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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,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

CASE NO. 3:20-cv-06145-RJB

ORDER ON MOTION FOR CLASS
CERTIFICATION

This matter comes before the Court on the Plaintiff C.P.’s Motion for Class Certification (Dkt. 78) and Motion to Strike the Expert Report of Scott Carr, Ph.D. (Dkt. 99). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein. The requested oral argument is not necessary to decide the motions.

In this case, Plaintiff C.P., a transgender male, and his mother, Plaintiff Patricia Pritchard, claim that Defendant Blue Cross Blue Shield of Illinois (“Blue Cross”) violated the anti-discrimination provision, Section 1557, of the Affordable Care Act (“ACA”), 42 U.S.C. § 18116, when it administered a discriminatory exclusion of gender-affirming care in a self-funded health

1 care plan governed by the Employee Retirement Income Security Act of 1974 (“ERISA”). Dkt.

2 1. The Plaintiffs now move for certification of a class of similarly situated people. Dkt. 78. For
3 the reasons provided below, the motion to certify a class (Dkt. 78) should be granted.

4 **I. FACTS**

5 **A. FACTS**

6 Plaintiffs are C.P., a boy of about sixteen, and his mother, Patricia Pritchard. Dkt. 38.

7 C.P. is a transgender male, which means that he has a male gender identity even though the sex
8 assigned to him at birth was female. *Id.* C.P. has been living as a male since around 2015. Dkt.
9 94-1 at 135.

10 Patricia Pritchard receives health care coverage through her employer under the Catholic
11 Health Initiatives Medical Plan (“the Plan”) and C.P. is enrolled in that Plan as her dependent.
12 Dkt. 81. The Plan is “self-funded” - Ms. Pritchard’s employer directly assumes financial
13 responsibility for employees and their dependents’ health care costs. Dkt. 88-1 at 11.

14 Defendant, Blue Cross, acts as the third-party claims administrator for the Plan. Dkt. 85-10.
15 As a third-party administrator, it “assemble[s] a network of providers, process[es] claims, and
16 handle[s] provider billing.” Dkt. 88-1 at 11.

17 C.P. has gender dysphoria. Dkt. 38. Gender dysphoria is a feeling of clinically significant
18 stress and discomfort that can result from being transgender, or, more specifically, from having
19 an incongruence between one’s gender identity and the sex assigned to that person at birth. *Id.*
20 The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders,
21 Fifth Edition (“DSM-5”) recognizes gender dysphoria as a medical condition that can be
22 extremely serious, resulting in anxiety, depression, or even death. Dkt. 38 at 6.

1 C.P. sought coverage for his first Vantas Implant (hormone therapy) in 2016. Dkt. 94-1
2 at 139. Blue Cross initially approved the treatment and later informed his mother that it had
3 made a mistake; that the treatment was not covered. Dkt. 94-1 at 137. Blue Cross paid for the
4 treatment however, but indicated that later claims would be denied. *Id.* at 139. A few years later
5 C.P. filed a claim for a second Vantas Implant and for chest reconstruction surgery; his claim
6 was denied by Blue Cross because “[t]ransgender services [were] not covered under the terms of
7 the plan.” *Id.*; 94-3 at 2-10.

8 The relevant Plan language in 2018 provided: “Transgender Reassignment Surgery Not
9 Covered: Benefits shall not be provided for treatment, drugs, therapy, counseling services and
10 supplies for, or leading to, gender reassignment surgery” (“Exclusion”). Dkt. 88-1 at 120. Of
11 the approximately 398 of the self-funded plans that Blue Cross administers as a third-party
12 administrator, 378, that is, 95% contain the same Exclusion that is in the Plan in which C.P. is
13 enrolled. Dkt. 85-8 at 7. The Plaintiffs contend that Blue Cross, as a third-party administrator,
14 has denied or will deny other enrollees in other self-funded plans gender affirming care by
15 relying on exclusions like the one applied to C.P. Dkt. 38. Blue Cross acknowledges that there
16 are hundreds of members (in approximately half the self-funded plans it administers) who have
17 received a denial based on such an exclusion. Dkt. 85-11 at 8. Blue Cross denies that its
18 activities as a third-party administrator are subject to the anti-discrimination provisions in
19 Section 1557 of the ACA. Dkt. 85-1 at 16-17.

