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; et al., Plaintiffs, v. BLUE CROSS BLUE SHIELD OF ILLINOIS, Defendant.	NO. 3:20-cv-06145-RJB CLASS'S OPPOSITION TO DEFENDANT'S MOTION FOR STAY PENDING APPEAL (DKT. NO. 210) **Noted for Consideration: January 12, 2024**

I. INTRODUCTION

The Court ordered BCBSIL to cease its illegal and discriminatory administration of gender-affirming health care exclusions. Dkt. No. 207–208. This injunctive order comes in the nick of time for Plaintiff S.L. and many others.

Plaintiff S.L. requires new puberty blockers to treat her gender dysphoria. Dkt. No. 176, ¶¶14–17. The puberty blockers' cost is more than any family can afford—approximately $200,000 per implantation. *Id.*, ¶15. BCBSIL has already denied one implantation, making the cumulative cost of this medically-necessary service prohibitive. *See id.* S.L. cannot wait for resolution of BCBSIL's appeal to get her treatment. *See id.* BCBSIL's requested stay would jeopardize S.L.'s health, and that of many others, causing irreparable harm. *M.R. v. Dreyfus,* 663 F.3d 1100, 1115 (9th Cir.

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2011); *Brandt v. Rutledge,* 47 F.4th 661, 671–72 (8th Cir. 2022); *Poe v. Labrador*, No. 1:23-cv-00269-BLW, 2023 U.S. Dist. LEXIS 229332, at *57 (D. Idaho Dec. 26, 2023). The Court should deny BCBSIL's motion to stay the permanent prospective relief ordered.

The Class is open to a limited stay of the Court-ordered reprocessing during BCBSIL's appeal, while requiring prospective injunctive relief to take effect; this proposal has been rejected by BCBSIL. Hamburger Decl. *Exh. 1.* Rather, BCBSIL's motion seeks a complete stay of the Court's injunction orders because the case addresses "legal issues of first impression" about which there are "serious legal questions." Dkt. No. 210, pp. 1–2. BCBSIL does not meet its burden for a stay:

First, the Court's merits decisions are well supported by existing Supreme Court, Ninth Circuit, and other caselaw, as well as the plain language of the Affordable Care Act's ("ACA"), 42 U.S.C. § 18116 ("§ 1557"). Specifically, each key decision in the case follows plainly from existing statutes and caselaw:

- The main substantive decision in this case—that covered health programs subject to § 1557 may not discriminate on the basis of sex, including transgender status—is well-supported. *See* Dkt. No. 148; *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022).
- The Court's holding that a covered entity must comply with § 1557 in all its activities, including its TPA program, is also on solid legal ground. Dkt. No. 148, p. 13; *see* 45 C.F.R. § 92.3(b); *T.S. v. Heart of Cardon, LLC,* 43 F.4th 737 (7th Cir. 2022); *Doe v. CVS Pharmacy, Inc.*, No. 18-cv-01031-EMC, 2022 U.S. Dist. LEXIS 139684, at *16 (N.D. Cal. Aug. 5, 2022); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018).
- The Court's rejection of BCBSIL's Religious Freedom Restoration Act ("RFRA") defense follows the vast majority of courts nationwide. *Listecki*

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v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 736 (7th Cir. 2015); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010); *Rweyemamu v. Cote*, 520 F.3d 198, 204 n. 2 (2d Cir. 2008); *see also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 841 (9th Cir. 1999).

Second, BCBSIL shows no "reasonable likelihood" of prevailing on its previously rejected complaints about class certification and the named plaintiffs. Dkt. No. 210, pp. 4–6. After all, the Ninth Circuit summarily denied BCBSIL's interlocutory appeal related to class certification. Dkt. No. 152.

Even if class certification were rejected on appeal, Plaintiffs would still be entitled to a prospective permanent injunction. Typically, when a defendant is found to violate the law, "[courts] vacate the [defendant's] action and remand to the [defendant] to act in compliance with its statutory obligations." *Defs. Of Wildlife v. United States EPA,* 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds, sub nom Nat'l Ass'n of Home Builders v. Defs. Of Wildlife,* 551 U.S. 644 (2007), *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 864 (9th Cir. 2014) (no abuse of discretion in "issuing an injunction requiring [defendant] to comply with Title IX"). A permanent injunction prohibiting BCBSIL from administering illegal exclusions is well within the Court's authority, even without class certification.

