

THE HONORABLE ROBERT J. BRYAN

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**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,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

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

**BLUE CROSS BLUE SHIELD OF
ILLINOIS’S MOTION TO DECERTIFY
THE CLASS**

ORAL ARGUMENT REQUESTED

**NOTE ON MOTION CALENDAR:
MARCH 3, 2023**

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I. INTRODUCTION

This Court certified a class under Rule 23(b)(1) and (b)(2). Under these Rules, Plaintiffs can only obtain injunctive and declaratory relief, not monetary damages.

During oral argument on the parties' summary judgment motions, the Court asked Plaintiffs what remedy they seek. Plaintiffs requested that this Court order BCBSIL to reprocess and pay previously-denied claims for transgender related services. Plaintiffs also requested that this Court order the employers who sponsor these plans and who are not parties to this action to pay future claims.

Plaintiffs' responses establish that this case should not be certified under Rule 23. And if this was not clear before, it has been confirmed by the Ninth Circuit's recent opinion in *Wit v. United Behavioral Health*, No. 20-17363, --- F.4th ---, 2023 WL 411441, at *9 (9th Cir. Jan. 26, 2023), decided after this Court's Amended Order Certifying Class. *Wit* demonstrates that (1) the class fails Rule 23(a)'s commonality and typicality requirements, and (2) the remedy Plaintiffs seek is inconsistent with the Rule 23(b)(1) and (b)(2) classes that this Court certified. Under *Wit*, the reprocessing remedy that the Plaintiffs demand really seeks monetary damages and is an improper remedy under Rule 23(b), and an injunction requiring a defendant to reprocess claims does not provide the final relief required by Rule 23(b)(2).

Plaintiffs' requested remedies are also impermissible because they would disproportionately burden BCBSIL. Plaintiffs themselves recognize that employers could easily sidestep the requested injunction by replacing BCBSIL with virtually any of its competitors, and courts hold that injunctions that disproportionately burden the defendant while providing the plaintiff with only illusory relief are inequitable.

This Court should decertify the class.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Court certified the class pursuant to Rule 23(b)(1) and Rule 23(b)(2).

Plaintiffs' motion for certification sought certification only under Rules 23(b)(1) and 23(b)(2). *See* Plaintiff C.P.'s Motion For Class Certification, Dkt. 78, at 20-23. The Court

1 certified the class pursuant to those rules. On December 12, 2022, the Court issued its Amended
2 Order Certifying Class and certified a class comprised of all individuals who:

3 (1) have been, are, or will be participants or beneficiaries in an ERISA self-
4 funded “group health plan” (as defined in 29 U.S.C. § 1167(1)) administered by
5 BCBSIL during the Class Period and that contains a categorical exclusion of some
or all Gender-Affirming Health Care services; and

6 (2) were, are, or will be denied pre-authorization or coverage of treatment
7 with excluded Gender Affirming Health Care services.

8 Dkt. 143 at 2.

9 The Amended Order described the relief that Plaintiffs seek as follows:

10 The class seeks declaratory relief. They seek an order enjoining Blue Cross Blue
11 Shield of Illinois from administering or enforcing health benefit plans that
12 exclude coverage for gender-affirming health care, including applying or
13 enforcing the plans’ exclusions of services for, or leading to, gender reassignment
14 surgery, and other similar exclusions during the class period, now and in the
15 future. The class seeks an order requiring Blue Cross Blue Shield of Illinois **to**
16 **reprocess** denied pre-authorizations and claims for gender affirming care under
the relevant self-funded health care plans without applying the discriminatory
exclusions, and when medically necessary and meeting the other terms and
conditions of the relevant plans, **provide coverage (payment)** for those denied
pre-authorizations and claims that were based solely on exclusions for gender
affirming care.

17 Dkt. 143 at 3 (emphasis added).

18 **B. At the December 12 Hearing, Plaintiffs’ Counsel Clarified that the Class Seeks**
19 **Monetary Damages.**

20 On December 12, 2022, the Court held a hearing and asked Plaintiffs about the relief they
21 sought:

22 You know, as we have worked on this, we have had sort of a double approach.
23 One is the plaintiffs are asking for an injunction that directs Blue Cross not to
24 decline coverage on the gender dysphoria issue. Then there is another angle about
25 who pays if the Court goes along with the plaintiffs’ theories. Are there two
issues that are separate there? Can Blue Cross be directed to change its
instructions without incurring financial liability? . . . Any comments on that?

26 Ex. A, Hearing Transcript at 22-23.

27 Plaintiffs’ counsel replied as follows:

1 I would say we have kind of three potential remedies here. One is the injunctive
 2 relief going forward, which does not have an impact on who pays because Blue
 3 Cross would have to notify its employers that this was happening. **Those**
 4 **employers that didn't want to pay for it could go find other TPAs. The**
 5 **prospective relief does not hit the 'who pays' issue because the employers**
 6 **that stay will obviously be on the hook to pay.**

7 Second, the retrospective reprocessing we have asked for, **we believe it is Blue**
 8 **Cross's liability.** It was Blue Cross's responsibility under the administrative
 9 services agreement to always comply with the law. It is Blue Cross's
 10 responsibility to fully comply with the statute. **So, we believe that any damage**
 11 **related to uncovered medical expenses is borne by Blue Cross Blue Shield of**
 12 **Illinois.** That said, as a contract matter, Blue Cross has indemnification
 13 agreements with every single employer that it administered this exclusion for.
 14 Even if Your Honor orders Blue Cross to pay, Blue Cross, outside of this
 15 courtroom, has a means of redress with those employers under their existing
 16 indemnity provisions.

17 I would suggest, Your Honor, and we will do this in the briefing, that that's
 18 between them. They will work it out or they won't work it out. What is
 19 important is the reprocessing occur. **Blue Cross would pay for it**, and then sort it
 20 out with the employers how they are going to handle it.

21 *Id.* at 23-24 (emphasis added). Plaintiffs thus clarified that they seek this Court to order BCBSIL
 22 to not only reprocess previously-denied claims but also to pay the claims itself.

23 **C. ERISA Plans, not TPAs, have the ultimate authority to decide whether a claim is**
 24 **paid or not.**

25 Most ERISA self-funded employers retain, pursuant to the plan documents, ultimate
 26 authority to decide whether any claim is covered or not. *See, e.g., King v. Blue Cross & Blue*
 27 *Shield of Ill.*, 871 F.3d 730, 736 (9th Cir. 2017) (the employer had the "exclusive right and
 discretion to interpret the terms and conditions of the Plan"). BCBSIL is not a party to the
 ERISA contract between employers and their employees. 29 U.S.C. § 1022. In this case, the
 contract between the sole named plaintiff's and employer, CommonSpirit Health, f/k/a Catholic
 Health Initiatives ("CHI"), states that CHI retains final decision-making authority over all
 claims. Dkt. 38-1 at 8, 117-19, 142 (identifying CHI as the Plan Sponsor, the Plan
 Administrator, and the party solely responsible to fund benefits; delegating only limited duties to
 BCBSIL; serving as the only agent for service of legal process; possessing the sole right to
 amend the plan; retaining final decision-making authority with respect to eligibility for and
 coverage of benefits; and serving as the sole signatory on the summary plan description).

1 BCBSIL is one of the many companies CHI has hired to perform functions related to the plan
2 and is one of multiple TPAs employed by the plan. *See* Ex. B, Decl. of L. Malec, ¶ 3 Ex. A. The
3 plan also explains that BCBSIL bears “no liability for the funding of the Benefit plan.” Dkt. 38-
4 1 at 117; Dkt. 38-1 at 8. Moreover, with respect to transgender-related services specifically, CHI
5 requires BCBSIL to send all transgender claims directly to CHI for final approval. Dkt. 94-1,
6 Ex. E.

7 II. ARGUMENT

8 A. A party may move for decertification at any time before final judgment.

9 A district court may decertify a class any time before final judgment. Fed. R. Civ. P.
10 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before
11 final judgment.”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (under
12 Rule 23(c)(1)(C), “[a] district court may decertify a class at any time”); *see also* 7AA Charles
13 Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1785.4 (3d ed.) (“Courts
14 have modified or decertified classes at the outset of pretrial, the completion of discovery, after
15 summary judgment in favor of plaintiff class’s injunctive claims, but before awarding damages,
16 at the close of plaintiff class’s case-in-chief, and at the completion of the trial on the merits.”).

17 Thus, “district court[s] retain[] the flexibility to address problems with a certified class as
18 they arise, including the ability to decertify.” *United Steel Workers v. ConocoPhillips Co.*, 593
19 F.3d 802, 809 (9th Cir. 2010). In deciding whether to decertify, a court may consider
20 “subsequent developments in the litigation,” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147,
21 160 (1982), including “previous substantive rulings in the context of the history of the case” and
22 “the nature and range of proof necessary to establish the [class-wide] allegations.” *Marlo v.*
23 *UPS*, 251 F.R.D. 476, 479-80 (N.D. Cal. 2008) (alteration in original, citation omitted). Here,
24 Plaintiffs’ admission that the class seeks to order BCBSIL to reprocess claims and pay damages
25 necessitates decertification.

