

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 on his own behalf
and on behalf of similarly situated others; and
PATRICIA PRITCHARD,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

No. 3:20-cv-06145-RJB

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR LEAVE TO FILE A
SECOND AMENDED COMPLAINT AND
TO ADD PARTIES AS ADDITIONAL
CLASS REPRESENTATIVES

**Note on Motion Calendar:
October 13, 2023**

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I. INTRODUCTION

From the outset, Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) gets the facts and law wrong. Defendant’s opposition is premised on the erroneous contention that “Plaintiffs seek leave to file a new Amended Complaint, to remove the named Plaintiff C.P., and to substitute two new named Plaintiffs, S.L. and Emmett Jones.” Dkt. No. 184, p. 2. Plaintiffs seek no such thing, instead asking that “Emmett Jones and S.L. ... [be] appointed as Class Representatives *in addition to* C.P.” Dkt. No. 175, p. 13 (emphasis added).

Further, BCBSIL does not even ask the Court to deny the relief requested by Plaintiffs. Instead, BCBSIL again challenges the class’s certification, this time to create a rationale for reopening discovery. The Court should reject BCBSIL’s backdoor maneuver to reargue decertification. Nor should the Court authorize BCBSIL’s requested discovery, which would be futile, given that all issues regarding BCBSIL’s liability have been resolved in ways equally applicable to C.P., Mr. Jones and S.L. No amount of discovery will alter the facts that matter – S.L. and Mr. Jones are members of the class because they “are ... participants or beneficiaries in an ERISA self-funded ‘group health plan’ administered by Blue Cross Blue Shield of Illinois during the Class Period and that contains a categorical exclusion of some or all Gender-Affirming Health Care services; and ... *were, are, or will be denied* pre-authorization or coverage of treatment with excluded Gender Affirming Health Care services.” Dkt. No 143, p. 2 (emphasis added).

II. ARGUMENT

A. C.P. REMAINS AN ADEQUATE CLASS REPRESENTATIVE.

BCBSIL spills much ink arguing that a class must always have an adequate representative. But C.P. has been one and will remain one post-amendment. As the Court previously held, C.P.’s claims are typical of the class. “Like the class, he contends that Blue Cross impermissibly discriminated against him, contrary to the ACA, when it administered

1 and/or enforced exclusions for gender affirming care in self-funded ERISA healthcare plans.”
2 Dkt. No. 113, p. 12. “The requirements of typicality under Rule 23(a)(3) are met.” *Id.* This is
3 unchanged by C.P.’s change of health plans.

4 Nonetheless, BCBSIL claims that Plaintiffs concede that C.P. is no longer an adequate
5 class representative. Not true. *See* Dkt. No. 175, p. 6 (“C.P. would remain as a named plaintiff
6 and class representative.”). Rule 23(a)(4) mandates that “the representative parties will fairly and
7 adequately protect the interests of the class.” As this Court stated, “[i]n order to decide whether
8 named plaintiffs will adequately represent a class, two questions are considered: ‘(1) do the
9 named plaintiffs and their counsel have any conflicts of interest with other class members and
10 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
11 class?’” Dkt. No. 113, p. 13 (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th
12 Cir. 2011)). BCBSIL presents no argument regarding either of these questions. Indeed, by
13 seeking to **add** class representatives, C.P. and his counsel follow Fed. R. Civ. P. 23(a)(4)’s
14 requirement: to vigorously protect the interests of the *entire* class.

15 **B. THERE IS GOOD CAUSE TO AMEND THE COMPLAINT.**

16 At the outset, BCBSIL concedes most of the factors considered when determining
17 whether to grant leave to amend. BCBSIL does not argue that amendment would be futile, that
18 there was undue delay, or that amendment is sought in bad faith. Nor does BCBSIL argue that
19 leave to amend should be denied because it was previously granted. Instead, BCBSIL hangs its
20 hat on one factor: whether amendment would prejudice BCBSIL. Here, too, BCBSIL errs.

