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' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Noted for Consideration:
October 22, 2021

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I. INTRODUCTION

This case was brought by C.P., a transgender boy, and his mother, Patricia Pritchard, to challenge the administration of a blanket "Transgender Reassignment Surgery Exclusion" ("Exclusion") by Defendant Blue Cross Blue Shield of Illinois ("BCBSIL"). BCBSIL applied the Exclusion to deny coverage for C.P.'s vantas implant and gender affirming chest surgery. Plaintiffs alleged that BCBSIL's administration of the Exclusion constitutes illegal discrimination on the basis of sex, in violation of the Affordable Care Act's anti-discrimination provision, Section 1557. Upon BCBSIL's Motion to Dismiss, the Court concluded that Plaintiffs' original complaint appropriately pled a claim for discrimination on the basis of sex. *See* Dkt. No. 23, p. 8.

Plaintiffs moved to amend the complaint to add class allegations to the pleadings to ensure that all similarly situated individuals receive the benefit of any injunctive relief obtained by C.P. *See* Dkt. No. 26. No Answer has been filed by BCBSIL. In opposition, BCBSIL argues that the Motion is futile since (1) class certification may ultimately be denied by the Court; and (2) because all of the self-funded plans for which BCBSIL administers the same or similar Exclusion must purportedly be joined as indispensable parties. *See* Dkt. No. 32.

BCBSIL does not demonstrate futility. *Barnett v. Cty. of Contra Costa*, 2010 U.S. Dist. LEXIS 68864, at *9 (N.D. Cal. June 18, 2010) (the non-moving party bears the burden of demonstrating futility). A motion to amend the complaint is futile only if the amended complaint is legally insufficient under ***any*** possible factual scenario. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). BCBSIL does not – and cannot – argue that the well-pled Amended Complaint is legally insufficient. Instead, BCBSIL tries to litigate class certification before Plaintiffs have conducted class wide discovery and without any pending class certification motion. Courts in the Ninth Circuit have repeatedly rejected

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similar attempts to thwart class certification at the pleading stage. *See e.g.*, *Barnett*, 2010 U.S. Dist. LEXIS 68864, at *12-13. BCBSIL then argues that amendment is futile because it requires the joinder of purported "indispensable parties." BCBSIL's "indispensable party" argument, however, is unfounded since complete relief for Plaintiffs and the Class may be obtained from BCBSIL alone. *See Carr v. United Healthcare Servs.*, 2016 U.S. Dist. LEXIS 182561, at *9 (W.D. Wash. May 31, 2016). "To be complete, relief must be meaningful relief ***as between the parties***." *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013) (internal quotations omitted, emphasis in original). Here, Plaintiffs and the Class can indisputably obtain meaningful relief from BCBSIL by enjoining it from enforcing the unlawful and discriminatory Exclusion. The Court should reject BCBSIL's arguments and permit Plaintiffs to file their amended complaint.

II. ARGUMENT

A. BCBSIL's Class Certification Arguments Are Premature.

When a defendant's arguments about futility focus on class certification, the arguments are more properly raised in opposition to a motion for class certification. *Barnett,* 2010 U.S. Dist. LEXIS 68864 at *12. As the *Barnett* court explained:

> [T]he Ninth Circuit long ago explained that "compliance with Rule 23 is not to be tested by a motion to dismiss for failure to state a claim," *Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969), and it follows from the above discussion that Rule 23 should also not be tested on a motion for leave to amend.