Third, BCBSIL fails to show that it suffers irreparable harm by having to follow anti-discrimination law. *See* Dkt. No. 210, pp. 10–12. BCBSIL complains it will be subject to a "competitive disadvantage" if forced to follow the law but offers no evidence of such a disadvantage. And, BCBSIL ignores the indemnity agreements it has with every employer that asked BCBSIL to administer a discriminatory exclusion. Dkt. No. 207, p. 9. Any financial burden imposed by the Court's Order may be shifted to BCBSIL's employers.

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Conversely, the Class has suffered and will continue to suffer irreparable harm without prospective injunctive relief. Any consideration of the competing hardships and the public interest weighs strongly in favor of implementing the Court's injunction. *See Kadel v. Folwell*, No. 1:19CV272, 2022 U.S. Dist. LEXIS 190506, at *18 (M.D.N.C. Oct. 19, 2022).

II. FACTS

A. Procedural History.

This case was filed on November 23, 2020. Dkt. No. 1. The Court denied BCBSIL's motion to dismiss on May 4, 2021. Dkt. No. 23. Plaintiffs then amended their Complaint to include class allegations. Dkt. No. 37.

Discovery closed on August 12, 2022. Dkt. No. 73. Plaintiffs moved for class certification, and the parties each moved for summary judgment. Dkt. Nos. 78, 87, 96. The Court ordered class certification and then amended the class certification definition on December 12, 2022. Dkt. No. 113, 143. The Court granted summary judgment to Plaintiffs and denied it to Defendant on December 21, 2022. Dkt. No. 148.

On February 9, 2023, Plaintiffs moved for class-wide declaratory and injunctive relief. Dkt. No. 153. Defendant moved to decertify the class. Dkt. No. 156. The Court then stayed this matter until the Ninth Circuit issued a decision in *Wit v. United Behav. Health,* No. 20-17363. Dkt. No. 171.

After the Ninth Circuit issued a new decision in *Wit,* 79 F.4th 1068 (9th Cir. 2023), the Court lifted the stay. Dkt. No. 173. The Court permitted the Class to add two additional named plaintiffs so that prospective injunctive relief could be ordered. Dkt. No. 188. The parties provided additional briefing on the impact of the new *Wit* opinion, and Defendant's motion to decertify. *See* Dkt. Nos. 179–180, 190–191, 193, 197. Argument was heard on November 29, 2023. Dkt. No. 202.

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The Court issued an order granting an amended class certification on December 4, 2023. Dkt. No. 203. The Order established two subclasses, one consisting of those who were denied pre-authorization or coverage of treatment based on the gender-affirming care exclusions in the past, and another consisting of those who are or will be denied pre-authorization or coverage in the future. *Id.,* p. 3. On December 11, 2023, the Court denied BCBSIL's motion to decertify the class. Dkt. No. 206.

On December 19, 2023, the Court granted the Class's Motion for Class-wide injunctive relief and nominal damages. Dkt. Nos. 207–208. Specifically, the Court ordered that BCBSIL was permanently enjoined from administering or enforcing plans or policies that wholly exclude or limit coverage of "gender affirming health care" so long as it is a "health program or activity" under § 1557. Dkt. No. 207, p. 21. That injunction took immediate effect. *Id.*

The Court also entered an injunction to effectuate claims reprocessing without the discriminatory exclusion. That injunction does not take effect until after: (1) class notice is approved and distributed to class members; and (2) class members have 90 days to submit their claims to BCBSIL. *Id.* The Court further requested additional briefing regarding the form of class notice and any other remaining relief issues. Dkt. No. 208.

Shortly thereafter, BCBSIL filed an appeal with the Ninth Circuit Court of Appeals and moved to stay the Court's injunctive orders. Dkt. No. 210.

