming medical care was medically necessary. To the extent,
9 BCBSIL’s disagrees with their conclusions, that is not a basis to exclude testimony. *See Messick*
10 *v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1199 (9th Cir. 2014).

11 **2. BCBSIL’s Claim that Plaintiffs’ Medical Experts Ignored Important**
12 **Medical Literature Is Unfounded.**

13 BCBSIL misleadingly claims that Plaintiffs’ Medical Experts ignored important medical
14 literature. Dkt. No. 103 at 9–11.

15 *First*, all of Plaintiffs’ Medical Experts reviewed and cited to BCBSIL’s medical policy,
16 which itself did not consider most of the documents that BCBSIL faults Plaintiffs’ Medical Experts
17 for ignoring. *See generally* Dkt. No. 84-4.

18 *Second*, BCBSIL points to no medical *peer-reviewed* literature that was ignored by
19 Plaintiffs’ Medical Experts.³ The three documents that BCBSIL identifies are not peer-reviewed
20 or published by medical organizations. And the documents are not contrary original research;
21 rather, they are reviews of existing literature *based upon the same body of research* that Plaintiffs’
22 Medical Experts consider.

23
24
25
26 ³ BCBSIL relies on peer-reviewed scientific literature for its own medical necessity determinations and
medical policies. *See* Hamburger Decl., *Exh. 15*; *see also, e.g.*, Dkt. No. 108-7 at 13 of 17 (concluding that
WPATH’s Standards of Care “are supported by evidence-based peer-reviewed scientific literature”).

1 Take the 2016 Decision Memo from the Centers for Medicare and Medicaid Services
 2 (“CMS”), which is not original research. Karasic Dep. at 106:3.⁴ Each of Plaintiffs’ Medical
 3 Experts explained that (a) the 2016 Decision Memo pertained to a national coverage determination
 4 (“NCD”) and was specific in its conclusions in that it applied to the Medicare population (Ettner
 5 Dep. at 82:13–82:16; Karasic Dep. at 102:7–102:17; Schechter Dep. at 58:18), and that (b) most
 6 surgical procedures do not have NCDs mandating coverage under Medicare (Schechter Dep. at
 7 61:15–61:22, 62:2–62:5). This makes sense because, as the 2016 Decision Memo concludes,
 8 coverage determinations should occur “on a case-by-case basis”—something that the categorical
 9 Exclusions preclude. *See* Dkt. No. 104-1, *Exh. Q* at 49. Indeed, BCBSIL’s medical policy
 10 considered the 2016 CMS Medicare coverage position but *rejected it* in favor of providing
 11 coverage. *See* Dkt. No. 108-7 at 12 (BCBSIL medical policy citing to CMS 2016 Decision Memo).

12 Plaintiffs’ Medical Experts do cite to the 2014 CMS decision that concluded that “citing
 13 the alleged ‘experimental’ nature of transsexual surgery as a basis for noncoverage of all
 14 transsexual surgery is not reasonable.” Hamburger Decl., *Exh. 13* at 24; *see also id.* at 21 (noting
 15 that “transsexual surgery is a safe and effective treatment option for transsexualism in appropriate
 16 cases”); Ettner Dep., 82:17–82:18; Ettner Report, *Exh. B* (Bibliography); Schechter Report, *Exh. B*
 17 (Bibliography) at ¶56. The 2014 decision is more relevant because it found a prior categorical
 18 exclusion to be invalid and unsupported by the scientific evidence. Ettner Dep., 82:24–82:25,
 19 83:2–83:7; Karasic Dep., 103:17–103:22.

20 Three of the four studies that BCBSIL claims are the “best designed and conducted studies”
 21 considered by the CMS 2016 Decision Memo (Dkt. No. 103 at 9) are also relied upon by Plaintiffs’
 22 Medical Experts in support for their opinions. *See, e.g.,* Ettner Report, *Exh. B* (Bibliography)
 23 (citing Heylens, G., et al. (2014), Effects of different steps in gender reassignment therapy on
 24 psychopathology: a prospective study of persons with a gender identity disorder, *The Journal of*
 25

26

⁴ Nonetheless, Dr. Schechter cites to CMS’s 2016 decision memo in his report. *See* Schechter Report, *Exh. B* (Bibliography) at ¶5.