20 **B. ORGANIZATION OF OPINION**

21 This opinion will first consider a class definition and then whether Fed. R. Civ. P. 23’s
22 class action requirements are met. Lastly, this opinion will address the Plaintiff’s motion to
23 strike.

1 **II. DISCUSSION**

2 **A. CLASS DEFINITION**

3 Plaintiff C.P. moves for certification of the following class:

4 All individuals who:

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

8 (2) have required, require, or will require treatment with excluded Gender-
9 Affirming Health Care services.

10 **DEFINITIONS:**

11 “Class Period” means November 23, 2016 through the termination of the
litigation.

12 “Gender-Affirming Health Care” means any health care service—physical,
13 mental, or otherwise—administered or prescribed for the treatment of gender
dysphoria; related diagnoses such as gender identity disorder, gender
14 incongruence, or transsexualism; or gender transition. This includes but is not
limited to the administration of puberty delaying medication (such as
15 gonadotropin-releasing hormone (GnRH) analogues); exogenous endocrine agents
to induce feminizing or masculinizing changes (“hormone replacement therapy”);
16 gender-affirming or “sex-reassignment” surgery or procedures; and other medical
services or preventative medical care provided to treat gender dysphoria and/or
17 related diagnoses, as outlined in World Professional Association for Transgender
Health, Standards of Care for the Health of Transsexual, Transgender, and Gender
18 Nonconforming People, 7th Version (2012).

19 Blue Cross argues that this definition of the class is broader than that in the Amended
20 Complaint and so should be stricken and that the class claims are limited by the applicable
21 statute of limitations to events after November 2, 2018. Dkt. 93. Each argument will be
22 considered in turn.

23 Section (1) of the class definition proposed here is substantially the same as in the
24 Amended Complaint (Dkt. 38 at 16). Section (2) proposed here, (individuals who meet Section

1 (1) and “(2) have required, require, or will require treatment with excluded Gender-Affirming
2 Health Care services”) is substantially broader than that proposed in the Amended Complaint.
3 The Amended Complaint’s class definition only including individuals who meet Section (1) and
4 “who were, are or will be denied pre-authorization or coverage of otherwise covered services due
5 to [Blue Cross’s] administration of such an exclusion.” Dkt. 38 at 16. The proposed expansion
6 of the definition of the case is significantly larger; based on the plain language of the proposed
7 definition, it includes people that could have applied, but did not apply, for pre-authorization or
8 coverage, for whatever reason. Plaintiff’s proposed definition of the class in the motion is
9 overbroad. Further, a plaintiff can modify the proposed class if the proposed modifications are
10 (1) minor, (2) require no additional discovery, and (3) do not cause prejudice to the Defendants.
11 *See Jammeh v. HNN Associates, LLC*, 2020 WL 5407864, at *9 (W.D. Wash. Sept. 9, 2020).
12 Plaintiff’s expansion of the class definition is significant. It is prejudicial to Blue Cross.
13 Discovery has closed. The dispositive motions deadline has passed and trial is set to begin in
14 early February 2023.

15 Section (2) of the class definition should be rewritten, as this Court has leave to do, *Olean*
16 *Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir.
17 2022), and it should read: “(2) were, are, or will be denied pre-authorization or coverage of
18 treatment with excluded Gender Affirming Health Care services.”

19 Blue Cross also complains the statute of limitations bars claims before November 2, 2018
20 rather than November 23, 2016, which is included in the proposed class definition. Dkt. 93.
21 Blue Cross reasons that because the ACA does not contain a statute of limitations and it
22 incorporates the enforcement mechanisms provided for in Title VI, Title IX, Section 504 of the
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1 Rehabilitation Act and the Age Discrimination Act (none of which contain a statute of
2 limitations), the state statute governing personal injury claims is applied. Dkt. 93 at 29.

3 While “[t]raditionally, when a federal statute creating a right of action did not include a
4 limitations period, courts would apply the limitations period of the closest state analogue,” in
5 1990, “Congress established—in 28 U.S.C. § 1658(a)—a uniform, catchall limitations period for
6 actions arising under federal statutes enacted after December 1, 1990.” *McGreevey v. PHH*
7 *Mortgage Corp.*, 897 F.3d 1037, 1041–42 (9th Cir. 2018). This statute provides that “[e]xcept as
8 otherwise provided by law, a civil action arising under an Act of Congress enacted after
9 [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues.”
10 28 U.S.C. § 1658(a). “If § 1658(a) applies, there is no need for a court to seek a state law
11 analogue when analyzing a statute-of-limitations argument.” *McGreevey* at 1042. The ACA
12 was enacted in 2010. Accordingly, the four-year statute of limitation applies to claims under the
13 ACA.