21 Ignoring the case law in Plaintiffs’ motion, BCBSIL relies on two cases to argue that
22 amendment would prejudice them: *Wilson v. Frito-Lay N. Am., Inc.*, 2017 WL 3478776 (N.D.
23 Cal. Aug. 14, 2017), and *Osakan v. Apple Am. Grp.*, 2010 WL 1838701 (N.D. Cal. May 5, 2010).
24 Both cases are inapposite.

1 In *Wilson*, the plaintiffs sought amendment when no class had been certified and
2 defendants had already been granted summary judgment. *Wilson*, 2017 WL 3478776, at *1. Here,
3 by contrast, Plaintiffs have already proven liability on behalf of the certified Class, and the only
4 issue left is the choice of remedies. *See, e.g.*, Dkt. Nos. 148, 153, 180. Additionally, *Wilson*
5 involved an attempt to **substitute** a named plaintiff and class representative in what the court
6 viewed as plaintiffs’ attempt to circumvent their loss on summary judgment, which would have
7 required discovery to begin the case again “from scratch.” *Wilson*, 2017 WL 3478776 at *4. None
8 of these concerns apply here, where the Plaintiffs and the Class have already prevailed on
9 summary judgment and the named plaintiff (C.P.) is seeking to **add** (not substitute) class
10 representatives.

11 Furthermore, the *Wilson* plaintiffs conceded in depositions that they had not suffered the
12 injury at issue there and still did not seek amendment and substitution for over two years. *Id.* at
13 *3. Here, Plaintiffs and the Class seek to amend barely a month after the circumstance suggesting
14 that amendment might be appropriate arose. *See* Dkt. No. 178, ¶¶2–5.

15 Similarly, BCBSIL’s reliance on *Osakan v. Apple Am. Grp.* is misplaced. *See Whelan v.*
16 *Indus.*, 2012 WL 12920688, at *3 (N.D. Cal. Sept. 12, 2012) (finding *Osakan* “inapposite”
17 because, “[i]n *Osakan*, the plaintiff was not diligent in seeking amendment because he had settled
18 with the defendant sixteen months earlier, yet continued to pursue his claims.”). In *Osakan*, the
19 plaintiff sought not only to add four class representatives less than four months from trial, but
20 also modify the class definition and add a new allegation “directed to a company-wide practice”
21 by the defendant. *Osakan*, 2010 WL 1838701, at *2, *5. The court in *Osakan* found the requested
22 amendment untimely and prejudicial largely because the “inclusion of this allegation would
23 expand the scope of the litigation.” *Id.* at *5. None of these circumstances are present here.

24 This Court already found that the Class is entitled to summary judgment because “the
25 trigger for application of the Exclusion and a denial of coverage was a diagnosis of ‘gender
26 dysphoria’ for C.P. and the other class members.” Dkt. No. 148, p. 11. This “conduct is not

1 unique to Plaintiff C.P.” Dkt. No. 113, p. 12. “This action is based on Blue Cross’s conduct in
2 handling claims for gender dysphoria in plans with exclusions for all plan members.” *Id.* The
3 claims of S.L. and Mr. Jones are thus “identical to the claims of the class.” *Id.* “Like the class,
4 [they] contend[] that Blue Cross impermissibly discriminate[s] against [them], contrary to the
5 ACA, when it administer[s] and/or enforce[s] exclusions for gender affirming care in self-funded
6 ERISA healthcare plans.” *Id.*

7 BCBSIL also argues that discovery is needed because, for example, Mr. Jones does not
8 “appear to have exhausted his contractual remedies under his plan” or that “S.L.’s plan contains
9 different exclusion language than C.P.’s plan.” Dkt. No. 184, pp. 4, 6. This is nonsense.

10 The only salient facts here are (1) whether S.L. and Mr. Jones “are ... participants or
11 beneficiaries in an ERISA self-funded ‘group health plan’ administered by Blue Cross Blue
12 Shield of Illinois during the Class Period and that contains a categorical exclusion of some or all
13 Gender-Affirming Health Care services” and (2) whether they “were, are, or will be denied pre-
14 authorization or coverage of treatment with excluded Gender Affirming Health Care services.”
15 Dkt. No 143, p. 2.