On January 4, 2024, Class counsel proposed a compromise on injunctive relief. Hamburger Decl., *Exh. 1.* On January 8, 2024, BCBSIL rejected the proposal. *Id.*

III. ARGUMENT

A. Legal Standard.

"A stay pending appeal is an extraordinary remedy that may be awarded only upon a clear showing that an appellant is entitled to such relief." *Oracle USA, Inc. v.*

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Rimini St. Inc., No. 2:10-cv-0106-LRH-(VCF), 2018 U.S. Dist. LEXIS 155999, at *9 (D. Nev. Sept. 11, 2018). BCBSIL bears the burden of demonstrating that a stay is warranted. *Payan v. L.A. Cmty. Coll. Dist.*, No. 2:17-cv-01697-SVW-SK, 2020 U.S. Dist. LEXIS 165337, at *7 (C.D. Cal. May 29, 2020), *citing Nken v. Holder,* 556 U.S. 418, 434 (2009). Four factors are considered:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. "The first two factors are the most critical, and [the court may] only reach the last two once an applicant satisfies the first two factors." *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019). Moreover, a stay "is not a matter of right, even if irreparable injury might otherwise result." *Nken,* 556 U.S. at 433. Rather, the party moving for a stay must make a "strong showing" to justify the exercise of the court's discretion to issue a stay. *Id.* at 433–434. Where a defendant seeks an appeal from a district court's grant of a permanent injunction, evaluating whether there is a "likelihood of success on appeal" to justify a stay requires "assessing whether there are clear grounds for affirmance supported by the record." *Sierra Club*, 929 F.3d at 688 n.14.

Here, clear grounds exist for affirmance of the trial court's decisions, which are well supported by the record and the substantive law. BCBSIL does not meet its burden to make a "strong showing" that its appeal will be successful. Nor does it show any "irreparable harm" if required to follow anti-discrimination law. BCBSIL ignores the harms suffered by the Class from its proposed stay, nor can it show that a stay furthers the public interest. No stay may thus be entered.

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B. BCBSIL Fails to Make a "Strong Showing" of a Likelihood of Success on its Appeal of the Court's Substantive Decisions.

The Court's merits decisions stand on solid legal authority.

1. § 1557 Prohibits Covered Entities from Engaging in Discrimination on the Basis of Sex.

Covered health programs subject to § 1557 may not discriminate on the basis of sex, including based on transgender status. *See Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (holding that the decision in *Bostock v. Clayton Cty.,* 140 S. Ct. 1731, 1741 (2020) applies to § 1557 claims related to gender-affirming care exclusions). Courts considering similar categorical coverage exclusions have overwhelmingly concluded that they result in illegal discrimination. *See Dekker v. Weida*, No. 4:22cv325-RH-MAF, 2023 U.S. Dist. LEXIS 107421, at *35 (N.D. Fla. June 21, 2023); *Kadel v. Folwell*, No. 1:19CV272, 2022 U.S. Dist. LEXIS 103780, at *64 (M.D.N.C. June 10, 2022) (as corrected Aug. 10, 2022); *Fain v. Crouch*, 2022 U.S. Dist. LEXIS 137084, at *37 (S.D. W. Va. Aug. 2, 2022); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1027, 1030 (D. Alaska 2020); *Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1019–22 (W.D. Wis. 2019), among others.

2. § 1557's Prohibition Applies to all Activities of a Covered Entity, Including TPA Activities.

If an entity is a "health program or activity" that receives federal financial assistance, and BCBSIL is (*see* Dkt. No. 84-2, pp. 17:14–18:9), then § 1557 applies to all operations. 42 U.S.C. § 18116(a); *T.S. v. Heart of Cardon, LLC,* 43 F.4th 737, 743 (7th Cir. 2022). "The phrase 'health program or activity' in section 1557 plainly includes all the operations of a business principally engaged in providing healthcare." *Id.*; *Fain v. Crouch*, 545 F. Supp. 3d 338, 343 (S.D.W. Va. 2021) ("[B]y virtue of its acceptance of federal assistance under its Medicare Advantage program, The Health Plan must comply with Section 1557 under its entire portfolio"). *Accord Kadel v. Folwell*, No. 1:19CV272, 2022 U.S. Dist. LEXIS 218104, at *7 (M.D.N.C. Dec. 5, 2022); *Doe v. CVS Pharm., Inc.,* 2022 U.S. Dist.

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LEXIS 139684, at *27 (N.D. Cal. Aug. 5, 2022); *see also Hammons v. Univ. of Md. Med. Sys. Corp.*, 649 F. Supp. 3d 104, 120 (D. Md. 2023).

