HONORABLE JUDGE ROBERT J. BRYAN

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

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

Plaintiff,

vs.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendants.

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

RESPONSE TO MOTION TO FILE AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

NOTED ON MOTION CALENDAR: October 15, 2021

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I. INTRODUCTION

The Court should deny Plaintiffs' Motion to amend their complaint to turn this case into a class action, because their attempted amendment is futile. The plaintiffs want to expand this case to include all of the self-funded group health plans administered by BCBSIL. As an initial matter, the Court cannot afford the full relief Plaintiffs seek without the presence as parties of the self-funded group plans, who would be responsible for revising any such exclusions and would be required to pay any benefits the Court ultimately awards. Those plans are necessary parties, and many of them would not be subject to jurisdiction in this Court, and are therefore indispensable parties.

Another fundamental problem is that Plaintiffs' proposed class would require this Court to make a multitude of individualized findings to determine whether an individual is a class member. The proposed class includes members of any plan "that contains a categorical exclusion denying or limiting coverage for gender affirming health care . . . and who were, are, or will be denied pre-authorization or coverage of otherwise covered services due to BCBSIL's administration of such an exclusion." The Court must first determine whether each plan contains "a categorical exclusion denying or limiting coverage for gender affirming health care," like the Exclusion contained in the CHI Plan, and then determine whether the "gender affirming healthcare" sought by each plaintiff is an "otherwise covered service," *i.e.* is "medically necessary" under the plan regardless of that exclusion. There are hundreds of these plans, and the language varies greatly among plans. Plaintiffs could not possibly establish the commonality and typicality requirements of Rule 23. To do so, Plaintiffs would need to be able to allege that the exclusion in each class member's plan is *identical* to the Exclusion in Plaintiffs' Plan, that the medical issues and claims for each proposed class member are *identical* to Plaintiffs', *and* that each class member is subject to the same standard of review as Plaintiffs. They cannot.

Plaintiffs also cannot show that each of the hundreds of plans could be subject to incompatible standards of conduct or that they can seek "an indivisible injunction benefitting all its members at once" as required by Rule 23(b). As a result, Plaintiffs' proposed amendment is

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futile because it is not possible for Plaintiffs to show that their proposed class can be certified.

II. BACKGROUND

Plaintiffs filed their lawsuit on November 23, 2020, alleging that C.P. is a minor covered by the Catholic Health Initiatives Medical Plan ("Plan"), which is administered by BCBSIL. *Id.* at ¶ 2. The Complaint detailed C.P.'s unique medical history and situation: C.P. is a transgender boy diagnosed with gender dysphoria, he was assigned the sex of female at birth, but his gender identity is male and he has identified and lived as male since 2015. *Id.* at ¶¶ 44-46. BCBSIL and the Plan covered some of C.P.'s treatments, but denied coverage for a second Vantas implant, mastectomy, and chest reconstruction surgery, which Plaintiffs contend were medically necessary for treatment of his gender dysphoria. *Id.* at ¶¶ 47-68, 79-82. In their sole claim for relief, Plaintiffs challenge an exclusion in the Plan excluding benefits for treatment, "for, or leading to, gender reassignment surgery" (the "Exclusion"). *Id.* at ¶¶ 85-88.

The Court denied BCBSIL's Motion to Dismiss on May 4, 2021, agreeing that Plaintiffs would have lacked standing if *none* of the benefits they claimed were medically necessary under the plan, but determining, based on a detailed review of the Medical Policy's language, that the Policy did not preclude coverage for *all* of the treatments Plaintiffs sought. *C.P. v. BCBSIL.*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at *3-4 (W.D. Wash. May 4, 2021). The Court also held that BCBSIL lacks standing to raise its groups' RFRA defenses. *Id.* at *5.

On September 10, 2021, Plaintiffs filed a Motion seeking leave to file an Amended Complaint that would turn their claim into a class action on behalf of "[a]ll individuals who have been, are, or will be participants or beneficiaries in an ERISA self-funded 'group health plan' . . . administered by BCBSIL that contains a categorical exclusion denying or limiting coverage for gender affirming health care, like the 'Transgender Reassignment Surgery' Exclusion contained in the CHI Plan, at any time on or after November 23, 2014; and who were, are, or will be denied pre-authorization or coverage of otherwise covered services due to BCBSIL's administration of such an exclusion." Dkt. 26-1 at ¶ 91.