1 **B. Plaintiffs bear the burden of proof when opposing a motion to decertify.**

2 In opposing a motion to decertify, Plaintiffs bear the burden of proof just as when moving
3 to certify. *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 502 (E.D. Cal. 2014) (“The
4 standard is the same for class decertification as it is with class certification: . . . Plaintiff, as
5 ‘[t]he party seeking class certification[,] bears the burden of demonstrating that the requirements
6 of Rules 23(a) and (b) are met.’”) (quoting *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947
7 (9th Cir. 2011)).

8 **C. *Wit* confirms that no class may be certified.**

9 In *Wit*, the Ninth Circuit recently reemphasized that a class-wide reprocessing request
10 really seeks damages: “Simply put, reprocessing is not truly the *remedy* that Plaintiffs seek, it is
11 the *means to the remedy* that they seek.” 2023 WL 411441, at *9 (emphasis in original). In *Wit*,
12 the Ninth Circuit reversed the district court’s “reprocessing” injunction requiring United to re-
13 adjudicate claims pursuant to new guidelines and concluded that the “district court abused its
14 discretion in certifying Plaintiffs’ denial of benefits claims as class actions.” *Id.* at *8-*9.
15 Relying on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Ninth Circuit emphasized
16 that re-processing claims lack finality because “a remand to the administrator for reevaluation is
17 a means to the ultimate remedy.” *Id.* at *8. *Wit* emphasized the “numerous individualized
18 questions involved in determining Plaintiffs’ entitlement to benefits given the varying Guidelines
19 that apply to their claims and their individual medical circumstances.” *Id.*¹

20 *Wit*’s holding is similar to *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 886
21 (7th Cir. 2011). In that case, the Seventh Circuit held that an injunction requiring the
22 reprocessing of insurance claims for hail damage under Rule 23(b)(2) was improper because it
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24 ¹ *Wit* also emphasized that reprocessing is not a remedy allowed under ERISA, and ERISA plan
25 members cannot receive reprocessing as a remedy in a class action alleging an infirmity in their
26 ERISA plan. *Id.* at *9. As in *Wit*, the plans at issue here are all governed by ERISA. Plaintiffs
27 allege that BCBSIL has violated Title IX of the Civil Rights Act because it is incorporated into
the Affordable Care Act, which ERISA incorporates. Therefore, as in *Wit*, this Court can only
order a remedy allowed under ERISA, and reprocessing is not one of them. *Id.*

1 was actually an action for damages, not injunctive relief. *Id.* at 888-89 (“The relief is not
2 appropriate [for Rule 23(b) certification] for several reasons, not least of which is that the normal
3 remedy for wrongful denial of insurance benefits is damages, not equitable relief.”).

4 These cases confirm that class certification is impermissible in this case.

5 **1. Plaintiffs failed to satisfy Rule 23(a)’s commonality and typicality**
6 **requirements.**

7 As in *Wit*, the named plaintiffs in this case “expressly disclaimed the actual remedy
8 available to them . . . in an attempt to satisfy Rule 23’s commonality requirement.” 2023 WL
9 411441, at *9. The remedy provided to the named plaintiffs under ERISA is “to recover benefits
10 or to enforce or clarify rights under the plan.” *Id.* at *8. Yet those remedies are fatal for the
11 commonality and typicality requirements. For any member of the class, recovery of benefits or a
12 declaration of rights under the plan would depend upon “numerous individualized questions
13 involved in determining Plaintiffs’ entitlement to benefits given the varying Guidelines that
14 apply to their claims and their individual medical circumstances.” *Id.* Plaintiffs are not
15 permitted to invent remedies to avoid the strictures of Rule 23’s commonality and typicality
16 requirements.

17 Moreover, as *Wit* establishes, reprocessing is not proper relief. *See id.* at *9 (“Simply
18 put, reprocessing is not truly the *remedy* that Plaintiffs seek, it is the *means to the remedy* that
19 they seek.”). As they conceded, the relief Plaintiffs seek is that BCBSIL retroactively approve
20 and pay the denied claims for gender-affirming care. But such relief would not be typical for the
21 class. As the Ninth Circuit has explained, “even where named and unnamed plaintiffs state the
22 same general . . . injury, if the remedy sought by the named plaintiffs would not redress the
23 injury of the unnamed plaintiffs, the claims raise a ‘significantly different set of concerns’ that
24 consequently makes the named plaintiffs inadequate representatives of the unnamed plaintiffs’
25 claims.” *Melendres v. Arpaio*, 784 F.3d 1254, 1264 (9th Cir. 2015).

26 Moreover, while BCBSIL previously administered 398 plans that contained some form of
27 transgender exclusion during the class period, BCBSIL still administers only 292 of those plans.

1 See Ex. B, Decl. of L. Malec, ¶ 3. BCBSIL therefore has *no current relationship* with members
 2 of more than one-quarter (106) of the plans at issue—and, as a result, it has no ability to
 3 reprocess or pay any claims submitted by these members. The named plaintiffs cannot establish
 4 commonality or typicality with respect to absent class members affiliated with those plans.²

5 Finally, even apart from *Wit*, the named plaintiffs seek a form of relief that is not typical
 6 among the class as a whole. Specifically, the named plaintiffs seek reimbursement for the costs
 7 of gender-affirming care paid for out of pocket. There is no evidence that *any* other class
 8 members were denied hormone therapy or surgery at the preauthorization stage but then decided
 9 to pay for these treatments out of pocket. Thus, the named plaintiffs have failed to show such
 10 relief is typical for the class. Indeed, their request for reprocessing masks the atypical nature of
 11 the relief the named plaintiffs actually seek.

12 **2. Plaintiffs failed to satisfy Rule 23(b)(1).**

13 A “class action predominantly for money damages” is not allowed under Rule 23(b)(1)
 14 and (b)(2) because those are mandatory classes, and the lack of an opt out would violate due
 15 process. *Dukes*, 564 U.S. at 363.³ In *Dukes*, the Supreme Court “made clear that ‘individualized
 16 monetary claims belong in Rule 23(b)(3)’ rather than Rule 23(b)(2).” *Wang v. Chinese Daily*
 17 *News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Dukes*, 564 U.S. at 362); *see also Lozano*

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 20 ² At the very least, therefore, the class must be redefined to exclude members of the 106 plans for
 which BCBSIL is no longer the TPA.

21 ³ “Rule 23(b)(1) allows a class to be maintained where ‘prosecuting separate actions by or
 22 against individual class members would create a risk of either ‘(A) inconsistent or varying
 23 adjudications,’ or ‘(B) adjudications . . . that, as a practical matter, would be dispositive of the
 24 interests of the other members not parties to the individual adjudications or would substantially
 25 impair or impede their ability to protect their interests.’” *Dukes*, 564 U.S. at 346 n.2. “Rule
 26 23(b)(2) . . . applies when ‘the party opposing the class has acted or refused to act on grounds
 27 that apply generally to the class, so that final injunctive relief or corresponding declaratory relief
 is appropriate respecting the class as a whole.’” *Id.* at 345-46. In contrast, Rule 23(b)(3) states a
 class may be maintained where “questions of law or fact common to class members predominate
 over any questions affecting only individual members,” and a class action would be “superior to
 other available methods for fairly and efficiently adjudicating the controversy.” *Id.* at 346 n.2.

1 v. *AT&T Wireless Servs., Inc.*, 504 F.3d 718, 729 (9th Cir. 2007) (affirming the district court’s
2 denial of certification under 23(b)(2) because the plaintiff sought money).⁴

3 *Wit* makes clear that Plaintiffs’ class claims fail, and the Court must decertify, because
4 they seek monetary relief for individual class members for a class certified under Rule 23(b)(1)
5 and (b)(2). As the Ninth Circuit explained, “reprocessing is not truly the *remedy* that Plaintiffs
6 seek, it is the *means to the remedy* that they seek.” 2023 WL 411441, at *9. And that remedy is
7 *money*. *Id.* *Wit*’s point that reprocessing is merely monetary relief in disguise fatally
8 undermines the Court’s earlier conclusion that class certification was warranted under (b)(1)(A),
9 (b)(1)(B), and (b)(2).