14 Blue Cross also asserts that the class claims (filed in the Amended Complaint on
15 November 2, 2021) should not be permitted to relate back to the filing of the initial complaint
16 (which was filed on November 23, 2020) and so the statute of limitation period should be based
17 on the filing of the Amended Complaint. Dkt. 93.

18 Under Rule 15(c)(1)(B), “[a]n amendment to a pleading relates back to the date of the
19 original pleading when . . . the amendment asserts a claim . . . that arose out of the conduct,
20 transaction or occurrence set out - or attempted to be set out - in the original pleading.” “To
21 relate back, the original and amended pleadings must share a common core of operative facts so
22 that the adverse party has fair notice of the transaction, occurrence, or conduct called into
23 question.” *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014).

1 The Amended Complaint here relates back to the date of the original Complaint. The
2 Complaint provided “fair notice of the . . . conduct called into question,” *ASARCO* at 1004, and
3 sought injunctive relief enjoining Blue Cross’s administration of the exclusions of gender-
4 affirming care “in the health benefit plans [Blue Cross] administers and enforces, in violation of
5 the [ACA] now and in the future.” Dkt. 1. The Plaintiffs’ claim in the original complaint and
6 the class claims added in the Amended Complaint “will likely be proved by the same kind of
7 evidence. *ASARCO* at 1004.

8 Accordingly, November 23, 2020, the date the Complaint was filed, began the time to
9 calculate the four-year statute of limitations period. The “Class Period” being defined as
10 “November 23, 2016 through the termination of the litigation” was not in error.

11 This opinion will now turn to whether the class, as newly defined, should be certified.

12 **B. MOTION TO CERTIFY THE CLASS**

13 “A member of a class may sue as a representative party if the member satisfies Federal
14 Rule of Civil Procedure 23(a)’s four prerequisites: numerosity, commonality, typicality, and
15 adequacy of representation.” *Johnson v. City of Grants Pass*, 50 F.4th 787, 802 (9th Cir. 2022).
16 If Rule 23(a) requirements are met, a putative class representative must then show that “the class
17 falls into one of three categories under Rule 23(b).” *Id.*

18 1. Rule 23(a)(1) - Numerosity

19 To satisfy the numerosity requirement in Rule 23(a)(1), “a proposed class must be so
20 numerous that joinder of all members is impracticable.” *Johnson* at 803. “[P]roposed classes of
21 less than fifteen are too small while classes of more than sixty are sufficiently large.” *Id.*

1 The Plaintiffs seek to certify a class of over 60 individuals (maybe as many as 1740).
2 Blue Cross does not contest that the Plaintiffs have met this requirement. Dkt. 93 at 30. The
3 Plaintiffs have satisfied the numerosity requirement of Rule 23(a)(1).

4 2. Rule 23(a)(2) - Commonality

5 Rule 23(a)(2) mandates that there be “questions of law or fact common to the class.”
6 “[T]he word “question” in Rule 23(a)(2) is a misnomer.” *Johnson* at 804. “What matters to
7 class certification is not the raising of common questions—even in droves—but, rather the
8 capacity of a classwide proceeding to generate common answers apt to drive the resolution of the
9 litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Class claims must
10 depend on a “common contention.” *Id.* Further, that “common contention . . . must of such a
11 nature that it is capable of classwide resolution which means that determination of its truth or
12 falsity will resolve an issue that is central to the validity of [class claims] in one stroke.” *Id.*

13 The Plaintiffs have met the commonality requirement of Rule 23(a)(2). The class claim
14 depends on a “common contention.” *Wal-Mart* at 350. As Plaintiff C.P. points out, that
15 “common contention” is that a third-party administrator, like Blue Cross here, that is subject to
16 the ADA’s Section 1557 anti-discrimination provisions cannot permissibly “administer
17 discriminatory exclusions of gender-affirming care contained in ERISA self-funded plans.” This
18 “common contention” is “of such a nature that it is capable of classwide resolution . . .
19 determination of its truth or falsity will resolve an issue that is central to the validity of [the
20 class’s claims] in one stroke.” *Wal-Mart* at 350.