Id. at *13. "[C]ourts have found it premature for a defendant to challenge class certification through an opposition to a motion for leave to amend." *Ashcraft v. Welk Resort Grp., Corp.*, 2018 U.S. Dist. LEXIS 4423, at *6-7 (D. Nev. Jan. 10, 2018) (citing cases). "Our cases stand for the unremarkable proposition that often the pleadings alone will not resolve the question of class certification and that some discovery will be warranted." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009). *See also*

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Walintukan v. SBE Entm't Grp., LLC, No. 16-cv-01311-JST, 2017 U.S. Dist. LEXIS 22559, at *7 (N.D. Cal. Feb. 15, 2017) ("The Court will not deny amendment based on issues related to class certification."); *Albers v. Yarbrough World Sols., LLC*, No. 5:19-cv-05896-EJD, 2020 U.S. Dist. LEXIS 190545, at *33 (N.D. Cal. Oct. 14, 2020) (same).[1]

The three federal district court cases relied upon by BCBSIL are easily distinguished. In each case, the plaintiffs failed to satisfy ***minimum pleading requirements*** when amending their pleadings. *See Rodriguez v. Instagram, LLC*, No. C 12-06482 WHA, 2013 U.S. Dist. LEXIS 98627, at *9 (N.D. Cal. July 12, 2013) (district court denied amendment primarily because it was "aimed at contriving subject-matter jurisdiction where none previously existed" by expanding the definition of the class beyond California); *Rosell v. Wells Fargo Bank,* 2013 U.S. Dist. LEXIS 108855, at *18 (N.D. Cal. Aug. 1, 2013) (plaintiffs failed to plead under which Rule 23 subsection they hoped to obtain certification and to make factual allegations related to commonality and typicality); *Zinman v. Wal-Mart Stores,* 2010 U.S. Dist. LEXIS 62826, at *5-8 (N.D. Cal. June 1, 2010) (the "vague and broad amended complaint" was legally insufficient). Here, the proposed amended complaint includes all factual and legal allegations necessary for a class action complaint. *See generally,* Dkt. No. 26-1. BCBSIL does not argue otherwise.

[1] For example, at the pleading stage, Plaintiffs need not "demonstrate" commonality and typicality – rather they only need to assert legally sufficient allegations regarding those Rule 23 requirements. *See* Dkt. No. 26-1, ¶¶93-94. After discovery, Plaintiffs will easily demonstrate the Rule 23 class requirements and fully counter BCBSIL's arguments against certification. The proposed class definition is wholly consistent with those approved in similar nationwide litigation against claims administrators. *See e.g., Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 495 (N.D. Cal. 2017); *Wit v. United Behavioral Health*, 317 F.R.D. 106, 116 (N.D. Cal. 2016).

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B. The Amended Complaint Does Not Need to Name Every Self-Funded Plan for Which BCBSIL Administers a "Transgender Reassignment Surgery" Exclusion as a Defendant.

BCBSIL argues that the motion to amend is futile because the self-funded plans for which it administers the Exclusion are purported necessary parties under Fed. R. Civ. P. 19. *See* Dkt No. 32, p. 3. BCBSIL is wrong. The proper defendant here is the ***administrator*** of the Exclusion, BCBSIL. On behalf of the proposed class, Plaintiffs seek injunctive relief (both prospective and retrospective) that prohibits BCBSIL from administering the Transgender Reassignment Surgery Exclusion. Dkt. No. 26-1, p. 24, ¶¶3-4. That relief can be obtained from BCBSIL alone. *See Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017) (claims administrator may be liable for Section 1557 sex discrimination even if the employer controlled the terms of the plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) ("Nothing in Section 1557, explicitly or implicitly, suggests that TPAs are exempt from the statute's nondiscrimination requirements").

This Court has rejected BCBSIL's "necessary party" argument in a similar case. *See e.g., Carr*, 2016 U.S. Dist. LEXIS 182561, at *9. In *Carr,* United Healthcare was an administrator of a self-funded plan that sought to impose a visit limit on outpatient mental health services in violation of the Federal Mental Health Parity Act, 29 U.S.C. § 1185a. United Healthcare administered the plan as directed, even though the visit limit violated the Parity Act. United argued that the plan was an "indispensable party" and must be joined in the litigation. *Id.* at *9. The court rejected the claim that relief could not be obtained without the plan:

> Plaintiff has not named Kaiser Aluminum [the Plan] in the complaint and has crafted her relief request such that she may obtain the relief she requests without Kaiser Aluminum as a party. If, as UHC alleges, Kaiser Aluminum has agreed to indemnify it against any judgment, Kaiser Aluminum may wish to move to intervene (or Defendant may

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> choose to interplead the company), but Plaintiff will not be required to join them as a party.