10 The Court concluded that certification under Rule 23(b)(1)(A) was warranted because
11 “[m]ultiple suits would create a risk of ‘inconsistent or varying adjudications’ resulting in
12 ‘incompatible standards of conduct.’” Dkt. No. 113 at 14. But because *Wit* establishes that the
13 requested reprocessing remedy is really just monetary relief, that risk vanishes. “Rule
14 23(b)(1)(A) certification requires more . . . ‘than a risk that separate judgments would oblige the
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17 ⁴ *Dukes* involved a 23(b)(2) class, but its prohibition of monetary relief applies to 23(b)(1)
18 classes as well. This is because “[c]lasses certified under (b)(1) and (b)(2) . . . are also
19 mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt
20 out, and does not even oblige the District Court to afford them notice of the action. Rule
21 23(b)(3), by contrast . . . allows class certification in a much wider set of circumstances but with
22 greater procedural protections.” *Dukes*, 564 U.S. at 361-62. “And unlike (b)(1) and (b)(2)
23 classes, the (b)(3) class is not mandatory . . . Given that structure, we think it clear that
24 individualized monetary claims belong in Rule 23(b)(3).” *Id.* at 362; *see also Daskalea v. Wash.*
25 *Humane Soc’y*, 275 F.R.D. 346, 364 (D.D.C. 2011) (“[T]here is every reason to believe that the
26 Supreme Court’s holding that ‘individualized monetary claims belong in Rule 23(b)(3) . . .
27 applies with equal force to subdivision (b)(1)’”); *Altier v. Worley Catastrophe Response, LLC*,
2011 WL 3205229, at *14-15 (E.D. La. July 26, 2011) (“Because monetary relief predominates
in plaintiffs’ complaint, certification under Rule 23(b)(1) must be denied . . . as the Supreme
Court discussed in *Dukes*, due process concerns inform whether a Rule 23(b)(1) class can be
certified when claims for individual monetary damages predominate.”); *Zinser v. Accufix*
Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir. 2001) (“Certification under Rule 23(b)(1)(A)
is therefore not appropriate in an action for damages.”); *McCluskey v. Trustees of Red Dot Corp.*
Emp. Stock Ownership Plan & Tr., 268 F.R.D. 670, 677 (W.D. Wash. 2010) (same).

1 opposing party to pay damages to some class members but not to others or to pay them different
2 amounts.” *Zinser*, 253 F.3d at 1193 (citation omitted).

3 Nor is certification under Rule 23(b)(1)(B) proper. That rule applies only if this Court’s
4 ruling in the named Plaintiffs’ case would have a broad dispositive effect on all absent class
5 members. But that is not true here. *See La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461,
6 467 (9th Cir. 1973) (“Neither the *stare decisis* consequences of an individual action nor the
7 possibility of false reliance upon the improper initiation of a class action can supply either the
8 practical disposition of the rights of the class, or the substantial impairment of those rights, at
9 least one of which is required by Rule 23(b)(1)(B).”). Moreover, the named plaintiffs argued
10 that the resolution of C.P.’s claim would be dispositive of other claims because BCBSIL is, in
11 their mind, required to consistently administer the Exclusions. But that may be true only with
12 respect to all claims submitted to the *same* plan. This case involves a class of beneficiaries of
13 398 plans. There is no statutory or regulatory requirement to administer exclusions consistently
14 across *different* plans. The named plaintiffs have thus not justified the creation of a mandatory
15 class consisting of members of *different plans* under Rule 23(b)(1)(B).

16 **3. Plaintiffs failed to satisfy Rule 23(b)(2).**

17 “Rule 23(b)(2) ‘does not authorize class certification when each class member would be
18 entitled to an individualized award of monetary damages.’” *Ellis v. Costco Wholesale Corp.*, 657
19 F.3d 970, 987 (9th Cir. 2011). Since “reprocessing” is just a cover for individualized monetary
20 relief, this class violates that prohibition.

21 Moreover, reprocessing injunctions are impermissible because they fail to provide “final
22 relief” as required under Fed. R. Civ. P. 23(b)(2) and require too many individualized
23 determinations of eligibility and medical necessity. An injunction that merely “initiate[s] a
24 process through which highly individualized determinations of liability and remedy are made”
25 does not provide “final relief” and therefore does not satisfy Rule 23(b). *Jamie S. v. Milwaukee*
26 *Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012). The reprocessing injunction Plaintiffs seek cannot
27 satisfy Rule 23(b) because it “would only lay an evidentiary foundation for subsequent

1 individual determinations” of medical necessity and damages. *Kartman*, 634 F.3d at 886. This
2 is so for two independent reasons.

3 **First**, final relief would occur only after (1) BCBSIL reprocesses each individual class
4 member’s claim via highly individualized inquiries to determine medical necessity and amounts
5 due, *and* (2) those class members receive any payment to which they are entitled. These
6 individual inquiries preclude class certification. *See Day v. Humana Ins. Co.*, 335 F.R.D. 181,
7 199-200 (N.D. Ill. 2020).

8 In *Kartman*, for example, the district court issued an injunction requiring State Farm to
9 reinspect all class members’ roofs pursuant to a new standard, but the court found that class
10 certification was improper because the relief only provided an “evidentiary foundation for
11 subsequent determinations of liability.” 634 F.3d at 893. The court emphasized that the
12 injunction would result in a multitude of subsequent, individual proceedings to determine breach,
13 causation, and damages. *Id.* As the court explained, “certification of a class under Rule 23(b)(2)
14 is permissible only when class plaintiffs seek ‘final injunctive relief’ that is ‘appropriate
15 respecting the class as a whole.’” *Id.* at 886. In other words, “the injunction envisioned by the
16 plaintiffs would in no sense be a final remedy. A class-wide roof reinspection would only lay an
17 evidentiary foundation for subsequent individual determinations of liability and damages.” *Id.*

18 In *Jamie S.*, the plaintiffs sought certification under Rule 23(b)(2) of all children with
19 disabilities eligible for special education services under the Individuals with Disabilities
20 Education Act. 668 F.3d at 485, 487. As the court explained, “[t]hat the plaintiffs have
21 superficially structured their case around a claim for class-wide injunctive and declaratory relief
22 does not satisfy Rule 23(b)(2) if as a *substantive* matter the relief sought would *merely initiate a*
23 *process through which highly individualized determinations of liability and remedy are made;*
24 this kind of relief would be class-wide in name only, and it would certainly not be final.” *Id.* at
25 499 (emphases added). The court denied certification because “there can be no single injunction
26 that provides final relief to the class as a whole.” *Id.*

1 The class that the Court has certified in this case suffers from the same fatal flaw.
2 Plaintiffs seek an injunction directing BCBSIL to re-adjudicate all claims for transgender-related
3 services previously denied under an exclusion—a process that involves “highly individualized
4 determinations” of medical necessity and payments owed for each class member. *Id.* This is
5 impermissible because no class member would receive final relief from *this Court*, as required
6 by Rule 23(b). The Ninth Circuit has recognized the individualized inquiry required for each
7 member claiming a benefit for transgender-related services. In *Doe v. Snyder*, 28 F.4th 103 (9th
8 Cir. 2022), the Ninth Circuit affirmed the district court’s finding that the plaintiffs “had not
9 shown that male chest reconstruction surgeries were medically necessary for them or safe and
10 effective for correcting or ameliorating their gender dysphoria.” *Id.* at 106. The Court
11 emphasized the individualized inquiry required as to each plaintiff, holding that based on
12 individual “facts specific to Doe and the irreversible nature of the surgery,” the plaintiffs had
13 failed to show that they were likely to succeed on the merits of their permanent injunction. *Id.* at
14 106, 111.

15 Here, an injunction requiring BCBSIL to re-adjudicate claims for transgender-related
16 services would only initiate a process involving a re-evaluation of each absent class member’s
17 individual claims. Each class member would then have to prove that the requested treatment was
18 medically necessary, that he or she was otherwise entitled to coverage under the relevant plan,
19 and that as a result he or she is entitled to benefits. This fails under Rule 23(b) because it does
20 not provide final injunctive relief.

21 ***Second***, the injunction the named Plaintiffs seek would not provide “final injunctive
22 relief” for an additional reason: they sued BCBSIL, the plans’ third-party administrator, and not
23 the employers who sponsor the self-funded plans and are contractually responsible to pay the
24 class members’ claims.

25 Even if BCBSIL reprocessed the claims, the injunctive relief would not require any non-
26 party plan to pay a claim. The employers, not BCBSIL, contracted with members to pay benefits
27 to the members. See *Takeda v. Nw. Nat’l Life Ins. Co.*, 765 F.2d 815, 819-20 (9th Cir. 1985) (the

1 employer who sponsored the plan was a necessary party because, as here, the plan was self-
2 funded and would bear the expense of any benefit awarded); *see also* Dkt. 38-1 at 8, 117-19,
3 142. The non-party employers would not be bound by any reprocessing injunction issued by this
4 Court, could freely ignore any injunction issued by the Court, and would not be required to pay
5 any claim.⁵

6 As a result, the non-party employers could simply refuse to pay any benefits. Employers
7 could either replace BCBSIL or countermand an order to pay any claim, as they retain authority
8 to decide any claim. For example, the CHI summary plan description provides that CHI is the
9 “Plan Administrator” and retains all of the powers it has delegated to BCBSIL, including
10 ultimate authority over BCBSIL. *See* Dkt. 38-1 at 117.