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III. ARGUMENT

A. Legal Standard under Rule 15.

Rule 15(a)(2) states that a court "should freely give leave" to amend "when justice so requires." However, a Court may deny leave if amendment would be futile, such as where "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim . . . ." *Barahona v. Union Pac. R. Co.*, 881 F.3d 1122, 1134 (9th Cir. 2018). An amendment is futile where it fails to name necessary parties. *Monterey Bay Military Hous., v. Pinnacle Monterey,* No. 14-cv-03953-BLF, 2015 WL 1737691, at *2 (N.D. Cal. Apr. 13, 2015) (denying motion for leave where "the proposed claims omit an indispensable party"); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 777 F. Supp. 779, 784 (1991) (denying motion to amend where indispensable party could not be joined). An amendment involving class allegations can also be denied as futile where the putative class action "would almost certainly be denied at the class certification stage." *Rodriguez v. Instagram,* No. C 12-06482 WHA, 2013 WL 3732883, at *3 (N.D. Cal. July 15, 2013); *see also Rosell v. Wells Fargo Bank*, No. C 12-6321 PJH, 2013 WL 4079178, at *6 (N.D. Cal. Aug. 1, 2013) ("[T]he court finds that the proposed amendment to add class allegations is futile because it does not allege facts sufficiently plausible to suggest that the requirements of Rule 23 can be met."); *Zinman v. Wal-Mart Stores,* No. 09-02045 CW, 2010 WL 2230449, at *3 (N.D. Cal. June 1, 2010) (denying motion to amend to turn individual case into class action because "Plaintiff would be unable to certify a class" as proposed).

B. Plaintiffs' Proposed Class Is Futile Because The Plans Are Indispensable Parties.

Plaintiffs' proposed amendment is also futile because it does not, and cannot, name as parties each of the plans, which are indispensable parties to this action. The court undertakes a two-step process under Rule 19 to determine whether parties must be joined:

> [The court] must first consider whether the party is necessary, *i.e.*, whether: "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise

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> inconsistent obligations by reason of his claimed interest." . . . [T]hen we must consider whether . . . he is indispensable. In connection with this inquiry, four factors are relevant: "[1] to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; [2] the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; [3] whether a judgment rendered in the person's absence will be adequate, [4] whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Takeda v. Nw. Nat. Life Ins. Co., 765 F.2d 815, 819 (9th Cir. 1985) (quoting Fed. R. Civ. P. 19).

Here, the plans are indispensable parties to Plaintiffs' proposed class action because complete relief cannot be provided without their involvement. Any injunctive relief granted by the Court requiring the deletion or revision of an exclusion must be carried out by the plans. Such an injunction rendered in the plans' absence would be highly prejudicial. *See Takeda*, 765 F.2d. at 817–20 (holding plan was an indispensable party because "the ultimate responsibility for the medical plan . . . rests with [the plan]"). Further, because the putative class is limited to *self-funded* plans, those plans will be responsible for paying any benefits awarded to any class member. *See Sypher v. Aetna Ins. Co.*, No. 13-10007, 2014 WL 1230028, at *4 (E.D. Mich. Mar. 25, 2014) ("[FedEx] is self-insured, and it, not Aetna, both funds the Plan and pays benefits. . . . Because Plaintiff seeks benefits, and because those benefits would be paid by [FedEx], (1) the Court cannot grant complete relief in the absence of [FedEx], and (2) [FedEx] cannot protect its interests in the absence of joinder."); *cf. Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 501–02 (N.D. Cal. 2017) (holding self-funded plans were not necessary parties because the challenged policies "were created entirely by the Blue Shield entities" and because plaintiffs did not seek any "monetary award for denial of benefits, which the self-funded plan would have to pay").