21 Blue Cross contends that the putative class lacks commonality because the plans’
22 exclusion language, coverage choices available to employees, and religious beliefs of the
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1 employers vary widely among the 398 self-funded plans it administers that contain transgender-
2 related exclusions. Dkt. 93.

3 Contrary to Blue Cross’s assertions, the variations in the plans’ exclusionary language do
4 not defeat commonality. Blue Cross’s Fed. R. Civ. P. 30(b)(6) witness testified that it
5 administers exclusions consistently. Dkt. 85-5 at 11-13. It reviews claims to determine if the
6 “diagnosis code” is for “gender dysphoria” or “gender reassignment” and examines the
7 “procedural code” to see if the claim is for gender reassignment treatment. *Id.* If based on that
8 criteria Blue Cross determines that the services are for gender reassignment, the claim is denied.
9 *Id.* at 12-13. The class seeks to challenge this standard conduct. The fact that some plans may
10 cover portions of care for gender dysphoria (like hormone treatments or mental health
11 counseling) do not change the challenges to Blue Cross’s conduct.

12 Blue Cross asserts that some of the employers of these self-funded plans offered
13 employees other plans that do not have transgender-related exclusions. Dkt. 93. It concludes
14 that it cannot be said to have engaged in discriminatory conduct as to those employees. Blue
15 Cross’s argument is unpersuasive. As Plaintiffs properly point out, “[a]nti-discrimination law
16 does not permit defendants to get a ‘free pass’ on discrimination if the plaintiff could have
17 obtained coverage elsewhere.” Dkt. 99.

18 Blue Cross argues that some plans have not denied a transgender claim. Dkt. 93. It
19 claims that only over 200 plans have actually denied a claim based on an applicable exclusion.
20 *Id.* This concern, raised in the context of whether the Plaintiffs have met the commonality
21 requirements, are resolved with the Court’s alteration in the class definition to only include those
22 who have been denied preauthorization or coverage of treatment with excluded Gender
23 Affirming Health Care services.

1 Blue Cross contends that the Court will be required to engage in an assessment of each
2 class member’s individual circumstances to grant them relief. Dkt. 93. It maintains that
3 commonality is not met because of these necessary inquiries. *Id.*

4 Relief sought for the class is a declaration that Blue Cross violated their rights under the
5 ACA when it administered and enforced exclusions of treatment for gender affirming care, and
6 to enjoin Blue Cross from doing so in the future. Dkt. 38 at 21-22. Class members’ individual
7 medical services are not relevant to this portion of their requested relief. The harm alleged –
8 Blue Cross’s alleged discriminatory conduct in the processing of their claims - is common to all
9 the class members. The class also seeks an order requiring Blue Cross to “reprocess and when,
10 medically necessary and meeting other terms and conditions under the relevant plans, provide
11 coverage (payment) for all denied pre-authorizations and denied claims for coverage . . . that
12 were based solely upon exclusions for gender-affirming care.” *Id.* at 22. Individualized
13 assessments are not required for the Court to grant this relief. Whether the class is entitled to this
14 requested remedy can be addressed on a common basis. Accordingly, this Court would not need
15 to engage in an individualized inquiry to address the Plaintiffs’ claims regarding liability or
16 related to their relief.

17 Blue Cross contends that the proposed class lacks commonality because the plans have
18 different possible defenses. Dkt. 93 at 20. It points to a possible defense under the Religious
19 Freedom Restoration Act (“RFRA”) as to some of the plans it administers. *Id.*

20 Blue Cross’s assertion of a RFRA defense or other defenses would not destroy
21 commonality. As stated in the Order Denying Defendant’s Motion to Dismiss, applicability of
22 RFRA here is in doubt. That Order provided:

23 RFRA states, “Government shall not substantially burden a person’s
24 exercise of religion even if the burden results from a rule of general applicability”

1 unless the Government “demonstrates that application of the burden to the person
 2 – (1) is in furtherance of a compelling government interest; and (2) is the least
 3 restrictive means of furthering that compelling interest.” 42 U.S.C. § 2000bb-
 4 1(a), (b). It continues, “[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.” 42
 U.S.C. § 2000bb-1(c)(*emphasis added*).

5 RFRA provides relief against the government, but the government is not a
 party to this action. *See Listecky v. Off. Comm. of Unsecured Creditors*, 780 F.3d
 6 731, 736 (“Based on RFRA’s plain language [and] its legislative history . . .
 RFRA is not applicable in cases where the government is not a party.”); *compare*
 7 *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (challenge by employers to HHS
 rules requiring insurance coverage for birth control despite religious objection by
 employer).