11 Moreover, as noted above, BCBSIL has no current relationship with members employed
12 by more than one-quarter of the plans at issue. As a result, it has no ability to reprocess or pay
13 any claims submitted by these members.

14 Finally, under ERISA’s enforcement scheme, were any class member to disagree with the
15 plan’s decision, they would have to bring suit in a district court that has personal jurisdiction
16 over the plan and where venue is proper. *See* 29 U.S.C. § 1132(a). This Court lacks personal
17 jurisdiction over many of the plans. *See* Dkt. 94 ¶ 3 (“Under its license agreement, BCBSIL only
18 administers self-funded health plans for businesses whose corporate headquarters are in the State
19 of Illinois.”). Thus, the requested injunctive relief could not possibly provide “final injunctive
20 relief” required to certify a class under Rule 23(b) because the employers who are obligated to
21 pay claims pursuant to contracts with class members are not parties.

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⁵ An injunction only binds a nonparty that has actual notice and either (1) is the alter ego of, or has identity of interest with, a party, or (2) aids and abets a party’s violation of the injunction order. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323-24 (9th Cir. 1998). None of these circumstances apply here.

1 **D. The Court should decertify the class because any injunction would be inequitable by**
 2 **disproportionately burdening BCBSIL and benefiting its competitors.**

3 Finally, the class as currently certified would unduly and disproportionately burden
 4 BCBSIL. Employers could easily avoid any injunction by this Court by replacing BCBSIL with
 5 any of BCBSIL's many competitors, including all the major national, for-profit insurers such as
 6 Aetna, Cigna, United, other Blue Cross Blue Shield Association licensees, and others. While
 7 BCBSIL itself would bear the full burden of any injunction, the injunction would actually benefit
 8 BCBSIL's competitors by allowing them to use their ability to enforce the exclusion to take
 9 away BCBSIL's customers, at the same time the injunction provided the class with no final
 10 relief. The Court must undertake a "balancing of [the] equities" before issuing an injunction.
 11 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("[T]he court 'balances the
 12 conveniences of the parties and possible injuries to them'" according to how "they may be
 13 affected by the granting or withholding of the injunction."); *see also Kartman*, 634 F.3d at 892
 14 (rejecting a reprocessing injunction, and noting that "[i]njunctive relief is also not 'appropriate'
 15 because the hardships of the contemplated injunction would fall disproportionately on State
 16 Farm"). Any injunction here would be inequitable and should be rejected for this reason.

17 Any injunction would disproportionately burden BCBSIL, advantage BCBSIL's
 18 competitors, leave many class members with no remedy, and therefore would violate the
 19 requirements of equity. The Court should decertify the class for this reason as well.

20 **CONCLUSION**

21 The Court should vacate the certification order and deny Plaintiffs' motion to certify the
 22 class.

23 Dated this 9th day of February, 2023.

24 KILPATRICK TOWNSEND & STOCKTON LLP

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, BLUE CROSS BLUE SHIELD OF ILLINOIS’S MOTION TO DECERTIFY THE CLASS , 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:

<p>Eleanor Hamburger SIRIANNI YOUTZ SPOONEMORE HAMBURGER 3101 WESTERN AVENUE STE 350 SEATTLE, WA 98121 206-223-0303 Fax: 206-223-0246 Email: ehamburger@sylaw.com</p>	<p><input checked="" type="checkbox"/> by CM/ECF <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>
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DATED this 9th day of February 2023.

KILPATRICK TOWNSEND & STOCKTON LLP

By: /s/ Gwendolyn C. Payton
 Gwendolyn C. Payton, WSBA #26752

Counsel for Blue Cross Blue Shield of Illinois

EXHIBIT A

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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,)	3:20-cv-06145-RJB
)	
Plaintiffs,)	Tacoma, Washington
)	
v.)	December 12, 2022
)	
BLUE CROSS BLUE SHIELD OF)	Summary Judgment
ILLINOIS,)	
)	11:00 a.m.
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

Proceedings stenographically reported and transcribed
with computer-aided technology

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1 MORNING SESSION

2 DECEMBER 12, 2022

3 THE COURT: This is C.P. and others versus Blue Cross
4 Blue Shield of Illinois, and comes on this morning for oral
5 argument.

6 A couple of preliminary matters -- I guess I should
7 make a record of who is present. Ms. Hamburger, Ms. Pizer
8 and Mr. Gross are here for plaintiff. Ms. Payton and
9 Ms. Bedard are here for the defendant.

10 A couple of preliminary matters. There is a motion to
11 strike pending regarding supervised -- regarding supplemental
12 authority filed; that motion, I think, should be granted.

13 There are a couple of things that should, for the record,
14 be stricken. The first is plaintiff opened up discussion on
15 this subject by quoting a bit of the *Kadel* case and that line
16 on line 23 of their Docket No. 135 will be stricken as to the
17 content of the *Kadel* case, and the defendant's response
18 should be stricken as well. That motion is granted. You can
19 discuss the issues you raised if you want to during argument.

20 I issued a draft order. That always causes some concern
21 to lawyers. Let me explain a little bit. When a judge has
22 the opportunity to read the pleadings before argument, you
23 can bet that the judge has drawn some conclusions and has
24 some ideas. Sometimes we have gone so far as to prepare an
25 order that we have not filed when we hear oral argument, and

1 sometimes we do, as I did here, which is issue a discussion
2 draft.

3 I guess what I am trying to say is that the discussion
4 draft is only that. It should not be indicated as the
5 Court's final conclusion in any way. It is a matter that we
6 have worked on and got a draft together and offer it for your
7 discussion. It does not indicate the final order. There are
8 many issues that remain outstanding that may be covered in
9 our order, but are not the opinions of the Court for sure at
10 this point.

11 It is five after 11 now. I would like you to limit your
12 argument to 20 minutes a side so we have time for discussion
13 at the end as well, and I would invite comments on the
14 proposed class definition submitted as well as on any of the
15 matters raised in the motions for summary judgment.

16 The defendant started this with the filing for summary
17 judgment, so I guess, Ms. Payton, you are first, and I would
18 ask you to proceed with whatever comments you wish to make.

19 MS. PAYTON: Thank you, Your Honor.

20 We did appreciate getting the draft thoughts from the
21 Court. That will allow me to focus my argument today on a
22 number of issues that I think we want to raise with you. I
23 will use my time on those, not necessarily everything in the
24 order.

25 Obviously, Your Honor, as you would expect, we have

1 disagreements with the Court's draft order. I want to focus,
2 in particular, on the part of the order which the Court
3 concluded that it does not have to give deference to the 2020
4 HHS regulations on this issue.

5 Before I really get into that issue, I want to give you
6 some more high-level thoughts on this case. I think it is
7 important to think about where this case sits in this
8 universe that we have on this issue.

9 As the Court knows, there is a lot of regulatory activity
10 on this specific issue. There are a lot of cases out there
11 that are coming fast and furious. In fact, this morning, we
12 filed a notice of supplemental authority with no quotations
13 from the case of an Eighth Circuit opinion that came out on
14 many of these same issues here today. It came out late on
15 Friday. In this case for the Court's consideration as well,
16 I will reference that a little bit as I go forward.

17 I think, Your Honor, your order acknowledges this: At the
18 end of the day, a lot of what Illinois is saying to you here,
19 the third-party administrator in front of you is not the
20 correct party for this particular lawsuit. There is no cause
21 of action under Section 1557 against a third-party
22 administrator, TPA, as a matter of law.

23 There is most emphatically a cause of action available for
24 this plaintiff against the proper party, and that would be
25 the employer that designed, implemented and funds this plan.

1 If the plaintiffs are correct here that the exclusion at
2 issue is a violation of Section 1557, they have a remedy and
3 they have a remedy against the actor who can correct that
4 violation, if it exists.

5 What we have here is a lawsuit that would create an
6 illusory victory, even if the plaintiffs were successful,
7 because this employer can just go get a new third-party
8 administrator. There are thousands of them. The plaintiffs
9 have made a strategic decision, and it is creating problems
10 because we don't have the right party in front of you, and
11 that creates gaps and analytical jumps and all sorts of
12 problems in the analysis that really stems from that
13 fundamental problem.

14 We know the Court is aware, these transgender exclusions
15 are common. We know that than for no other reason than we
16 see a lot of regulatory activity on this issue and a lot of
17 cases filed all throughout the country on this exact same
18 issue.

19 This case in front of you, Your Honor, is different in the
20 way of no other case that I am aware of in that it is against
21 a vendor, a third-party administrator. It is not the entity
22 that drafted or funded this exclusion.

23 That makes you wonder why, right? Why are we novel here
24 sitting in the Western District that we have one of these
25 cases against a third-party administrator?