1 *Sexual Medicine*, 11(1), 119–126; Ruppin, U., Pfafflin, F. (2015), Long-term follow-up of adults
 2 with Gender Identity disorder, *Archives of Sexual Behavior* 44(5): 1321–1329; Smith, Y., et al.
 3 (2005), Sex reassignment: Outcomes and predictors of treatment for adolescent and adult
 4 transsexuals, *Psychological Medicine* 35(1): 89–99; Karasic Report, *Exh. B* (Bibliography) (citing
 5 Smith, et al., 2005). Indeed, one of the studies “concluded that after surgery there was ‘a virtual
 6 absence of gender dysphoria’ in the cohort and ‘results substantiate previous conclusions that sex
 7 reassignment is effective.’” Ettner Report at ¶57 (quoting Smith, et al., 2005). While another
 8 showed “statistically significant improvements in internalizing psychopathology (e.g., anxiety and
 9 depression), general well-being, and suicidality” after hormone treatment. Ettner Report at ¶51
 10 (citing, *inter alia*, Heylens, et al., 2014). *Cf.* Karasic Dep., 105:7–105:25. The studies cited in the
 11 2016 decision memo were primarily looking at psychometric measures, not “at the effect on gender
 12 incongruence specifically, the alignment of one’s body with their identity,” which is the “the
 13 primary indication for surgery.” Schechter Dep. at 60:14–61:12.

14 BCBSIL also points to a document published by the Council for Choices in Health Care in
 15 Finland (“COHERE Report”). But the report was issued by a governmental entity, not a medical
 16 organization, and was not peer-reviewed. Karasic Dep. at 134:12–134:23. The document is of
 17 limited value, as only a *summary* of the report has been produced; the full report is not available
 18 in English. Schechter Dep. at 62:15–62:16. What is more, the COHERE Report does not contradict
 19 the testimony of Plaintiffs’ Medical Experts. As the Eighth Circuit has observed, “the report still
 20 recommends that gender-affirming care be available to minors under appropriate circumstances,”
 21 and its “recommendations for treatment closely mirror the standards of care laid out by the World
 22 Professional Association for Transgender Health (WPATH) and the Endocrine Society.” *Brandt*
 23 *by & through Brandt v. Rutledge*, 47 F.4th 661, 671 (8th Cir. 2022).

24 The final document that BCBSIL claims Plaintiffs’ Medical Experts missed is a statement
 25 by Astrid Lindgren Children’s Hospital. However, the statement is from a single hospital in
 26 Sweden, is not peer reviewed, and is not medical or scientific evidence. Karasic Dep., 133:8–

1 133:13. BCBSIL offers no explanation as to why that document is in any way relevant to this
2 litigation.

3 Given the lack of peer review of any of the documents referenced by BCBSIL, there is no
4 reason why Plaintiffs' Medical Experts should have cited to them.⁵ Moreover, Plaintiffs' Medical
5 Experts' review of the relevant literature was extensive and comprehensive. Indeed, they discuss
6 the very scientific literature that BCBSIL's preferred documents discuss, and more. BCBSIL's
7 argument that Plaintiffs' Medical Experts ignored contrary evidence or opinions "are matters for
8 cross-examination, not exclusion." *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 583 (N.D.
9 Cal. 2020); *see also Heinrich v. Ethicon, Inc.*, No. 220CV00166APGVCF, 2021 WL 1854648 at
10 *2 (D. Nev. May 10, 2021) (holding medical expert's testimony was admissible because their
11 "review of the relevant literature was extensive" and "any flaw" in their "decision to discount" a
12 study "can be explored through cross examination"); *Allen*, 287 F.Supp.3d at 802–03.

13 3. Plaintiffs' Medical Experts Took into Account Side Effects.