Proceeding in the plans' absence will also impair the plans' ability to assert any RFRA defenses, as this Court has already held that BCBSIL cannot assert those defenses on the plans' behalf. *See C.P.*, 2021 WL 1758896, at *5; *see also Takeda*, 765 F.2d at 820. Meanwhile, the proposed class plaintiffs will continue to have adequate remedies through individual claims.

Many of these plans will not be subject to personal jurisdiction in this Court, rendering amendment futile. *Followay Prods., Inc. v. Maurer*, 603 F.2d 72, 76 (9th Cir. 1979) (affirming

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dismissal where court lacked jurisdiction over indispensable parties); *Great-West Life & Annuity Ins. Co. v. Woldemicael*, No. C05-1174JLR, 2006 WL 1638497, at *3 (W.D. Wash. June 2, 2006) (dismissing action where it lacked jurisdiction over indispensable party); *Reichert v. Keefe Commissary Network,* 331 F.R.D. 541, 558 (W.D. Wash. 2019) ("It would be a waste of time to certify the national class only to decertify it because there are indispensable parties that cannot feasibly be joined" due to lack of personal jurisdiction). The plans are indispensable parties to Plaintiffs' putative class action rendering their proposed amendment futile.

C. The Class Definition Renders the Action Inappropriate For Class-Wide Adjudication, and Plaintiffs' Proposed Amendment Is Therefore Futile.

1. The proposed class definition is futile because it requires individualized adjudication to determine class membership.

A class definition is fundamentally flawed, precluding class certification, if it is not self-executing and requires individualized adjudications to determine who is a class member. *See Urena v. Earthgrains Distrib.,* No. SACV1600634CJCDFMX, 2017 WL 4786106, at *10 (C.D. Cal. July 19, 2017) (denying certification because "[t]he proposed class definition will require detailed, individualized inquiries to determine whether a particular Distributor is a class member"). "Although there is no explicit requirement concerning the class definition in FRCP 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Berndt v. Cal. Dep't of Corr*., No. C 03-3174 VRW, 2010 WL 2035325, at *1, 3 (N.D. Cal. May 19, 2010) (denying class certification because there was "no easy way to determine class membership . . . without the court conducting individualized analyses based on the merits of each case"). Plaintiffs state the class definition as follows:

> All individuals who have been, are, or will be participants or beneficiaries in an ERISA self-funded "group health plan" (as defined in 29 U.S.C. §1167(1)) administered by BCBSIL that contains a categorical exclusion denying or limiting coverage for gender affirming health care, like the "Transgender Reassignment Surgery" Exclusion contained in the CHI Plan, at any time on or after November 23, 2014; and who were, are, or will be denied pre-authorization or coverage of otherwise covered services due to BCBSIL's administration of such an exclusion.

Dkt. 26-1 at 18. Plaintiffs argue, based on this definition, that this action will require a

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determination of the following question common to all class members:

> [W]hether BCBSIL's administration of the Transgender Reassignment Surgery Exclusion *and other similar exclusions* denying coverage for gender affirming health care in the ERISA self-funded plans that it administers, violates Section 1557 of the Affordable Care Act. Adjudication of this issue will in turn determine whether BCBSIL must reprocess all such denied claims and be enjoined from administering such exclusions now and in the future."

Id. at ¶ 94 (emphasis added). Here, while Plaintiffs have purported to identify a single "common" question, their proposed class definition betrays "minefields of subjectivity" requiring individualized adjudication just to decide class membership. *Berndt*, 2010 WL 2035325 at *3.

2. Determining whether an individual is a class member because he or she was denied "gender affirming care" for "otherwise covered services" would require individualized inquiry.

In order to determine whether plan members are included in the proposed Class Definition, the Court would have to determine whether the treatment each proposed class member sought is an "otherwise covered service"—*i.e.* "medically necessary"— under the terms of that member's plan. Dkt. 26-1 at ¶ 91; *see Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y.), *reconsidered on other grounds*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016) (holding plaintiff lacked standing to challenge a ban on coverage for individuals under 18 because the surgery she sought was not medically necessary under the plan terms). Plaintiff would need to be able to plead that the court could make a single determination as to all class members that the services they sought were "medically necessary" under the particular terms of their plans. They cannot.