1 I think that the answer may lie in the clarity of the
2 regulations. The regulations that are sitting in existence
3 right now and operative are clear that a third-party
4 administrator is not responsible for a Section 1557
5 violation, and the regulations are emphatic through the
6 entire course of the regulatory history that the action
7 belongs against the employer or the ERISA group that is
8 creating the plan design at issue.

9 Your Honor's draft order acknowledged there is a lot of
10 regulatory activity on this issue. I think with respect to
11 the regulatory issues, the questions we need to answer in
12 this case are really two-fold. First of all, what do the
13 regulations say? Then secondly, does this Court have to
14 defer to them?

15 So I want to talk about those two questions. The first
16 question, what do the regulations say? The regulatory
17 history is really interesting here, right? Because we see an
18 up and down and a change of position almost, you know,
19 completely diametrically opposed. So we had, of course, the
20 2016 HHS regulations that said, I think that these exclusions
21 violate Section 1557. Then we have the 2020 regulations come
22 along and say two things. One, they were not violations of
23 1557 and made more clear what was in the 2016 regulations
24 already, that the third-party administrator was not the
25 proper party for 1557 violations in this context.

1 One reason that the 2020 regulations found that exclusion
2 did not violate Section 1557 was that there was a good-faith
3 disagreement on the science in this area. It wasn't an issue
4 of animus. It was an issue of what the science was saying
5 and what the regulatory entity said. This is not a civil
6 rights issue. It is an issue that needs to be decided within
7 the scientific community, and we are not going to find a
8 categorical 1557 violation. To that point, Your Honor, that
9 there is a legitimate debate in the science, it is
10 acknowledged by the Ninth Circuit recently in the *Snyder*
11 case, which acknowledges that point. We have the 2020 regs,
12 and that is what they say.

13 So now we have proposed rule making from the Biden
14 administration in 2022. And interestingly, they have been
15 very clear about what they think they want to do. These rules
16 are not final, of course. They haven't gone through the
17 notice and comment period. They appear to indicate they are
18 going to move back to the position that the exclusions are
19 violations of 1557, but they have also reemphasized two
20 additional things. One is that the third-party administrator
21 is not the proper target of an enforcement action under 1557;
22 the employer is. There is a lot of clarity around that
23 point.

24 The other thing they emphasized, they are not going to
25 visit the Religious Freedom Restoration Act issues arising

1 from the 2016 regulations. There, they don't want to revisit
2 the injunction as in the *Whitman-Walker* case, such that there
3 is a carve-out on this issue related to RFRA issues.

4 They have pretty much told us where they are going. We
5 are left in the situation right now, as we sit here on
6 December 12th of 2022, that we have operative regulations in
7 effect that say the exclusions are allowed and that the
8 third-party administrator is not the party that can be liable
9 for a 15 -- a 1557 violation on this issue. Those rules
10 cannot be -- the 2020 rules cannot be applied retroactively.
11 Really, the situation is we do have regulations in front of
12 you that allow the conduct that is being complained of
13 against at least this defendant in front of you. So there
14 really is no dispute that Illinois was complying with the
15 operative regulation that is in place as of today.

16 That leaves the second question, that's the question of
17 whether this Court can still find Illinois liable despite
18 compliance with the regulations. That is the *Chevron*
19 question. Here, the question is -- I think we all agree the
20 Court must defer to the regulatory interpretation unless they
21 are either arbitrary and capricious or the statute itself is
22 so clear that no regulatory overlay is necessary for this
23 Court to interpret the statute.

24 I think this -- Your Honor, I am honing into the big issue
25 of where we diverge. That is the issue of whether the

1 Court -- whether the Court finds in the draft order that the
2 statute is clear and you don't need the regulations.
3 Therefore, you don't need to do the *Chevron* analysis of
4 whether or not they are arbitrary and capricious.

5 Here, Your Honor, in all respects, I think the order is
6 wrong. Numerous courts have found that Section 1557 is
7 ambiguous on the issue of whether or not it prohibits
8 transgender exclusion. This Court's order -- well, let me
9 say this: To make the argument, the plaintiffs are relying
10 on a completely separate third case which is *Bostock*. We
11 have to look at *Bostock* to determine that it is a 1557
12 violation. By its very face, that is not relying on the
13 language of the statute itself.

14 You know, the fact that we have had this roller coaster of
15 regulatory regimes saying one thing then the exact opposite
16 about the same statute is an indication that the statute is
17 not clear and unambiguous on this particular issue. With all
18 due respect to Your Honor, I think that is an error in the
19 order.

20 I think that leads you to the next step, which is to find
21 that you are not bound by the 2020 regulations with respect
22 to Illinois. You need to find that the 2020 regulations are
23 arbitrary and capricious. That is not in that draft order.

24 Even were you to do that, Your Honor, that wouldn't solve
25 the problem here with this particular case because you have a

1 third-party administrator. The 2016, the 2020 and the 2022
2 proposed rule making all make it clear that it is not the
3 liability of the third-party administrator. They give a lot
4 of reasons why. They are the reasons I touched on before
5 which is: This isn't the right party; not the party with
6 control; not the party that can solve the issue; if it is
7 indeed discrimination, it is a vendor that can be swapped
8 out; that there are many of them and it just isn't the right
9 way to do this.

10 Then on top of that, we have the problem of RFRA. Were
11 the proper party in front of the Court on this issue, the
12 RFRA issue would be much clearer and we wouldn't have to do
13 this sort of convoluted analysis about RFRA.

14 The Supreme Court and HHS have repeatedly said that
15 Section 1557 and RFRA must be read in conjunction together.
16 Your Honor, I just want to be clear, this is not an issue
17 where Illinois is saying we have a cause of action under
18 RFRA, or we are bringing affirmative defenses under RFRA.
19 You will find that is not in the answer.

20 What our argument is, is you cannot read 1557 without
21 looking at the parameters and the boundaries of 1557 with
22 respect to RFRA. In other words, it is one thing to say I
23 have a cause of action under a statute. It is another thing
24 to say that when interpreting the parameters of one
25 statute -- here that is the Affordable Care Act -- you must

1 understand that its parameters are sculpted with another
2 statute, which here is RFRA. You cannot think about the
3 Affordable Care Act without also thinking about the
4 boundaries created by RFRA. The Supreme Court has said that
5 numerous times. The regulations clearly say that when they
6 are looking at it. They don't care who the target is. They
7 care what the statute says. That's what this Court also
8 needs to be looking at.

9 Our Supreme Court has made clear you cannot -- you
10 cannot make a TPA do something that the group would not have
11 to do under RFRA. That is *Hobby Lobby* and that is *Sisters of*
12 *the Poor* case. There, in those cases, the government claimed
13 that it could just bypass the RFRA issues of the group by
14 having the TPA do what the group didn't have to do. They said
15 it is not a problem because we will even fund it. They will
16 fund the contraception and have the TPA pay for the
17 contraception with government funds. Our Supreme Court said
18 no, that is still a RFRA violation. What you cannot do is
19 cause the TPA to do something that the employer would
20 otherwise not have to do under RFRA. That's what we are
21 doing here. That runs afoul of what our Supreme Court has
22 told us are the parameters of the Affordable Care Act and
23 RFRA.

24 Your Honor, this is an important issue we all care about.
25 We all care about doing the right thing. There is a lot to

1 balance here. There are a lot of issues, a lot of concerns,
2 a lot of entities with a vested interest in this. A TPA is
3 not a good defendant for this case. It is a vendor. It is
4 not the actor with the interest at stake.

5 Moving ahead a little bit to your proposed order. One
6 thing I would respectfully request the Court change is
7 "Illinois asserts a RFRA defense." Illinois doesn't.
8 Illinois says there are RFRA issues the Court must consider
9 when adjudicating the parameters of the liabilities under
10 this case. It is a slight distinction, but it is an
11 important distinction and really goes to the issue that this
12 is just not an action the regulators, courts, or anybody else
13 has said can be brought against a third-party administrator
14 and for good reasons.

15 The plaintiffs here are not without a proper avenue to
16 resolution. They could sue the employer. They could sue the
17 actor. They chose strategically not to do this. That would
18 have given the Court the proper parties to adjudicate
19 fulsomely.

20 As I said, it is an important issue. It should not be
21 done without the proper defendant because that leads to
22 incorrect decisions.

23 The operative regulations that Illinois was operating
24 under say that these exclusions are legal. It is the 2020
25 regulations, and that the TPA regardless is not liable in

1 this situation.

2 With that overlay, there simply is no finding of liability
3 against Illinois. The plaintiffs are not left without a
4 remedy. This is just the improper way to do this.

5 I will sum up by saying this is ERISA. These are all
6 ERISA self-funded plans. ERISA is about employers.
7 Employers have the right to design plans that afford coverage
8 to their employees. ERISA is designed to encourage employers
9 to provide health care coverage because we have an
10 employer-based system in the United States. We afford those
11 employers a lot of flexibility. We give them deference in
12 the court. We allow expedited litigation. We give
13 encouragement for them to offer multiple plan designs that
14 can create affordability. We incentivize them to create
15 coverage.