8 Dkt. 23.

9 There may be common questions as to the applicability of a defense like RFRA, or other
 10 defenses available to an employer paying for the self-funded plan. Those defenses may be raised
 11 when and if they are ripe for decision. Those possible defenses do not impact commonality for
 12 class purposes.

13 Plaintiff C.P. has shown that there are “questions of law or fact common to the class.”

14 Rule 23(a)(2). The Rule 23(a)(2) requirements are met.

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 16 3. Rule 23(a)(3) - Typicality

17 Typicality requires that “the claims or defenses of the representative parties are typical”
 18 of the class. Fed. R. Civ. P. 23(a)(3). Typicality “refers to the nature of the claim or defense of
 19 the class representative, and not to the specific facts from which it arose or the relief
 20 sought.” *Johnson* at 805 (*internal quotation marks and citation omitted*). It is a “permissive
 21 standard.” *Id.* “The test of typicality is whether other members have the same or similar injury,
 22 whether the action is based on conduct which is not unique to the named plaintiffs, and whether
 23 other class members have been injured by the same course of conduct.” *A. B. v. Hawaii State*
 24 *Dep’t of Educ.*, 30 F.4th 828, 839 (9th Cir. 2022).

1 Plaintiff C.P. has met his burden under Rule 23(b)(3). His injury is the same or is similar
2 to other class members. He asserts that Blue Cross denied him access to coverage for needed
3 gender-affirming care as do all other members of the putative class. Blue Cross's conduct is not
4 unique to Plaintiff C.P. This action is based on Blue Cross's conduct in handling claims for
5 gender dysphoria in plans with exclusions for all plan members. Further, other class members
6 have suffered the same injury – they have been denied treatment for gender-affirming care. His
7 claim is identical to the claims of the class. Like the class, he contends that Blue Cross
8 impermissibly discriminated against him, contrary to the ACA, when it administered and/or
9 enforced exclusions for gender affirming care in self-funded ERISA healthcare plans.

10 Blue Cross asserts that C.P.'s claim is not typical of the class because of variation in the
11 language of his plan and because of a variety of defenses that may apply. These arguments do
12 not defeat typicality.

13 The variation in plan language and the possibility of the application of various defenses
14 does not exclude C.P.'s claim as typical of the class. Blue Cross administered the exclusions for
15 gender affirming care (regardless of the particular plan's coverage) consistently. At least one of
16 the defenses that Blue Cross contends apply to C.P. applies to all class members. (The statutory
17 definition of covered entities).

18 Blue Cross argues that C.P.'s claim is not typical of the class because some of his care
19 was covered. "This does not defeat typicality." *Johnson* at 805. While some of his care was
20 covered due to a mistake that Blue Cross made, Blue Cross does not deny that it denied his later
21 request for gender affirming care by relying on the exclusion in C.P.'s plan.

22 The requirements of typicality under Rule 23(a)(3) are met.

23 4. Rule 23(a)(4) - Adequacy of Representation
24

1 Rule 23(a)(4) mandates that “the representative parties will fairly and adequately protect
2 the interests of the class.” In order to decide whether named plaintiffs will adequately represent
3 a class, two questions are considered: “(1) do the named plaintiffs and their counsel have any
4 conflicts of interest with other class members and (2) will the named plaintiffs and their counsel
5 prosecute the action vigorously on behalf of the class?” *Ellis v. Costco Wholesale Corp.*, 657
6 F.3d 970, 985 (9th Cir. 2011).

7 Plaintiff C.P. and his counsel will “fairly and adequately protect the interests of the
8 class.” There are no conflicts of interest with other class members. Dkts. 82-84. C.P., through
9 his parents, and his counsel intend to prosecute the case vigorously on behalf of the class. Dkts.
10 80-84. Blue Cross does not contest the adequacy of class counsel. Dkt. 93 at 22. Counsel has
11 experience in class actions. Dkts. 82-84.