In order to determine whether an individual is a class member pursuant to the Class Definition, the Court would have to determine whether any benefit claimed was medically necessary under the terms of his or her plan. The Court's denial of BCBSIL's Motion to Dismiss demonstrates this. BCBSIL argued that Plaintiffs lacked standing because, even if the Exclusion was not in the Plan, they would still not qualify because CP is a minor and BCBSIL's Medical Policy provides that gender affirming surgery is not medically necessary until the individual has "[r]eached the age of majority". *C.P.*, 2021 WL 1758896, at *3–4; Compl. ¶ 58; Dkt. 1-7 at 2–3. The Court rejected that argument because it found, after analyzing the specific language of

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the Medical Policy, that not *all* of the treatments sought by Plaintiffs were precluded by the Policy because she is a minor. *C.P.*, 2021 WL 1758896, at *4. In determining class membership, the Court would have to make similar individualized findings for each proposed class member to determine whether the "gender reaffirming health care" they seek is medically necessary. Plaintiffs' proposed amended complaint also demands that the Court order BCBSIL to "reprocess" each class member's claim and, pursuant to the Class Definition, a class member has denied claims "*that were based solely upon exclusions for gender-affirming care[.]*" Dkt. 26-1 at § VII ¶ 4 (emphasis added). Thus, in order to determine class membership, the Court would need to determine if each denial was "based solely upon [an] exclusion[] for gender-affirming care" in that plaintiff's plan and, if so, order BCBSIL to reprocess the claim under the applicable plan. The Court need only look to its opinion on BCBSIL's motion to dismiss to know that this will be a problematic calculus. *C.P.*, at *3-4. The Northern District of Illinois recently struck class allegations in an ERISA case illustrating that the Court would have to make individualized medical necessity determinations in order to determine class membership under the proposed Class Definition. In *Day v. Humana Ins. Co.*, 335 F.R.D. 181 (N.D. Ill. 2020), the plaintiff sought to certify a class of all persons covered under plans administered or insured by Humana who were denied coverage for proton beam radiation therapy based on a determination it was not medically necessary. *Id.* at 189, 199. As the plan administrator, Humana had discretion (as BCBSIL does here) in determining whether the treatment was "medically necessary" given the member's individual circumstances. *Id.* The court allowed plaintiff's individual claims to proceed, but concluded that "[a]gainst this backdrop, Plaintiff's allegations nowhere identify a common way in which Humana applies the [plans] to deny PBRT coverage." *Id.* at 195–199; *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("If, to make a prima facie showing on a given question the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question.").

The same is true here; there is no way other than individualized inquiry for the Court to determine whether any person is properly included as a member of Plaintiffs' proposed class

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because the benefit he or she seeks is medically necessary, precluding class adjudication.

3. The proposed Class Definition requires individualized inquiry to determine existence of "exclusions denying or limiting coverage for gender affirming health care" in a variety of documents for many different plans.

In order to determine class membership under the proposed Class Definition, the Court would also have to separately analyze whether the exclusion in each class member's plan violates Section 1557. For this reason alone, the proposed Class Definition is infirm. *See Moore v. Apple Inc.*, No. 14-CV-02269-LHK, 2015 WL 7351464, at *5 (N.D. Cal. Nov. 20, 2015) ("Because of the variations in wireless service contracts, individualized issues will govern the Court's inquiry into whether the class members . . . had a contractual right to receive text messages.")

Plaintiffs' proposed class is not limited to those members who are subject to the exact Exclusion in C.P.'s Plan. Instead, the proposed class encompasses all ERISA self-funded group health plans administered by BCBSIL since 2014 that contain "a categorical exclusion denying or limiting coverage for gender affirming health care." Dkt. 26-1 at ¶ 91. BCBSIL administers (and, since 2014, has administered) hundreds of such plans. As the proposed Class Definition implicitly acknowledges, those hundreds of plans contain many forms of exclusions for transgender services, in part because the terms were separately developed by the various self-funded Plans for whom BCBSIL acts as administrator.