16 What we don't want to do is bypass that system by creating
17 substantive and significant rulings with them not present and
18 with a vendor who is not the ultimate controller of this
19 issue.

20 Again, there are a lot of third-party administrators out
21 there. Saying no to one doesn't actually solve the issue
22 that the plaintiffs are here saying that they want decided.
23 It is a legitimate issue to be decided, but not with this
24 party as a defendant.

25 I will stop there, unless the Court has questions for me.

1 THE COURT: I may have. I will defer them.

2 Ms. Hamburger, I am pointing at the screen, but you can't
3 tell.

4 MS. HAMBURGER: Thank you, Your Honor, and good
5 morning.

6 May it please the Court, I am Eleanor Hamburger.

7 Let me just start where Ms. Payton left off. Third-party
8 administrators are proper defendants, both under ERISA and
9 under Section 1557. The Ninth Circuit has long concluded that
10 under ERISA, TPAs can be held liable for their decisions.
11 Courts across the country have held TPAs responsible.

12 Not only are they responsible for their benefit decisions,
13 but they are also responsible to follow the non-preempted
14 federal laws. That is under 29 U.S.C. 1144(d), which defense
15 counsel has not addressed at all in the briefing or today.
16 This is the exact situation in *Doe vs United Behavioral*
17 *Health*.

18 Suing a TPA is not unique. People do it all the time,
19 because they are where the rubber hits the road when it comes
20 to administering benefits and administering exclusions. It
21 is the TPA that is add -- making the decisions, reviewing the
22 claims, enforcing the exclusions. So the TPA is actually the
23 perfect place to pursue these claims because you can in one
24 stroke of the pen address an illegal action that is being
25 implemented by a TPA across hundreds of employer plans, which

1 is exactly what is going on here.

2 The Affordable Care Act has no exception for covered
3 entities that are third-party administrators.

4 Blue Cross's four main defenses don't solve its problems.
5 First of all, TPAs are covered entities under Section 1557.

6 Defense counsel wants you to go straight to the HHS rules,
7 but that is not what *Chevron* directs. The first stop on
8 *Chevron* is to look at the plain language of the statute.
9 That is exactly what this Court did in its draft opinion.
10 The plain language of the statute says a health program
11 cannot engage in discrimination under 1557, and it
12 specifically calls out contracts of insurance to be included.

13 This was new. Very similar language had appeared in the
14 Section 504 regulations, but the 504 regs excluded contracts
15 of insurance. For the first time, Congress explicitly
16 included contracts of insurance in anti-discrimination law.
17 That was what was groundbreaking about the Affordable Care
18 Act.

19 Now, many insurers have a wide -- have operations that are
20 both insurance and third-party administrators. Employers that
21 don't want to buy an insurance product may use the insurers
22 to administer the plans as a TPA. That is exactly what has
23 happened with Blue Cross Blue Shield of Illinois.

24 An employer can go to someone outside of like the Blue
25 Cross Blue Shield system and get a TPA not covered by Section

1 1557. That's their right. We think the value of the
2 insurers that are providing insurance and TPA services is so
3 significant that if they can't discriminate on the basis of
4 this section, this will not be an illusory victory. The
5 coverage will be put in place for thousands and thousands of
6 plans.

7 I always kind of laugh when a defense counsel tells you if
8 I win, our victory will be illusory. I think that is really
9 for us to determine.

10 Looking at the statute, Your Honor, the statute says
11 health insurance is in. Blue Cross Blue Shield has among its
12 operations health insurance on the exchange. It receives
13 various federal financial assistance. It admits to that. It
14 is undisputed. Then under the plain language of the statute,
15 all of its operations are in. No need to resort to the 2020
16 rules on whether it is a health program or activity.

17 The second way that Blue Cross resorts to the 2020 rules
18 is to say that the rules permit gender-affirming care
19 exclusions for any reason. There is no point in the rules,
20 no rule that they can point to where that is articulated. In
21 fact, the 2020 rules say they are continuing the status quo.

22 The only place where Blue Cross Blue Shield of Illinois
23 can rest its hat on this issue is in the preamble. The
24 regulatory preamble is unenforceable. It makes little sense
25 here because of the changes in the preamble language. If

1 Blue Cross was right, the exclusion would be illegal from
2 2016 to 2020, then there is this period of time where it is
3 not illegal, and then based on the 2020 rules, it is going to
4 be illegal again.

5 We ask Your Honor, as you did appropriately, to look to
6 the plain language of the statute and to both *Bostock* and *Doe*
7 *vs Snyder* to determine that under *Bostock* (inaudible) section
8 plays an unmistakable and impermissible role in the
9 administration of exclusion by Blue Cross Blue Shield. That
10 is textbook sex discrimination.

11 Blue Cross -- the third way in which Blue Cross would like
12 to rely on the rules instead of the statute is to say that
13 the Court should rely on the preamble language that says
14 TPAs -- Blue Cross says it indicates TPAs are not responsible
15 when they administer a discriminatory exclusion for an
16 employer. That is a misreading of the preamble. The
17 preamble says, where the alleged discrimination relates to
18 the administration of a plan by a covered third-party
19 administrator, which is exactly what we allege, OCR will
20 process the complaint against the third-party administrator
21 because it is the entity responsible for the decision being
22 challenged in the complaint. That is exactly what we are
23 doing here.

24 Blue Cross Blue Shield standard administration red flags
25 (inaudible) gender affirming care for denial based solely on

1 the diagnosis on the claim of gender dysphoria, a condition
2 that only people who are transgender are diagnosed with.

3 Most importantly here, the rule -- HHS is getting it wrong
4 when it thinks that TPAs are not responsible for following
5 federal law that is not preempted by ERISA. A TPA does not
6 get to evade anti-discrimination law based upon the design of
7 the plan. They must also obey non-preempted federal law.

8 Finally, Your Honor, turning to the RFRA argument. The
9 nuance that Ms. Payton is describing here, to me, is lost and
10 does not appear in the briefing. Blue Cross is arguing that
11 it should be protected by RFRA. It is neither an entity with
12 a sincerely-held religious belief, nor is a government party
13 present in this case.

14 Blue Cross seems to say if there are two parties and they
15 are both private parties, no government involved, no
16 sincerely-held religious belief, the Court should nonetheless
17 assume a religious entity is involved and rule as if one of
18 the parties is.

19 That is not what RFRA says. The plain language of RFRA
20 limits its protections to just disputes between the
21 government and entities with sincerely-held religious
22 beliefs.

23 The *Little Sisters* case that is referenced doesn't say
24 anything different. That case, just like the *Mercy* case
25 referenced this morning, both involve the government and an

1 entity with a sincerely-held religious belief.

2 What is critically important here is if you rule in our
3 favor, no employer will have to change their plan. No
4 religious employer will have to change their plan. They just
5 won't be able to contract with Blue Cross Blue Shield of
6 Illinois any more to implement the exclusion.

7 That's because Section 1557, if it is to have any teeth,
8 it must mean that it prohibits discrimination in all
9 operations, even when the subject entity is operating as a
10 TPA.

11 In short, there is no TPA or (inaudible) just following
12 ordinary exclusion or exception to the Affordable Care Act.
13 Since Blue Cross is a covered health program or activity and
14 it is subject to 1557, it cannot administer discriminatory
15 categoric exclusion for coverage for gender-affirming care,
16 even when it acts as a TPA.

17 Just to comment on the class motion -- class -- proposed
18 class order, we are fine with the proposed order as
19 Your Honor drafted. The only comment is, we understood the
20 rule to require -- to distinguish between individual claims
21 and class claims, so we are trying to call out the individual
22 claim for Ms. Pritchard in the proposed order. That may be
23 something you want to consider, Your Honor, as you move to
24 finalize the class certification order.

25 Unless Your Honor has other questions, I will defer the

1 rest of my time.

2 THE COURT: Ms. Payton, I guess you have an
3 opportunity for a response, if you wish, if it is something
4 we haven't already heard.

5 MS. PAYTON: I will be brief.

6 I think the argument that we are having here comes down to
7 whether or not you need to defer to the 2020 rule or not. It
8 is true, as counsel says, you can sue a third-party
9 administrator, but that is in the context where it fails to
10 comply with the ERISA plan. We see that over and over. When
11 it comes to the issue of plan design, that's the employer,
12 not the third-party administrator. It is absolutely
13 emphatically clear from the 2020 rule that HHS concluded that
14 the exclusions were allowed under 1557, and I quote from the
15 federal register, but it is stated above, even if it were
16 appropriate policy, such an end would not be achieved through
17 the application of 1557 and Title IX. There is no statutory
18 authority to require the provision of coverage for such
19 procedure under Title IX protection for discrimination on the
20 basis of sex. It is in there, and quoted in the brief.

