

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 TO COMPEL
DISCOVERY**

**Renoted on Motion Calendar:
June 24, 2022**

I. INTRODUCTION

After declaring that it would only produce the discovery that is the subject of this Motion if the Court ordered it to do so, and after the filing of the instant motion, BCBSIL has finally produced some – but not all – of the disputed information. Specifically, since this Motion was filed, BCBSIL has produced exemplar, redacted copies of Summary Plan Descriptions (“SPDs”) containing gender affirming care exclusions. Supp. Hamburger Decl., ¶2; *see* Dkt. No. 57-1, Addendum A. In its responsive briefing, BCBSIL promised to produce the exemplar Benefit Plan Applications (“BPAs”),¹ although no date of production has been provided by BCBSIL. Dkt. No. 58, p. 9:7-12. BCBSIL has also produced all of the emails it previously withheld as “privileged” described in the disputed privilege log.² Supp. Hamburger Decl., ¶2.

The discovery dispute is now narrowed to: (1) disclosure of the identified plans that contain or contained a gender affirming care exclusion during the proposed class period, in response to Interrogatory No. 3 and 6; (2) disclosure of the total number of people enrolled in these plans, by plan year, in response to Interrogatory No. 7;³ and (3) production of the responsive documents to RFP No. 13.

While Plaintiffs also believe they are entitled to copies of all BPAs and SPDs pursuant to RFP Nos. 12 and 14, given BCBSIL’s recent and promised production of a

¹ The BPAs contain information on each plan’s coverage including any custom benefits, such as exclusions of gender affirming care. *See* Supp. Hamburger Decl., *Exh. 17*, Drake Dep., pp. 38:22-39:25. Because of BCBSIL’s concession that it will produce redacted BPAs of the exemplar plans, Plaintiffs do not address (but do not concede) BCBSIL’s arguments regarding the BPAs. *See* Dkt. No. 58, p. 7.

² Similarly, Plaintiffs do not address (but do not concede) BCBSIL’s argument regarding its purported “Joint Defense Agreement.” *See* Dkt. No. 58, p. 9. Plaintiffs note, however, that the disputed communications were between non-attorney ERISA fiduciaries about their beneficiary C.P. No joint defense agreement can justify withholding such communications.

³ The opening brief mislabeled the disputed Interrogatory No. 7 as No. 8; however, it is clear that all parties understand the dispute to be over obtaining the total number of the population enrolled in plans that contain a gender affirming care exclusion.

1 redacted set of exemplar BPAs and SPDs, Plaintiffs are willing to ascertain whether such
2 production, together with a continued Rule 30(b)(6) deposition of BCBSIL on the belated
3 discovery, if necessary, is sufficient discovery for class certification. As such, Plaintiffs
4 are no longer asking the Court to decide the motion to compel as to RFP Nos. 12 and 14,
5 *at this time*. Plaintiffs do so without waiver of their right to renew this motion for copies
6 of all BPAs and SPDs pursuant to RFP Nos. 12 and 14 at a later point.

7 In good faith, Plaintiffs gave BCBSIL an extraordinary amount of time to respond
8 to discovery, which was first served nearly a year ago. BCBSIL responded by providing
9 every indication that it would produce the requested discovery, only to repudiate its
10 representations just days before the Rule 30(b)(6) deposition when it was too late for
11 Plaintiffs to obtain a court order beforehand. The Court should order the remaining
12 discovery to be produced immediately so that Plaintiffs may continue the Rule 30(b)(6)
13 deposition based on the belated disclosures before the class certification deadline.
14 Defense counsel's sharp practice should not be condoned.

15 II. LAW AND ARGUMENT

16 A. BCBSIL Waived Its Objections to Production of the Disputed Discovery.

17 BCBSIL waited until May 10, 2022 to inform Plaintiffs that it would not identify
18 the plans that utilize similar exclusions nor produce the underlying documents for those
19 plans. By this time, the discovery requests had been pending for many months. Dkt.
20 No. 53-1 (served on June 18, 2021); Dkt. No. 53-3 (served on November 9, 2021). In a
21 declaration, BCBSIL's counsel baldly declares that it "objected to producing the identity
22 of the plans in its initial discovery responses." *See* Dkt. No. 57, ¶7. Not true. The actual
23 discovery response shows that BCBSIL promised to produce the information: "BCBSIL
24 states that it will produce responsive documents sufficient to show the requested
25 information for ERISA self-funded group health plans in effect from November 23, 2016
26

1 to the present....” Dkt. No. 53-2, p. 22 of 135; *see also* Dkt. No. 53-4, RFP No. 13, p. 51 of
2 135 (incorporating the response to ROG No. 3). The Court may order BCBSIL to produce
3 the disputed discovery on this basis alone. *See* Fed. R. Civ. P. 33(b)(4); *Richmark Corp. v.*
4 *Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1991).