Thus, the Court would need to make individualized determinations of whether an exclusion on gender affirming health care in any class members' plan violates Section 1557. In such cases, courts have held that the required commonality does not exist. *See, e.g.*, *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, No. MDL 09-2074 PSG FFMX, 2014 WL 6888549, at *5–7 (C.D. Cal. Sept. 3, 2014) ("[t]his Court cannot determine what UCR obligations WellPoint had under the terms of its various plans without analyzing the specific terms of those plans[,] and [p]laintiffs have not offered any reasonable argument that there is a way to conduct that analysis without an individualized plan-by-plan review."); *Lapekas v. Kaiser Found. Health Plan, Inc.*, No. CV 10-5984-VBF(FMOX), 2011 WL 13217477, at *3 (C.D. Cal. May 25, 2011)

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(denying class certification where "LAUSD offers many different health care plans (which have changed over time), and Plaintiff fails to present sufficient evidence that there are sufficient common issues of law or fact across all health plans"); *Lipstein v. UnitedHealth Grp.*, 296 F.R.D. 279, 289 (D.N.J. 2013) ("Plaintiffs are correct that the question they seek to resolve could have a simple yes or no answer, but they ignore the reality that in order to make that determination the Court would need to make at least as many individual determinations as there are plans at issue across the broad class, after analyzing each plan's language . . . .").

Variations in the language of those exclusions requires individualized determinations by this Court including different facts and legal analysis. Thus, in order to determine class membership under the proposed class definition, Plaintiffs would need to be able to plead that the exclusions in all class members' plans are identical. They cannot.

D. Plaintiff's Proposed Amended Complaint Establishes that This Action is Inappropriate for Class-Wide Adjudication, and therefore it is Futile for that Reason as Well.

"Under Rule 23(a), the party seeking certification must demonstrate, first, that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class"—commonly referred to as the "numerosity," "commonality," "typicality," and "adequacy" requirements. *Dukes*, 564 U.S. at 345, 348. "Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id.* at 345. Plaintiffs here cannot allege facts sufficient to satisfy either subsection (a) or (b).

As is clear from the defects in Plaintiffs' proposed Class Definition, the court would have to make multiple individualized inquiries to determine whether any individual is a proper member of Plaintiffs' proposed class. These individualized inquiries render it impossible for Plaintiffs to plead any set of facts that would satisfy the commonality or typicality requirements of Rule 23(a), or to show that the proposed class could be certified under any section of Rule 23(b).

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1. Plaintiffs cannot plead facts to satisfy rule 23(a)'s commonality requirement.

The defects in Plaintiffs' proposed Class Definition render the Definition unable to satisfy Rule 23(a)'s "commonality" element, which requires that there be "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). The Supreme Court has cautioned that the "commonality" requirement is "easy to misread, since any competently crafted class complaint literally raises common questions." Dukes, 564 U.S. at 349. Instead, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[,]'" which injury "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 349–50 (citation omitted) (emphasis added). The defects in Plaintiffs' proposed Class Definition cannot be cured because Plaintiffs' cannot possibly satisfy the commonality requirement.

2. Plaintiff Cannot Plead Facts to Satisfy Rule 23(a)'s Typicality Requirement.

In order to sufficiently allege typicality, Plaintiffs would need to be able to plead facts showing that they are subject to the same standard of review as all other putative class members. They cannot. Instead, the Court would have to interpret each applicable plan to determine which of three standards of review applies to that class member, precluding class certification.[1] *See Hill v. UnitedHealthcare Ins. Co.*, No. SA CV 015-0526-DC(RNBx), 2017 WL 7038128, at *5–6 (C.D. Cal. Mar. 21, 2017) (finding plaintiff did not satisfy typicality requirement because "each of three standards of review will be applicable to various Class members' claims"); *Hendricks v. Aetna Life Ins. Co.*, No. CV1906840CJCMRWX, 2021 WL 2497950, at *4 (C.D. Cal. June 11, 2021) (holding plaintiffs could not satisfy typicality requirement "because their claims may be subject to a different standard of review" based on the relevant plan language).

[1] Plaintiffs also cannot satisfy the typicality requirement because their claims may be subject to unique defenses not applicable to other class members, such as the Plan's defenses under the RFRA. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("Several courts have held that 'class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.'").