21 It is very simple. Your Honor, you have an entity that is
22 a vendor in this complicated system of employer-based health
23 care who is operating under regulations and complying with
24 them. It just simply is a question of whether or not -- we
25 all may agree or disagree with the 2020 rules, but they are

1 the rules. Until they are changed, there really is no
2 liability for anybody, certainly not a third-party
3 administrator, that has been explicitly carved out by courts
4 and by the regulator from liability in this context.

5 This is not -- I know the Court understands this. I want
6 to make sure we are clear. This is not a contract of
7 insurance. This is third-party administration, which is
8 outside of the context of a contract of insurance. That is
9 upheld in the regulations in that division and affirmed by
10 numerous courts in finding the parameters of who is liable
11 for a 1557 violation in this context.

12 THE COURT: Hold on a minute. You can watch
13 something that most people don't get to see. I have to
14 change my batteries. It becomes very difficult to hear if I
15 don't do that because the computer puts the sound right
16 through my telephone and into my hearing aid. I got the
17 signal just as we were starting that I was getting low, my
18 battery level. We will change the batteries and then we will
19 be ready to go.

20 Okay. Somebody talk to me.

21 MS. PAYTON: How about this. Does it sound good?

22 THE COURT: It sounds good. Problems of aging.

23 You know, as we have worked on this, we have had sort of a
24 double approach. One is the plaintiffs are asking for an
25 injunction that directs Blue Cross not to decline coverage on

1 the gender dysphoria issue. Then there is another angle
2 about who pays if the Court goes along with the plaintiffs'
3 theories.

4 Are there two issues that are separate there? Can Blue
5 Cross be directed to change its instructions without
6 incurring financial liability? Of course, the liability of
7 the plaintiffs is comparatively small as compared to all of
8 the potential liability in pending matters.

9 Any comments on that?

10 MS. HAMBURGER: Let me go first since our suggestion
11 has been that we brief the remedies for you in this case.

12 You know, I would break it down a little bit differently.
13 I would say we have kind of three potential remedies here.
14 One is the injunctive relief going forward, which does not
15 have an impact on who pays because Blue Cross would have to
16 notify its employers that this was happening. Those
17 employers that didn't want to pay for it could go find other
18 TPAs. The prospective relief does not hit the "who pays"
19 issue because the employers that stay will obviously be on
20 the hook to pay.

21 Second, the retrospective reprocessing we have asked for,
22 we believe it is Blue Cross's liability. It was Blue Cross's
23 responsibility under the administrative services agreement to
24 always comply with the law. It is Blue Cross's
25 responsibility to fully comply with the statute. So we

1 believe that any damage related to uncovered medical expenses
2 is borne by Blue Cross Blue Shield of Illinois.

3 That said, as a contract matter, Blue Cross has
4 indemnification agreements with every single employer that it
5 administered this exclusion for. Even if Your Honor orders
6 Blue Cross to pay, Blue Cross, outside of this courtroom, has
7 a means of redress with those employers under their existing
8 indemnity provisions.

9 I would suggest, Your Honor, and we will do this in the
10 briefing, that that's between them. They will work it out or
11 they won't work it out. What is important is the
12 reprocessing occur. Blue Cross would pay for it, and then
13 sort it out with the employers how they are going to handle
14 it.

15 The third issue we think is outstanding is how are we
16 going to handle Pattie Pritchard's individual damages, the
17 \$12,000, which is small. Blue Cross did not dispute that in
18 the briefing that we did. We think that is ripe for
19 adjudication. If you want to wait to have it addressed in
20 remedies briefing, that is also fine. That's how we see
21 those three issues.

22 MS. PAYTON: I agree with Ms. Hamburger that this
23 issue merits additional briefing to the Court. I would love
24 to get a schedule in place to do that.

25 A couple of precursors on the problem we have here.

1 Your Honor has certified a (b)(1)/(b)(2) class. It cannot
2 have monetary damages. It can be injunctive relief only.
3 This whole idea, while Illinois can just pay the claims,
4 that's money damages. That cannot be allowed in what the
5 Court has done. There is also a requirement that any relief
6 afforded under Rule 23 be final. We have a myriad of cases
7 saying you can't issue an injunction that will be the
8 beginning of a process to find a resolution of the claim.
9 Reprocessing, getting employers to pay, whatever it may be,
10 outside of the parameters of what the Court has conducted
11 under Rule 23, cannot do that. That is as clear as anything
12 under the law.

13 We have a double problem here. They just told you they
14 are seeking money, which they cannot do under the class that
15 they have certified.

16 Secondly, they have told you that alternately it would be
17 something that someone can (inaudible). That cannot happen
18 under Rule 23. That remedy fails and does not satisfy Rule
19 23, and we'll be glad to brief that in addition.

20 THE COURT: Another question. I think in general
21 terms, I have thought of RFRA as a defense that may be
22 raised. I haven't thoroughly analyzed that, but that has
23 been my impression. If it is a defense that the payors under
24 these policies have to raise, at what point do they raise it
25 and how is it raised? I don't see how -- well, I am not as

1 familiar with TPAs perhaps as I should be, but I don't see
2 how someone that is managing insurance can make a decision
3 that can go along with their daily work in what is covered by
4 some religious or other exception to the work they are doing.
5 How are they going to do that? Here, we have this letter
6 that says CHI is the Catholic organization. What do you draw
7 from that? I don't know how that turns this particular plan
8 into one that is totally covered by RFRA. I guess part of
9 the thought that passed through my mind here is let them have
10 a rule that they tell people your claim is covered under the
11 law, but there may be some exception when you go to the
12 doctor. There may be some limit in the actual application
13 for services if someone says we can't do this because of the
14 religious issue and then have to prove it on a case-by-case
15 basis, which obviously doesn't sound like a very practical
16 result.

17 Anyway, those are thoughts about RFRA. I would be
18 interested in comments you have on that.

19 You go first, Ms. Hamburger.

20 MS. HAMBURGER: Thank you, Your Honor.

21 I think there are complicated issues about RFRA, but none
22 of them enter into this case because, for whatever reason,
23 CHI has not shown up. They clearly have some relationship
24 going on with Blue Cross Blue Shield of Illinois, but they
25 decline to submit any declaration or to participate in any

1 way in this case. So we don't know if the hospital at which
2 Ms. Pritchard works is subject to any religious exemption.
3 In fact, there is evidence in the record that even CHI
4 considers the facility that Ms. Pritchard is at, what used to
5 be Harrison Medical Center, to be part of CHI's for-profit
6 arm and not subject to the religious exemption.

7 Yes, there are a lot of complications, but I don't believe
8 we have evidence in this case that necessarily means that
9 there is a party in here with a sincerely-held religious
10 belief that needs to be accommodated. That's my response on
11 that.

12 These questions will have to be sorted out. I am sure
13 they will be sooner or later.

14 Where you have a third-party administrator with no
15 sincerely-held religious belief that is subject to 1557,
16 there is no exception for that TPA. Those employers that may
17 or may not have an exception, they can find a different TPA
18 to administer their coverage. That seems to me the answer to
19 that issue here, for this case.

20 THE COURT: Ms. Payton.

21 MS. PAYTON: This, Your Honor, is why every single
22 court, every single court and regulator have said the party
23 is the group when you are enforcing 1557 because they are the
24 ones that are dealing with the panoply of issues that come
25 into 1557. We have the United States Supreme Court and

1 numerous other courts saying when you analyze the Affordable
2 Care Act and 1557, in particular, you must also consider the
3 parameters of RFRA. You can't do an end run around RFRA, but
4 go after the TPA. That is *Hobby Lobby* and *Sisters of the*
5 *Poor*.

6 This problem is created by having the wrong defendant in
7 front of the Court. We do, however, have the only evidence,
8 and it is uncontradicted in the case, of a letter to these
9 named plaintiffs saying the exclusion was included for
10 religious beliefs. That is in this record. We can go beyond
11 that. We know from the ample number of cases brought by
12 Catholic institutions throughout the United States, all of
13 these leading cases enforcing and upholding these exclusions
14 are from Catholic institutions. Nobody is contesting these
15 are bona fide, good faith, religiously-held views. They are
16 important. It is impossible to adjudicate a 1557 claim
17 without taking them into consideration.

18 One thing we know from *Hobby Lobby* is that it is not just
19 the name of the group that you can tell. In *Hobby Lobby*, it
20 was the shareholders that had the bona fide religious view
21 that was protected by the RFRA defense in that case.

22 What we have here is the wrong party to even make that
23 analysis. So we have a problem we know is real. Right? We
24 know that RFRA is an issue here, and it will stop the payment
25 of many of these claims. Maybe not all of them. Maybe some

1 of them. We don't have that information in front of this
2 Court right now. We know there has to be some sort of
3 mechanism before affording relief to determine that. We
4 simply cannot do that within the parameters of this class.