5 **B. The Discovery Sought Is Relevant.**

6 BCBSIL insists that the discovery it has withheld from Plaintiffs’ review is not
7 relevant. But a defendant is not the arbiter of what discovery is relevant to a plaintiff’s
8 case and what is not.

9 Discovery already shows that BCBSIL administered various exclusions and
10 limitations on coverage of gender affirming care in various employer-based health plans,
11 despite the requirements of the Affordable Care Act’s anti-discrimination statute
12 (referred to herein as “Section 1557”). *See* 42 U.S.C. § 18116. Some employers, like
13 Catholic Health Initiatives (“CHI”), have claimed a “religious freedom” exemption. *See*
14 *Supp. Hamburger Decl., Exh. 18*, p. BCBSIL_CP_0008427. The rationale that other
15 employers, particularly secular employers, offered for the Exclusion remains unknown
16 because BCBSIL has not (yet) produced the BPAs or other responsive documents to RFP
17 No. 13 for plans other than CHI. *Supp. Hamburger Decl., ¶2, Exh. 17, Drake Dep.*
18 *pp. 98:19-99:3; 106:1-109:12* (Ms. Drake was not prepared to testify about the language
19 related to exclusions of gender affirming care in the BPAs of other plans). If other
20 employers asserted different legal justifications for the Exclusion, Plaintiffs are entitled
21 to discover those justifications. Such information is relevant to show that BCBSIL’s
22 administration of these discriminatory were undertaken without regard to their legal
23 obligations under Section 1557 and with full knowledge of the Exclusion’s
24 discriminatory nature. In addition, the information may reveal if the establishment of
25 subclasses or different arguments as to liability are necessary or appropriate.

1 In response, BCBSIL argues that Plaintiffs are “bound by the [class] definition
2 they have pled” in their Complaint, implying that they cannot modify the class definition
3 to conform to the evidence obtained in discovery either through amendment or class
4 certification. *See* Dkt. No. 58, p. 4. This is untrue. If discovery requires a modification
5 of the class definition, Plaintiffs may move to amend the complaint to fashion a class
6 definition that reflects the discovery. *See* Fed. R. Civ. P. 15(a)(2); *DCD Programs, Ltd. v.*
7 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

8 BCBSIL also objects to the disclosure of the identities of the plans with gender
9 affirming care exclusions, even subject to the existing Protective Order. *See* Dkt. No. 25.
10 BCBSIL offers no justification for its refusal other than to claim that the request is
11 somehow “improper.” Dkt. No. 58, p. 5. The discovery is entirely proper and relevant.
12 The names of the plans (already known to BCBSIL) will allow Plaintiffs to research which
13 plans are religious and which are not, and their relevant sizes (so Plaintiffs can estimate
14 the total size of the class).⁴ It is information that might serve to rebut BCBSIL’s asserted
15 and already-rejected defense that its actions are protected by RFRA. It also may lead to
16 other relevant and admissible evidence such as how BCBSIL has administered the
17 Exclusion across various plans, such as by revealing the identity of third-party witnesses,
18 i.e., the plans themselves. Importantly, BCBSIL identifies no legal basis for maintaining
19 the confidentiality of the employers who asked BCBSIL to administer the Exclusions.

20 Instead, BCBSIL tries to equate the identities of the plans with that of the proposed
21 class members. Dkt. No. 58, p. 5, *citing In re Williams-Sonoma, Inc.*, 947 F.3d 535, 537 (9th
22 Cir. 2020) (vacating discovery order seeking identity of absent class members so that
23 plaintiffs’ counsel could identify a new named plaintiff). Plaintiffs seek evidence in
24

25 ⁴ BCBSIL testified that it does not know the proportion of secular plans to religious plans with the
26 Exclusion. Supp. Hamburger Decl., *Exh. 17*, Drake Dep., pp. 59:16-18; 79:3-7.

1 BCBSIL's possession related to *non-party plans*, not absent class members, in order to
2 understand how BCBSIL administers its plans and the attendant Exclusions, as well as
3 whether there are any other *defenses* or justifications for BCBSIL's administration of the
4 Exclusion in those plans that might necessitate the establishment of subclasses. This
5 discovery request is entirely proper and related to the claims and defenses in this
6 litigation.

7 **C. The Discovery Sought is Necessary.**

8 This discovery is necessary, despite BCBSIL's claims to the contrary. *See* Dkt.
9 No. 58, pp. 5-6. By July 6, 2022, Plaintiffs must determine whether to amend their
10 complaint and class definition to reflect the evidence produced. Dkt. No. 46. Plaintiffs
11 require this information as quickly as possible to arrive at an appropriate class definition.
12 And while BCBSIL states that it will not dispute numerosity (Dkt. No. 58, p. 8:17-18), it
13 has not stipulated to commonality and typicality. The disputed discovery goes to these
14 class certification requirements. Indeed, BCBSIL's belated claim that it may administer
15 a gender affirming care exclusion for secular employers based upon a religious
16 exemption, proves Plaintiffs' point. *See* Dkt. No. 58, p. 7. Plaintiffs are entitled to know
17 if the secular employers all justified the Exclusion under a claim of "religious freedom"
18 or if some justified it on some other basis.