BCBSIL asks the Court to ignore both the plain language of § 1557 and case law, in favor of administrative commentary on federal rulemaking. Dkt. No. 210, p. 7, *citing* 85 Fed. Reg. 37244. ***But no federal rule allows BCBSIL to avoid liability for administering a discriminatory exclusion.*** Even now, BCBSIL cannot identify any federal rule for this proposition.[1] *See id.* The Court "need not go beyond the contours of ACA itself. The term 'health program or activity' in Section 1557 plainly includes health insurance providers and plans." *Kadel*, 2022 U.S. Dist. LEXIS 218104, at *7. Where, as here, the "plain, unambiguous language of the statute" does not excuse covered entities from liability when acting as a TPA, no deference to mere administrative commentary is required. Accordingly, courts have repeatedly concluded that TPAs subject to § 1557 may be liable for administering a discriminatory exclusion. *See*, *e.g.*, *Doe v. CVS Pharm.*, 982 F.3d at 1212; *Tovar,* 342 F. Supp. 3d at 956; *See Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018). This is not the first court to reach this straightforward conclusion.

3. BCBSIL Has No RFRA Defense.

RFRA applies to litigation between two specific entities: someone with a sincerely held religious belief, and the government. *See* 42 U.S.C. § 2000bb-1(c) ("***A person whose religious exercise has been burdened*** in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief ***against a government***.") (emphasis added); *see City of Boerne v. Flores*, 521 U.S. 507 (1997). As noted by the Court, "RFRA provides relief against the government, but the government is not a party to this action." Dkt. No. 23, p. 9. On this basis alone, BCBSIL's RFRA defense

[1] BCBSIL mislabels the federal commentary as the "2020 Rule." *See* Dkt. No. 210, p. 7.

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fails. *See Sutton,* 192 F.3d at 841 (Under RFRA, "governmental compulsion in the form of a generally applicable law, without more, is [in]sufficient to deem a private entity a governmental actor"). *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), cited by BCBSIL, is inapposite, as the defendants there were governmental entities. Caselaw postdating *Little Sisters* illustrates it. *E.g.*, *Ratliff v. Wycliffe Assocs., Inc.*, No. 6:22-cv-1185-PGB-RMN, 2023 U.S. Dist. LEXIS 92811, at *17 (M.D. Fla. May 26, 2023) ("Based on the plain text of RFRA, its legislative history, and the persuasive reasons offered by sister courts, the Court finds RFRA does not apply to lawsuits in which the government is not a party."); *Hammons* 649 F. Supp. 3d at 126–27 (the *Little Sisters* injunction only applies to government entities not private parties); *Clark v. Newman Univ., Inc.*, No. 19-1033-KHV, 2022 U.S. Dist. LEXIS 164360, at *37 (D. Kan. Sep. 12, 2022); *Billard v. Charlotte Catholic High Sch.*, No. 3:17-cv-00011, 2021 U.S. Dist. LEXIS 167418, at *49 (W.D.N.C. Sep. 3, 2021). Nor is BCBSIL a religious organization or one closely held by religious individuals, such that its religious belief can be burdened. *See* Dkt. No. 41, ¶14.

C. BCBSIL's Appeal of Class Certification Is Unlikely to Succeed.

1. *Wit* Is Irrelevant.

Wit addresses class certification pursuant to ERISA. *Id.,* 79 F.4th at 1084. ***This case is governed by the ACA's § 1557, not ERISA***. Dkt. No. 206, p. 4. BCBSIL identifies no authority that class certification under § 1557 is curtailed by ERISA. To the contrary, ERISA states plainly that it does not limit other federal laws like § 1557. 29 U.S.C. § 1144(d); Dkt. No. 148, pp. 16–17. *Wit* does not apply.

Even if *Wit* were to apply to this case, class members are entitled to have their claims reviewed without discrimination. *See Wit,* 79 F.4th at 1084. Remand for reprocessing is the proper remedy when a TPA applies the wrong standard to an ERISA

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plan. *Id.; Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 456 (9th Cir. 1996); *Kazda v. Aetna Life Ins. Co.*, No. 19-cv-02512-WHO, 2023 U.S. Dist. LEXIS 199175, *20 (N.D. Cal. Nov. 6, 2023). All that is required for class certification is that a showing that the "application of the wrong standard could have prejudiced" each class member. *Id.* at *22. Since a discriminatory standard was generally applied by BCBSIL to the Class, reprocessing without discrimination is the proper remedy. *See Wit.*, 79 F.4th at 1084.