14 BCBSIL asserts that Plaintiffs' Medical Experts are unreliable because they purportedly
15 did not take into account side effects to any gender-affirming care. Not true. Dr. Karasic discusses
16 how "some of the effects produced by the hormones are reversible (e.g., changes in body fat
17 composition, decrease in facial and body hair) while others are irreversible (e.g., deepening of the
18 voice, decreased testicular mass)." Karasic Report at ¶39. Similarly, Dr. Ettner discusses some of
19 the "effects of hormone therapy" such as "breast development, redistribution of body fat, cessation
20 of male pattern baldness, and reduction of body hair" for feminizing hormones, and "the voice
21 deepens, growth of facial and body hair, redistribution of body fat, and overall increase in muscle
22 mass" for masculinizing hormones. Ettner Report at ¶44. Moreover, puberty blockers do not
23 themselves cause infertility as they are fully reversible treatments. Ettner Report at ¶39; Karasic
24

25
26 ⁵ The positions of a governmental entity in Finland or a single hospital in Sweden have no relevance
here, where the parties both agree that gender-affirming care can be medically necessary, even for minors.
Cf. Hamburger Decl., Exh. 14 at 78:10-78:24 (explaining Finland and Sweden do not ban this care and
provide coverage through national health care systems).

1 Report at ¶38; Karasic Dep. at 74:11–74:16 (“If somebody stops puberty blockers, they just
 2 continue progressing in puberty. And when we look at people with central precocious puberty,
 3 they still have fertility ... after they have gone off of puberty blockers.”). Nor do hormone
 4 treatments necessarily lead to infertility. Karasic Dep. at 75:4–75:8; *see* Julie Compton,
 5 *Transgender fertility study sheds light on testosterone’s impact*, NBC News (Apr. 14, 2020),
 6 <https://nbcnews.to/3fIxVyi> (visited Nov. 5, 2022) (citing Leung, A., et al. (2019), Assisted
 7 reproductive technology outcomes in female-to-male transgender patients compared with
 8 cisgender patients: a new frontier in reproductive medicine, *Fertility and Sterility*, 112(5), 858–
 9 65).

10 The primary purpose of Plaintiffs’ Medical Experts’ testimony is to explain and
 11 contextualize the prevailing medical consensus and the recommended guidelines for the treatment
 12 of gender dysphoria along with the safety and efficacy of gender-affirming care.⁶ They discuss at
 13 length the scientific literature regarding the safety and efficacy of this care. *See, e.g.*, Ettner Report
 14 at ¶¶49–64; Karasic Report at ¶¶43–55; Schechter Report at ¶¶34–41. BCBSIL’s myopic focus on
 15 purported side effects of treatment that BCBSIL concedes is medically necessary (*see* Dkt.
 16 Nos. 84-4, 108-7) misses the mark. The purpose of this testimony is to demonstrate that these
 17 medications and procedures can be medically necessary, just as they are when used for other
 18 medical conditions. Karasic Report at ¶42; Ettner Report at ¶¶41, 61; Schechter Report at ¶35
 19 (“Notably, when performing gender confirmation surgeries, surgeons use many of the same
 20 procedures that they use to treat other medical conditions. ... There is no medical basis to conclude
 21 that the same surgical procedures are more or less safe simply because they are used to treat gender
 22 dysphoria, versus other underlying medical conditions.”); *id.* at ¶36; Karasic Dep. at 133:19–134:6.

23 Ultimately, any purported omission does not render Plaintiffs’ Medical Experts’ testimony
 24 unreliable. The presumption under the Rules is that “expert testimony is admissible once a
 25 proponent makes the requisite threshold showing; further disputes go to weight, not admissibility.”

26 _____
⁶ Dr. Ettner and Dr. Karasic also confirm the medical necessity of C.P.’s gender-affirming care.

1 *Rothe Dev., Inc. v. Dep't of Def.*, 107 F.Supp.3d 183, 197 (D.D.C. 2015), *aff'd*, 836 F.3d 57 (D.C.
2 Cir. 2016).