16 BCBSIL does not deny—nor can they—that the answer to the first question is yes. Rather,
17 BCBSIL confirms that both S.L. and Mr. Jones are such participants or beneficiaries. *See* Dkt.
18 No. 184, p. 7.

19 As to the second question, the class definition includes participants or beneficiaries who
20 were, are, or *will be* denied coverage of treatment with excluded Gender Affirming Health Care
21 services. This Court has already found that “Blue Cross administered the exclusions for gender
22 affirming care (regardless of the particular plan’s coverage) consistently.” Dkt. No. 113, p. 12;
23 *see also* Dkt. No 148, p. 11. More specifically, this Court found that,

24 Blue Cross’s Fed. R. Civ. P. 30(b)(6) witness testified that it administers exclusions
25 consistently. It reviews claims to determine if the “diagnosis code” is for “gender
26 dysphoria” or “gender reassignment” and examines the “procedural code” to see if
the claim is for gender reassignment treatment. If based on that criteria Blue Cross

1 determines that the services are for gender reassignment, the claim is denied. The
 2 class seeks to challenge this standard conduct.

3 Dkt. No. 113, p. 9 (citations omitted). It therefore does not matter whether S.L. or Mr. Jones have
 4 appealed their denials,¹ or whether there could be other reasons for their past denials. If there are,
 5 then they would be denied coverage *after* reprocessing. What matters is that they are transgender
 6 participants or beneficiaries with gender dysphoria who have or *will* require treatment for gender-
 7 affirming medical care, and that based on the Exclusions BCBSIL administers they will be denied
 8 coverage for such care.

9 To be clear, the purpose of the proposed amendment and addition of S.L. and Mr. Jones
 10 as class representatives is to secure *prospective relief* for the Class because S.L. and Mr. Jones
 11 are current participants and beneficiaries. *See* Dkt. No. 175, p. 6 (“Here, Jones and S.L. are
 12 members of the certified Class with standing to seek prospective injunctive relief”). “Both are
 13 enrolled in self-funded health plans administered by BCBSIL ... and both are likely to seek such
 14 coverage in the future.” *Id.*, citing Dkt. Nos. 177, ¶¶2–4, 7, 10–11; 176, ¶¶4, 9–12). For example,
 15 Mr. Jones is enrolled in the same Plan as C.P. was, and a BCBSIL representative told Mr. Jones
 16 “that the Plan ‘does not cover transgender surgery.’” Dkt. No. 177, ¶7. Mr. Jones, however, “may
 17 require additional gender-affirming care and surgery in the future” and “want[s] to have coverage
 18 for such treatment in the future if it is recommended as medically necessary by [his] treating
 19 providers.” *Id.* at ¶13. Similarly, S.L.’s plan states that “Gender reassignment surgery (also
 20 referred to as transsexual surgery, sex reassignment surgery or intersex surgery), including
 21 related services and supplies,” is “not covered.” Dkt. No. 176, ¶11. And “[b]ased on []
 22 consultation with S.L.[’s] healthcare providers, S.L. may require a new puberty blocker implant
 23 by the end of the year as well as gender affirming hormones in the future.” *Id.* at ¶14.

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 26 ¹ Notably, BCBSIL concedes that S.L. exhausted her appeals. Dkt. No. 176, ¶12, *Exh. 3*.

1 **C. BCBSIL’s ATTEMPTS TO MANUFACTURE CLASS CERTIFICATION**
 2 **ISSUES TO JUSTIFY DISCOVERY FAIL.**

3 First, the fact that class representatives in whatever new constellation would continue to
 4 seek reprocessing is in no way contingent on the Complaint’s amendment. Reprocessing is
 5 sought in the current and proposed Complaints. Dkt. No. 175-1, *Exh. A*, ¶118, §VII(4). Moreover,
 6 BCBSIL continues to misread the Ninth Circuit’s treatment of reprocessing in *Wit v. United*
 7 *Behavioral Health*, 79 F.4th 1068 (9th Cir. 2023). BCBSIL claims that *Wit* casts reprocessing as
 8 an exceptional remedy. But the Ninth Circuit makes clear that where an administrator made
 9 benefits determinations using the wrong standard, it is the *denial* of reprocessing that is
 10 exceptional, exercised only when reprocessing would be a “useless formality.” *Id.* at 1084-86.