2. Class Certification Under Rule 23(b)(1) and (b)(2) Is Proper.

BCBSIL offers no new argument to support its claim that the reprocessing relief sought is really a claim for monetary damages. Dkt. No. 210, p. 6. The Class has previously addressed this issue exhaustively, the briefing for which is incorporated by reference. *See* Dkt. No. 99, pp. 3–5, 6–9; Dkt. No. 180, pp. 11–13; Dkt. No. 191, pp. 10–11. The Ninth Circuit withdrew its statement that reprocessing was a claim for monetary damages in *Wit,* and BCBSIL offers no precedential authority to support this argument. *See Wit,* 79 F.4th at 1085–86; *Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 508 (N.D. Cal. 2017) ("[T]he reprocessing injunction that Plaintiffs seek is precisely the sort of final relief that the Court should order under binding Ninth Circuit precedent."). BCBSIL's continued reliance on outlier analysis from out-of-jurisdiction caselaw is misplaced. *See* Dkt. No. 210, p. 5.

3. Named Plaintiffs C.P., S.L., and Jones Are Adequate and Typical of the Classes.

BCBSIL continues to argue that the Named Plaintiffs are not adequate or typical of the classes, which should be rejected out of hand.

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a. Adequacy of Representation.

BCBSIL ignores the legal standard for "adequacy of representation." *See* Dkt. No. 113, p. 13; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011). BCBSIL offers no argument or evidence that the named plaintiffs have "conflicts of interest" with other class members or that they will not vigorously prosecute this litigation. Plaintiffs C.P., S.L., and Jones are adequate representatives of the retrospective class, while Plaintiffs S.L. and Jones are adequate representatives of the prospective class.

b. Typicality Is Met.

BCBSIL offers no evidence that the named plaintiffs are not typical of the classes they represent. As the Court has already concluded, Plaintiff S.L. was denied coverage of gender-affirming health care services solely because BCBSIL concluded that "transgender services, including this service, are not covered under the terms of your plan." Dkt. No. 176, p. 10. BCBSIL's post-litigation speculation as to other reasons for which S.L.'s claims might be denied is "immaterial" and at odds with BCBSIL's initial pre-authorization of the claims. Dkt. Nos. 176, ¶8; 206, p. 7. BCBSIL acted on S.L.'s claims as it does with all claims submitted by class members with a gender dysphoria diagnosis—it denied coverage based solely on transgender status. "[I]t is th[is] standard conduct that is being challenged." *Id.* S.L.'s injury is based on the same standard conduct as other class members, not her individual situation. *Id.*

Similarly, the Court properly concluded that Mr. Jones is typical of both classes. Mr. Jones suffered the same injuries as other class members, since his claim for coverage for gender-affirming healthcare services was denied, and he was told it would be denied

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due to the Exclusion.[2] Dkt. No. 177, ¶¶7–11. Moreover, the Court properly concluded that Mr. Jones was typical of the prospective class because there was no adequate showing by BCBSIL that Mr. Jones' plan changed to now cover gender-affirming surgeries. Dkt. No. 206, p. 10.

4. Plaintiffs Are Entitled to Prospective Injunctive Relief Even Without a Certified Class.

Even if BCBSIL had made a "strong showing" that its appeal of class certification will likely be successful (it has not) and sustained its burden regarding the three other *Nken* factors (it cannot, as described below), such a showing does not require a stay of the Court's prospective injunction. A certified class is not needed to order BCBSIL to obey § 1557 in all its activities. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1971); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1226 (9th Cir. 1997); *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987); *E.E.O.C. v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987) (approving injunctions for compliance with federal anti-discrimination laws beyond the specific complainant).

D. BCBSIL Fails to Show Irreparable Harm from the Injunctive Relief Ordered.

First, BCBSIL complains that a permanent injunction would place it at a competitive disadvantage with other TPAs, but offers no actual evidence of such "disadvantage." Dkt. No. 210, p. 10. The record contains nothing regarding this beyond BCBSIL's say-so. To consider a "competitive injury" claim, the court must receive actual evidence of such injury. *See Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015). BCBSIL makes no such showing likely because BCBSIL may recover any

[2] Mr. Jones is not required to exhaust ERISA administrative remedies before bringing an anti-discrimination claim under Section 1557. Dkt. No. 210, p. 6; *see Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) (where a plaintiff challenges a standard exclusion that unambiguously applies to the plaintiff, there is no need for the plaintiff to submit a claim for the excluded benefit). Exhaustion was futile. Dkt. No. 206, p. 13, Dkt. No. 207, pp. 12-13, 16.

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monetary losses from its contracted employers pursuant to the indemnification agreements. Dkt. No. 207, p. 9.