19 Finally, BCBSIL argues that Plaintiffs do not "need" to know the total number of
20 people enrolled in each of the identified plans for this litigation, since it does not contest
21 numerosity. Dkt. No. 58, p. 8. The number of people enrolled in the affected plans is
22 relevant to (a) numerosity, which must be demonstrated, despite BCBSIL's numerosity
23 stipulation, (b) the scope of relief, and (c) possible settlement.

24 Plaintiffs have offered that if it is burdensome for BCBSIL to produce the total
25 numbers of people in the affected plans, it can simply provide the identities of the plans.
26

1 Then Plaintiffs' counsel can look up the approximate enrollees in the plans on the
2 publicly-available Form 5500s, through the U.S. Department of Labor to arrive at an
3 estimate for the total number of affected individuals. Supp. Hamburger Decl., ¶4; *see*
4 *also* Internal Revenue Service Form 5500 Sample, Part II, Items 6a(1), a(2), *available at*
5 [https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-](https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2021-form-5500.pdf)
6 [administration-and-compliance/reporting-and-filing/form-5500/2021-form-5500.pdf](https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2021-form-5500.pdf).
7 (last viewed June 9, 2022).

8 The total number of enrollees in the plans is significantly different from the
9 number of claims denied by BCBSIL. *See* Dkt. No. 58, p. 8. Denied claims are only a
10 portion of the actual claims to be reprocessed, should Plaintiffs prevail. Some class
11 members likely never submitted their claims because they concluded, after reading their
12 policies or calling customer service, that there was no coverage for gender affirming care
13 and submission of any claim would be futile. *See, e.g., Z.D. v. Grp. Health Coop.*, 2012 U.S.
14 Dist. LEXIS 76498, at *21 (W.D. Wash. June 1, 2012) (notice of injunctive relief and
15 reprocessing was provided to all participants and beneficiaries, not just those who were
16 denied coverage under the disputed exclusion). Indeed, BCBSIL has identified that
17 while there are 398 plans with an Exclusion, only about half of these plans had any
18 denied claims. The total number of affected enrollees is highly relevant, discoverable
19 information.

20 **D. The Discovery Sought Is Not Burdensome.**

21 BCBSIL complains that production of the remaining requested information is too
22 burdensome. Dkt. No. 58, pp. 8-9. BCBSIL knows the identities of the now 398 plans
23 that contain a gender affirming care exclusion. There is no additional burden imposed
24 on BCBSIL to disclose that information to Plaintiffs under the existing protective order.
25
26

1 While there is a burden imposed on BCBSIL to produce responsive information
2 to RFP No. 13, Plaintiffs are willing to accept, without waiver of their right to additional
3 discovery, only the emails and related documents to the exemplar plans identified in
4 BCBSIL's Addendum A. And Plaintiffs' counsel remains willing to work with BCBSIL's
5 counsel if that approach is still burdensome. Ultimately, what Plaintiffs seek are the
6 standard justifications for the Exclusions, apart from "religious freedom," if any, so
7 Plaintiffs can determine the appropriate class definition in this case.

8 **III. CONCLUSION**

9 The Court should order BCBSIL to produce the promised exemplar BPAs
10 immediately, and the remaining disputed information sufficiently in advance of the class
11 certification deadline on July 6, 2022, so Plaintiffs can determine whether their class
12 definition will need to be modified, and how. Additionally, the Court should order
13 BCBSIL to produce its Rule 30(b)(6) witness, Telisa Drake, to be questioned on this
14 belated production, should Plaintiffs conclude that the continued deposition is
15 necessary.

16 DATED: June 16, 2022.

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The Honorable Robert J. Bryan

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NO. 3:20-cv-06145-RJB

[REVISED PROPOSED]
ORDER GRANTING PLAINTIFFS'
MOTION TO COMPEL DISCOVERY

**Noted on Motion Calendar:
June 24, 2022**

THIS MATTER having come before the below-signed Judge of the above-entitled Court upon the Plaintiffs' Motion to Compel Discovery, and the Court having considered the Motion and the pleadings in this matter, and it appearing to be in the best interest of the case, therefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Compel Discovery is GRANTED.

Defendant shall fully and completely respond to Interrogatories Nos. 3, 6, and 7, and produce the documents responsive to RFP Nos. 12-14 as related to the summary plan descriptions quoted in BCBSIL's Addendum A (referred to herein as "exemplar

1 SPDs”). See Dkt. No. 57-1. Specifically, Defendant shall produce the Benefit Program
2 Applications (“BPAs”) for the exemplar SPDs by no later than _____. All
3 remaining responsive documents shall be produced by no later than _____.

4 DATED this _____ day of June, 2022.

5
6 _____
7 Robert J. Bryan
8 United States District Judge

9 Presented by:

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