3 **E. BCBSIL's Objections to Dr. Fox's Testimony Go to Its Weight, Not Its**
4 **Relevance or Reliability.**

5 **1. Dr. Fox's Testimony Is Relevant.**

6 BCBSIL argues that since it concedes "numerosity," Dr. Fox's opinion regarding the
7 number of people impacted by BCBSIL's administration of the Exclusions is irrelevant. Dkt.
8 No. 103 at 15. Dr. Fox's testimony estimates the number of enrollees impacted by the Exclusions
9 on an annual basis, both historically and in the foreseeable future. *See* Dkt. No. 79, *Exh. B*, ¶17.
10 This conclusion shows that more enrollees likely seek gender-affirming care than the number of
11 enrollees identified by BCBSIL as having received denials of claims. *See* Dkt. No. 99 at 2–3 (citing
12 to Dkt. No. 87-17 at 7). Dr. Fox's testimony is aimed at both class certification and appropriate
13 equitable remedy in this dispute. Any injunctive relief should be targeted at ensuring that all class
14 members receive notice and an opportunity to benefit from any determination by the Court on the
15 merits.

16 For this reason, *Top Notch Sols., Inc. v. Crouse & Assocs. Ins. Brokers*, 2019 U.S. Dist.
17 LEXIS 165085 at *7 (W.D. Wash. Sep. 25, 2019), is easily distinguished. *See* Dkt. No. 103 at 15–
18 16. *Top Notch* did not address the situation in place here, where the Plaintiffs offer expert testimony
19 on the likely size of the class relevant to both the class certification and the equitable relief sought.
20 *See id.*

21 **2. Dr. Fox's Methodology Is Reliable.**

22 BCBSIL takes "pot shots" at Dr. Fox's assumptions and data used, but not his overall
23 methodology; those arguments go to the weight of Dr. Fox's testimony not its admissibility. *See*,
24 *e.g.*, *Empire Health Found. v. CHS/Community Health Sys.*, No. 2:17-cv-00209-SMJ, 2019 U.S.
25 Dist. LEXIS 243524 at *6 (E.D. Wash. July 9, 2019). As Judge Mendoza concluded when a
26 different defendant attempted to exclude Dr. Fox's testimony, "[defendant] asks the Court to
decide that Dr. Fox and Mr. Beaton are wrong. But that is not part of the Court's gatekeeping

1 function.” *Id.* A disagreement over the assumptions made when forming the opinion (such as the
 2 prevalence used, the assumptions related to the use of certain data sets,⁷ etc.) “is not a basis to
 3 exclude expert testimony.” *Id.*, citing to *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036,
 4 1045 (9th Cir. 2014); see also *D.T. v. NECA/IBEW Family Med. Care Plan*, No. 2:17-cv-00004-
 5 RAJ, 2020 U.S. Dist. LEXIS 1742 at *10 (W.D. Wash. Jan. 6, 2020) (allowing Dr. Fox’s expert
 6 testimony). The remedy for areas of BCBSIL’s apparent disagreement is to subject Dr. Fox to be
 7 “attacked by cross examination, contrary evidence, and attention to the burden of proof, not
 8 exclusion.” *Primiano*, 598 F.3d at 564. Most importantly, neither BCBSIL nor Dr. Carr dispute
 9 Dr. Fox’s ultimate conclusion—that the number of enrollees in BCBSIL-administered ERISA self-
 10 funded plans that utilize gender-affirming care is approximately 300 individuals per calendar year.

11 IV. CONCLUSION

12 For the foregoing reasons, the Court should deny BCBSIL’s Motion to exclude the reports,
 13 opinions, and testimony of Dr. Ettner, Dr. Karasic, Dr. Schechter, and Dr. Fox.