5 This goes back to what I was saying at the beginning of
6 this discussion, which you have an injunctive class that
7 cannot afford monetary damages and then you don't have
8 finality because you don't really have the people in front of
9 you to make a determination of whether these claims should be
10 paid or not. We simply don't have means to give final relief
11 in this particular case.

12 There is really no legitimate question from anybody who
13 has analyzed Section 1557, courts, regulators, that you
14 should do that in a vacuum outside of the RFRA issues. You
15 cannot do that if you don't have the RFRA entity in front of
16 you. They are real, and they are here.

17 I will note, Your Honor, that at the beginning of this
18 case we moved under Rule 19, indispensable parties. Many of
19 these entities (inaudible) because Blue Cross Blue Shield of
20 Illinois only administers plans for groups that are
21 headquartered in the state of Illinois. This case really
22 doesn't have a lot of nexus to the state of Washington. We
23 do have a plaintiff who resided in the state of Washington.
24 All of the employer groups are based in the state of
25 Illinois. Many of them are not subject to the jurisdiction

1 of this Court. We have a really peculiar situation going on
2 here.

3 When I started this argument, I said to Your Honor, a lot
4 of problems that we have here, and they are real problems
5 that we have to sort through, are created by the fact we have
6 a TPA and not a group. That is why -- that is why the courts
7 and the regulators say you need to deal with the group on
8 this issue, not the TPA. They have said it clearly. They
9 said it explicitly. They said it over and over since 2016.
10 None of the rulemaking has changed on that issue. The Biden
11 administration has doubled down on that and made it very
12 clear they are not going to do this with a TPA for many of
13 the reasons we are running into here. We just can't figure
14 it out unless we have the institutions that are responsible
15 for these claims in front of us. An injunctive order saying
16 reprocess these claims does not satisfy Rule 23 because we
17 get to a stop. Rule 23 doesn't (inaudible).

18 THE COURT: Let me ask you: How does Blue Cross feel
19 about being required to give what basically could be contrary
20 advice that forecloses coverage that perhaps should be
21 allowed? Doesn't it put Blue Cross in a position where you
22 are putting out bad information to your patients, or
23 potentially bad, at least?

24 MS. PAYTON: Let me say it this way, Your Honor:
25 What Blue Cross's position is, is it wants to comply with the

1 law. It wants to have the law to be consistent through the
2 industry, right? So we are not just putting one business out
3 of business. That is one consideration in Rule 23. There
4 are thousands of third-party administrators out there. They
5 all have these exclusions. We have Aetna, Signa,
6 United Health, all the Blue Cross Blue Shield plans. They
7 are all doing this. What Blue Cross wants to know is what
8 the law is, to follow the law and to be consistent with the
9 rest of the industry so it can still operate. Otherwise,
10 what you are doing is targeting and put a death knell on one
11 carrier and not on the rest. That really does nothing on
12 this issue. We do want an answer on this issue. We want to
13 do the right thing. We want to follow the law.

14 It is very hard to know what is going on here. You have
15 an entity in good faith following the regulatory regime that
16 it was subjected to. It did. It did everything required
17 under those regulations. Were the regulations to change, it
18 would comply with the changed regulations. It is not the
19 actor that has the interest in this issue.

20 It is really peculiar because I don't think there has been
21 any argument that Blue Cross Blue Shield of Illinois violated
22 the regulatory regime that it lives under. It is the
23 obstruction (inaudible) of, well, it might have been illegal
24 for somebody else, therefore it is illegal for you. That's
25 just not how the law works.

1 To your question of what are we going to tell people about
2 this, I don't know. It is very unclear what is going on here
3 because we cannot afford the relief that the plaintiffs are
4 requesting. We simply do not have the power to do this.
5 There was nothing, absolutely nothing, Your Honor, stopping
6 them from suing the entity that did. They chose not to do
7 that. That is the plaintiffs' burden.

8 THE COURT: Okay. Ms. Hamburger, quickly.

9 MS. HAMBURGER: Yes, Your Honor, there is no --
10 plaintiffs get to chose their defendant. It is clear we have
11 a cause of action against TPAs. TPAs are correctly subject
12 to this law if they are a covered health entity, which we
13 believe your draft decision found that they are.

14 Blue Cross Blue Shield of Illinois represented to its
15 members, to its enrollees, to the Pritchards, in every letter
16 they included a tag line "we do not discriminate on the basis
17 of sex." They promised they wouldn't do that time and time
18 again in every communication with these plaintiffs. They
19 also promised in their contract with Blue Cross -- with CHI
20 and with other employers that they would always follow the
21 relevant federal law.

22 The failure to follow 1557 and to not discriminate on the
23 basis of sex rests solely with Blue Cross Blue Shield of
24 Illinois. They did their own analysis when the ACA came out
25 and concluded in 2015 that they were going to remove these

1 exclusions from all of their insured plans. They understood
2 they needed to follow this law in their insured plans, but
3 because they wanted to keep the business of the entities that
4 wished to continue to discriminate, they agreed to administer
5 the exclusions putting their own financial interest ahead of
6 the promises they made to the Pritchards. That
7 responsibility for following the law rests solely at Blue
8 Cross Blue Shield of Illinois' feet.

9 THE COURT: Okay. It is quitting time for me. Only
10 for an hour or so for lunch and then we will dive into this
11 further and try and get everything back to you as soon as we
12 can. It will take a little while.

13 Okay. Thank you very much.

14 MS. PAYTON: Thank you.

15 MS. HAMBURGER: Thank you.

16 MS. PAYTON: Good-bye, everyone.

17 (The proceedings adjourned.)

18
19 C E R T I F I C A T E

20
21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23
24 /s/ *Angela Nicolavo*

25 ANGELA NICOLAVO
COURT REPORTER

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EXHIBIT B

HONORABLE JUDGE ROBERT J. BRYAN

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**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,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

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

**DECLARATION OF LAURA MALEC IN
SUPPORT OF BLUE CROSS BLUE
SHIELD OF ILLINOIS’S MOTION TO
DECERTIFY THE CLASS**

Pursuant to 28 U.S.C. § 1746, I, Laura Malec, hereby declare as follows:

1. I am the Divisional Vice President of Market Enablement for Health Care Service Corporation (“HCSC”). I have worked for HCSC for nine years. I have personal knowledge of the facts set forth in this declaration.

2. This declaration is filed in support of Blue Cross Blue Shield of Illinois (“BCBSIL”)’s Motion to Decertify the Class.

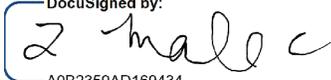
3. Of the 398 ERISA self-funded group health plans for which BCBSIL administers or has administered a gender-affirming care exclusion, BCBSIL no longer administers claims for at least 101 of those plans.

4. BCBSIL is one of the many companies that CommonSpirit Health, f/k/a Catholic Health Initiatives (“CHI”) has hired to perform functions related to the plan and is one of

1 multiple third party-administrators employed by the plan. For example, between September
2 2018-September 2019, CHI also used Anthem, Blue Cross Blue Shield of Nebraska, Cigna,
3 CVS, QualChoice, VirginPulse, Wellmark and Zenith as third-party administrators in addition to
4 BCBSIL. See Exhibit A.

5 5. I declare, under penalty of perjury under the laws of the United States of America,
6 that the foregoing is true and correct.

7 DATED this ___ day of February, 2023, at _____ 2:23pm
8 2/9/2023

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12 Laura Malec

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EXHIBIT A



April 2019 Monthly Vendor Call

Date: April 19, 2019

Location: Nazareth Room

Dial-In: 877-402-9753; access code - 4216659

Start Time: 12:00 PM ET

End Time: 1:00 PM ET

Attendee's– BCBSIL, BCBSNE/SC, Cigna, QualChoice, Wellmark, Zenith, Anthem

Not in Attendance – Anthem, CVS, VirginPulse

* **Reflection** –I believe if you keep your faith, you keep your trust, you keep the right attitude, if you're grateful, you'll see God open up new doors. Joel Osteen

* **CommonSpirit Health** – No Updates.

Redacted



Redacted

*** *Transgender Services Reminder*** – Please run a report for all 2017 & 2018 denied services for Transgender services. Reminder in 2017 we asked to see all services before denying, 2018 only reassignment surgery and procedures associated with the surgery should deny. Review the report and let me know if you have any questions. We would like to see any services that are possibly going to deny concerning Transgender services prior to them denying (requested from all carriers in 2017). Also, the only service we do not cover is transgender reassignment surgery and procedures associated with the surgery. *ICD-9/10 codes to use to pull*



the report are F640, F641, F642 and F649. Received reports from Anthem, BCBSIL, BCBSNE/SC, Cigna, QualChoice, Wellmark. Still waiting on response from Zenith.

Redacted