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3. Due to the varying obligations BCBSIL has under each of the hundreds of plans it administers, Plaintiffs cannot plead facts supporting certification under subsection (b)(1).

Plaintiffs seek certification under Rule 23(b)(1)(A). Subsection (b)(1)(A) allows certification where "the prosecution of separate actions by or against individual members of the class would create a risk of: (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class," but does not apply "simply when separate actions would raise the same question of law[.]" *McDonnell-Douglas Corp. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975). Although Plaintiffs have identified a question of law that may be raised regarding each class member's plan—whether an exclusion on gender-affirming treatment violates Section 1557—BCBSIL's obligations vary among the hundreds of plans applicable to the proposed class. Courts have found that in such circumstances, there is no risk of incompatible standards of conduct sufficient for certification under (b)(1)(A). *See, e.g.*, *WellPoint*, 2014 WL 6888549, at *20 (finding (b)(1)(A) certification "improper" where WellPoint's "obligations differ between its plans," and "there is no risk that separate lawsuits would result in 'incompatible standards of conduct' for WellPoint"); *Pipefitters Loc. 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 633 (6th Cir. 2011) (denying (b)(1)(A) certification in ERISA breach of fiduciary duty case because BCBSM's duty depended on the agreement between it and each class member, eliminating the chance "that individual adjudications would subject BCBSM to conflicting affirmative duties.").

4. Plaintiff cannot plead facts to satisfy requirements of subsection (b)(2).

Plaintiffs also seek certification under Rule 23(b)(2), but their proposed class, the injunction they request, and their demand for individualized monetary relief all show that certification under this subsection would be improper. Dkt. 26-1 at 25. The Supreme Court in *Dukes* explained the scope of subsection (b)(2) as follows:

> [C]laims for *individualized* relief . . . do not satisfy the Rule." *Id.* at 360. The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared

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> unlawful only as to all of the class members or as to none of them. . . . It does not authorize class certification when each individual class member would be entitled to a *different* injunction or . . . when each class member would be entitled to an individualized award of monetary damages."

Dukes, 564 U.S. at 360–61 (citations omitted).

The issue Plaintiffs identify is whether the exclusions limiting coverage for gender-affirming care in any of the hundreds of self-funded plans administered by BCBSIL violate Section 1557 of the ACA. Under the Court's analysis, the answer to this question could be "yes" as to some plans, or "no" – depending on the language of any plan administered by BCBSIL. The conduct alleged by Plaintiffs is therefore not "such that it can be enjoined or declared unlawful only as to ***all*** of the class members or as to none of them," and there is no single injunction or declaration that could provide relief to ***all*** members of the proposed class. *Id.* (emphasis added); *see, e.g.*, *WellPoint*, 2014 WL 6888549, at *21 (holding certification under subsection (b)(2) improper where, "[d]ue to the variation among WellPoint's ERISA plans, there is no 'single injunction or declaratory judgment [that] would provide relief to each member of the class[es].'"); *Lipstein*, 296 F.R.D. at 292 (denying (b)(2) certification due to variations among ERISA plans). Also, the individualized inquiries discussed above would be essential for the Court to determine the propriety of the requested injunction, and thus Plaintiffs cannot show that they are seeking "an indivisible injunction benefitting all its members at once," as Rule 23(b)(2) "demands." *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 559 (C.D. Cal. 2012).

Plaintiffs also seek individualized monetary relief as part of their prayer for relief, further rendering this action improper for class resolution under (b)(2). *See* Dkt. 26-1 at § VII ¶¶ 5-6; *Dukes*, 564 U.S. at 360 (holding that claims seeking backpay were improperly certified under subsection (b)(2), and that "individualized monetary claims belong in Rule 23(b)(3)").

IV. CONCLUSION

For these reasons stated above, BCBSIL respectfully requests that the Court deny Plaintiffs' motion to amend their complaint as futile.

DATED this 8th day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, RESPONSE TO MOTION TO FILE AMENDED COMPLAINT to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

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I affirm under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct to the best of my knowledge.

DATED this 8th day of October, 2021.

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