14 DATED: November 10, 2022.

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 16 SPOONEMORE HAMBURGER PLLC

17 /s/ Eleanor Hamburger

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25 ⁷ BCBSIL is flatly wrong when it argues that Dr. Fox’s analysis does not include C.P. because he resides
 26 in Washington state. Dkt. No. 103, p. 16. Dr. Fox used certain census data related to Illinois to determine
 the age-specific population bands in his analysis because ***no data was produced by BCBSIL as to where
 each of the class members reside.*** Dkt. No. 79, *Exh. B*, ¶15; Hamburger Decl., *Exh. 16* at 77:21–78:21.
 Dr. Fox’s use of Illinois census data to calculate age-specific population bands did not “exclude” C.P. from
 the proposed class.

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

This matter came before the Court on Blue Cross Blue Shield of Illinois’s Motion to Exclude Plaintiffs’ Experts under *Daubert*. 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:

- Blue Cross Blue Shield of Illinois’s Motion to Exclude Plaintiffs’ Experts under *Daubert*;
- Declaration of Gwendolyn C. Payton and all exhibits in Support of Motion;

- 1 • Plaintiffs’ Opposition to Blue Cross Blue Shield of Illinois’s Motion to Exclude
- 2 Plaintiffs’ Experts under *Daubert*;
- 3 • Declaration of Eleanor Hamburger and all exhibits in Support of Opposition;
- 4 • BCBSIL’s Reply in Support of its Motion to Exclude Plaintiffs’ Experts under
- 5 *Daubert*, and all declarations and exhibits in support of the reply brief, if any;
- 6 • The files and records in this case, and
- 7 • _____
- 8 • _____.

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

10 1. **General Principles.** The proposed testimony and reports of Plaintiffs’ proposed
11 expert witnesses, Dr. Randi C. Ettner, Dr. Dan H. Karasic, Dr. Loren S. Schechter, and Dr.
12 Frank G. Fox, as outlined in their expert reports and in other evidence provided to and considered
13 by the court, as listed above, fulfills the requirements for reliability and relevance imposed by
14 Fed. R. Evid. 702 and 703, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993), and
15 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

16 2. **Relevance.** The test for a proposed expert testimony’s relevance under Fed. R.
17 Evid. 702, *Daubert*, and *Kumho Tire* is more stringent than the traditional relevance standard set
18 out in Fed. R. Evid. 401. However, even if it were not, the testimony of these proposed experts
19 satisfies the basic relevance requirement applicable to all evidence and would be admissible under
20 Fed. R. Evid. 401 and 402.

21 3. **Reliability.** The testimony of each of these proposed expert witnesses satisfies the
22 Fed. R. Evid. 702/*Daubert/Kumho Tire* requirements for reliability, in that the experts’ testimony:
23 1] has a reliable basis in the knowledge and experience of the relevant disciplines, 2] is the product
24 of reliable principles and methods that are reliably applied to the facts of the case; and 3] there
25
26

1 are sufficient facts in the record to demonstrate that there is an objective independent validation
2 of any of these experts' methodologies.

3 4. **Sufficient Facts or Data:** The proposed experts' testimony further satisfies the
4 requirements Fed. R. Evid. 702(b) and 703 that admissible expert opinion be based on sufficient
5 facts or data.

6 For the foregoing reasons, this Court exercises its discretion and DENIES Blue Cross Blue
7 Shield of Illinois's Motion to Exclude Plaintiffs' Experts under *Daubert*.

8 NOW, THEREFORE, IT IS HEREBY ORDERED that the testimony of Plaintiffs'
9 experts, Dr. Randi C. Ettner, Dr. Dan H. Karasic, Dr. Loren S. Schechter, and Dr. Frank G. Fox
10 and the reports they have completed shall be considered in this matter.

11 DATED this _____ day of _____, 2022.

12
13 _____
14 ROBERT J. BRYAN
United States District Judge

15 Presented by:

16 SIRIANNI YOUTZ
17 SPOONEMORE HAMBURGER PLLC

18 /s/ Eleanor Hamburger

19 Eleanor Hamburger (WSBA # 26478)
20 Daniel S. Gross (WSBA #23992)

21 LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

22 /s/ Omar Gonzalez-Pagan

23 Omar Gonzalez-Pagan, *pro hac vice*
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