An order prohibiting BCBSIL from administering an illegal exclusion is not a "fundamental business change" that could result in irreparable harm. Dkt. No. 210, p. 10, *citing FTC c. Qualcomm Inc.,* 935 F.3d 752, 756 (9th Cir. 2019). BCBSIL experiences no "irreparable harm" when it is simply ordered to follow the law. *BMW of N. Am., LLC v. Rocco,* 2020 U.S. Dist. LEXIS 217040, at *34 (C.D. Cal. Nov. 18, 2020); *Sugarfina, Inc. v. Sweitzer Ltd. Liab. Co.*, 2018 U.S. Dist. LEXIS 226440, at *26 (C.D. Cal. Mar. 8, 2018) (where "[a] permanent injunction would require [a defendant] to cease their unlawful activity this factor weighs in favor of granting the injunction."). BCBSIL's assertion that other TPAs also break the law is irrelevant. Dkt. No. 210, pp. 10–11. Administering non-discriminatory health coverage cannot result in a "competitive disadvantage" when all covered entities must obey the same requirements.[3]

Second, BCBSIL offers no evidence of the "substantial expenses" associated with class notice and claims process. *Compare* Dkt. No. 210, p. 11 with Hamburger Decl., *Exh. 1.* Since class notice must be issued only to approximately 1,500 potential class members and, as requested by the Class, their providers, this burden is not significant, costing approximately $6,200. *Id.* Moreover, all of the costs associated with reprocessing may be recouped under the indemnity agreements.

[3] BCBSIL cannot justify its actions by asserting that its competitors will violate the law. "While predicting the behavior of third parties is always dubious, it is particularly troubling to postulate that a third party will violate a valid law that is not being challenged." *Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 57 (1st Cir. 1998). BCBSIL's argument, that "[e]veryone's doing it," is simply unavailing. *3K Inv. Partners v. Commissioner*, 133 T.C. 112, 116 (2009); *Ashby v. Farmers Ins. Co.*, 565 F. Supp. 2d 1188, 1214-15 (D. Or. 2008).

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E. S.L. and Class Members Will Suffer Irreparable Harm Without Injunctive Relief, and the Public Interest Favors Permanent Injunction.

BCBSIL made clear that it will only follow § 1557 in its TPA program when ordered by the Court. *See* Dkt. No. 180, p. 6. Class members should get the coverage they need, now, without discrimination. They suffer irreparable harm without a prospective injunction.

The public interest weighs heavily in favor of enforcing anti-discrimination law. *M.R.*, 667 F.3d at 738. "'[T]he public interest in this case lies with protecting public health by ensuring that all individuals covered under [the plans] receive 'medically necessary services for the treatment of gender dysphoria.'" *Kadel* 2022 U.S. Dist. LEXIS 190506, at *18. Conversely, there is no benefit to the public from allowing BCBSIL to continue to illegally discriminate. Dkt. No. 207, pp. 13–14.

IV. CONCLUSION

The Court should deny BCBSIL's Motion to Stay in full. Should the Court consider any stay of its injunctions, it should enter only a limited stay of retrospective relief as suggested by the Class but rejected by BCBSIL. *See* Hamburger Decl., *Exh. 1.*

DATED: January 8, 2024.

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I certify that the foregoing contains 4,115 words, in compliance with the Local Civil Rules.

LAMBDA LEGAL DEFENSE AND
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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; *et al.*, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF ILLINOIS, Defendant.	NO. 3:20-cv-06145-RJB [PROPOSED] ORDER DENYING DEFENDANT'S MOTION FOR STAY PENDING APPEAL (DKT. NO. 210)

THIS MATTER having come before the undersigned Judge of the above-entitled Court upon Defendant BCBSIL's Motion for Stay Pending Appeal, and the Court having considered the Motion for Stay, Plaintiff Class's Opposition to the Motion for Stay, the Declaration of Eleanor Hamburger and all attachments, BCBSIL's reply in support of its Motion and declarations and exhibits in support, if any, and the pleadings in this matter, and it appearing to be in the best interest of the case, therefore,

IT IS HEREBY ORDERED that BCBSIL's Motion for Stay is DENIED.

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The Court's injunctive orders dated December 19, 2023 (Dkt. No. 207-208) must be implemented in full.

DATED this _____ day of January, 2024.

Robert J. Bryan
United States District Judge

Presented by:

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/s/ Eleanor Hamburger
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