11 Second, whether or not Mr. Jones appealed his denial is of no moment. Contrary to
 12 BCBSIL’s bald assertion, ERISA plans do not of themselves require exhaustion. Dkt. No. 184,
 13 p. 6. *Wit* acknowledges that exhaustion is not required for some statutory ERISA claims and does
 14 not suggest that Section 1557 claims require exhaustion. *Wit*, 79 F.4th at 1087. Again, “ERISA’s
 15 command ... to administer the exclusions as written is subservient to Section 1557.” Dkt. No.
 16 148, p. 20.

17 Third, the fact that the Exclusions in C.P.’s and S.L.’s health plans are not identical word-
 18 for-word is irrelevant. This Court found that BCBSIL implements the exclusions in a standard
 19 manner, using a diagnosis of “gender dysphoria,” an objectively defined disorder, as the
 20 condition that triggers their application. Dkt. No. 148, p. 11. Moreover, BCBSIL makes no claim
 21 that the exclusion language in S.L.’s plan is materially different from that in C.P.’s plan, nor can
 22 it. *See* Dkt. No. 176, ¶11, *Exh.3*, pp. 1–3; Declaration of Daniel Gross in Support of Motion to
 23 Amend and Add Class Representatives, *Exh. A.*, p. 100; *Exh. B*, p. 101.

24 **III. CONCLUSION**

25 BCBSIL suffers no prejudice from the proposed Amendment. Nor is further discovery or
 26 liability litigation justified. The Court determined that BCBSIL administered the Exclusions in a

1 standard manner across health plans, and that, *as a matter of law*, it cannot administer those
2 Exclusions. Moreover, Mr. Jones and S.L. are undeniably members of the Class.

3 For the foregoing reasons, the Court should grant Plaintiffs' Motion.

4 DATED: October 13, 2023.

5 *I certify that the foregoing contains 2,094 words,*
6 *in compliance with the Local Civil Rules.*

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The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
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[PROPOSED]
ORDER GRANTING PLAINTIFFS’
MOTION TO AMEND COMPLAINT AND
DENYING DEFENDANTS’ REQUEST TO
REOPEN DISCOVERY AND SET A NEW
BRIEFING SCHEDULE

**Note on Motion Calendar:
October 13, 2023**

THIS MATTER comes before the Court on Plaintiffs’ Motion for Leave to File a Second Amended Complaint and to Add Parties as Additional Class Representatives, pursuant to Fed. R. Civ. P. 15(a)(2) and LCR 15. The Court has reviewed all the pleadings and filings in the record, including Plaintiffs’ Motion, the supporting Declaration of Eleanor Hamburger, Defendant’s Opposition and the supporting Declaration of Suzanne Livorsi, Plaintiffs’ Reply, and the supporting Declaration of Daniel Gross, and proposed Second Amended Complaint in *Appendix A* to Plaintiffs’ Motion.

Therefore, pursuant to Fed. R. Civ. P. 15(a)(2), 16(b), and 21, and LCR 15, IT IS HEREBY ORDERED that Plaintiffs’ Motion for Leave to File a Second Amended Complaint and to Add Parties as Additional Class Representatives is GRANTED.

1 IT IS FURTHER ORDERED that Plaintiffs are directed to file the Second Amended
2 Complaint.

3 IT IS FURTHER ORDERED that Emmett Jones and S.L., by and through her parents,
4 S.R. and R.L., are hereby appointed as Class Representatives in addition to C.P., by and through
5 his parents, Pattie Pritchard and Nolle Pritchard.

6 IT IS FURTHER ORDERED that Defendant's Requests to suspend consideration of
7 BCBSIL's Motion to Decertify the Class and Plaintiffs' Motion for Classwide Declaratory Relief
8 and Permanent Injunctive Relief, reopen discovery, and set an additional briefing schedule in this
9 matter is DENIED.

10 DATED: October _____, 2023.

11
12 _____
13 Robert J. Bryan
United States District Judge

14 Presented by:

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