Id. The Amended Complaint is proper because no additional party is needed for the Court to enter the relief sought by Plaintiffs. Courts routinely permit class actions across various self-funded plans where the relief sought is to enjoin the actions of the claims administrator for the entire class. *See e.g.*, *Hendricks v. Aetna Life Ins. Co.*, 2021 U.S. Dist. LEXIS 115630, at *21 (C.D. Cal. June 11, 2021); *Caldwell v. Unitedhealthcare Ins. Co.*, 2020 U.S. Dist. LEXIS 244828, at *10 (N.D. Cal. Dec. 29, 2020); *Atzin v. Anthem, Inc.*, 2020 U.S. Dist. LEXIS 79991, at *8-9 (C.D. Cal. May 6, 2020); *Des Roches*, 320 F.R.D. at 502; *Wit*, 317 F.R.D. at 128.

BCBSIL misleadingly relies upon *Takeda v. Nw. Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985), for its argument that the Motion to Amend must be denied due to the absence of the self-funded plans in the amended complaint. In *Takeda,* the appellant argued that, had an indispensable party been joined, diversity jurisdiction would have been destroyed, such that the case should have been remanded to state court, destroying federal jurisdiction. *Id.* That is simply not the issue here. *Takeda* says nothing about whether the absence of an alleged necessary party in a proposed Amended Complaint renders the Motion to Amend futile. The answer is clearly no. Whether or not the self-funded plans for whom BCBSIL serves as a claims administrator are joined, this case will proceed in federal court, since jurisdiction is based upon the alleged violation of a federal anti-discrimination law. Dkt. No. 1, ¶15. If BCBSIL believes that additional parties are missing, it has the option to move for joinder. *See* Fed. R. Civ. P. 19(a)(2).

Reichert v. Keefe Commissary Network, 331 F.R.D. 541, 558 (W.D. Wash. 2019), cited by BCBSIL supports Plaintiffs' Motion. In *Reichert,* this Court ***rejected*** defendants' argument that the administrators of a fee-laden debit card provided to released prisoners could not be sued in a class action without joining the various jails and prisons across

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the country with which the administrators contracted to offer the debit cards. *See id.*, (reserving a decision on whether the jails were necessary parties until oral argument); Hamburger Decl., ¶2, *Exh. A* (granting national class certification without joinder of additional parties). At class certification, the Court will be able do the same here.

Finally, BCBSIL includes two "throw-away" arguments. ***First,*** BCBSIL complains that proceeding without the self-funded plans impairs the plans' RFRA defenses. Dkt. No. 32, p. 4. The injunctive relief sought by Plaintiffs would bind ***only*** BCBSIL – it does not impact the plans' rights under RFRA. In any event, as the Court has already held, RFRA provides relief against the government, not private parties like the self-funded plans. *See* Dkt. No. 23, p. 9. Lastly, as noted above, BCBSIL has the option to move for joinder, however, futile it might be. *See Carr*, 2016 U.S. Dist. LEXIS 182561, at *12-13. ***Second,*** BCBSIL argues, that many of the plans are not subject to the personal jurisdiction of the Court. Dkt. No. 32, p. 4. Not only is this claim unsupported by evidence, but if the self-funded plans are not necessary parties, it is irrelevant whether personal jurisdiction over them can be obtained.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Leave to File the Amended Complaint should be granted.[2]

[2] In its response, BCBSIL uses the female pronoun "she" in reference to Plaintiff C.P. Dkt. No. 32, p. 8. Plaintiffs assume this is a typological error and reassert that C.P.'s gender identity is male and that he should be referred to with male pronouns.

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