12 Adequacy of representation is met. Rule 23(a)(4).

13 5. Rule 23(b) Requirements

14 In addition to meeting the requirements of Rule 23(a), C.P. must also show that “the class
15 falls into one of three categories under Rule 23(b).” *Johnson* at 802. The Plaintiffs state that they
16 seek certification of a proposed class under Rule 23(b)(1) and/or (b)(2). Dkt. 78 at 27. Those
17 provisions of the rule provide:

18 (b) A class action may be maintained if Rule 23(a) is satisfied and if:

19 (1) prosecuting separate actions by or against individual class members would
20 create a risk of:

21 (A) inconsistent or varying adjudications with respect to individual
22 class members that would establish incompatible standards of
conduct for the party opposing the class; or

23 (B) adjudications with respect to individual class members that, as
24 a practical matter, would be dispositive of the interests of the other
members not parties to the individual adjudications or would

1 substantially impair or impede their ability to protect their
2 interests;

3 [or]

4 (2) the party opposing the class has acted or refused to act on grounds that apply
5 generally to the class, so that final injunctive relief or corresponding declaratory
6 relief is appropriate respecting the class as a whole . . .

7 C.P. has shown that certification under Rule 23(b)(1)(A) and (B) is warranted. Blue
8 Cross, as an ERISA fiduciary, is obligated to apply plan provisions consistently with respect to
9 similarly situated enrollees. Plaintiffs allege that there are at least hundreds of people who were,
10 are, or will be discriminated against contrary to ACA’s Section 1557 provisions by Blue Cross’s
11 conduct, all of whom could file suit. Multiple suits would create a risk of “inconsistent or
12 varying adjudications” resulting in “incompatible standards of conduct” for Blue Cross. Rule
13 23(b)(1)(A). Further, independent adjudications on whether Blue Cross is subject to Section
14 1557 when it acts as a third-party administrator, as a practical matter, “would be dispositive of
15 the interests of the other members not parties to the individual adjudications or would
16 substantially impair or impede their ability to protect their interests.” Rule 23(b)(1)(B).

17 Certification under Rule 23(b)(2) is also appropriate here. C.P. and the class seek
18 declaratory and injunctive relief from Blue Cross’s practice of administering exclusions for
19 gender affirming care in self-funded plans. Individualized inquiries are unnecessary. Plaintiffs
20 are seeking a determination of whether Blue Cross’s practice violates Section 1557 of the ACA.
21 “Rule 23(b)(2) requirements are unquestionably satisfied when members of a putative class seek
22 uniform injunctive or declaratory relief from policies or practices that are generally applicable to
23 the class as a whole.” *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1067 (9th Cir. 2021)(*internal
24 quotation marks and citations omitted*).

The class falls into the requirements of Rule 23(b). *Johnson* at 802.

1 6. Conclusion on Certification

2 The class, as defined above, should be certified. Plaintiff C.P. has demonstrated that the
3 requirements of Rule 23 are met.

4 **C. MOTION TO STRIKE**

5 In their reply, the Plaintiffs move to strike a report from Scott Carr, Ph.D., (Dkt. 94-3 at
6 77-116) as untimely. Dkt. 99. The Plaintiffs concede that Blue Cross did not rely on the Carr
7 report in addressing the motion to certify the class. *Id.* After conceding that Plaintiffs met the
8 numerosity requirement under Rule 23(a)(1), Blue Cross mentioned the Carr report, and
9 contended that Frank Fox, Ph.D.’s opinion, the Plaintiffs’ expert on the number of transgendered
10 individuals effected by this litigation, was “misleading and unreliable.” Dkt. 93.

11 The Plaintiffs’ motion to strike the Carr report (Dkt. 94-3 at 77-116) should be denied
12 without prejudice. Neither the parties nor the Court relied on the Carr report for any reason. The
13 grounds raised to strike the report, that it was not timely disclosed, is not relevant to this motion
14 and need not be raised in a reply.

15 **III. ORDER**

16 Therefore, it is hereby **ORDERED** that:

- 17 • Plaintiff C.P.’s Motion for Class Certification (Dkt. 78) **IS GRANTED**;

- 18 ○ The Class is certified as:

19 All individuals who:

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

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

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2 DEFINITIONS:

3 “Class Period” means November 23, 2016 through the termination of the
4 litigation.

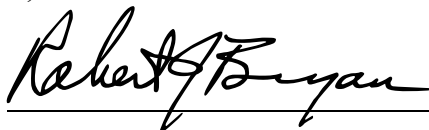
5 “Gender-Affirming Health Care” means any health care service—
6 physical, mental, or otherwise—administered or prescribed for the
7 treatment of gender dysphoria; related diagnoses such as gender identity
8 disorder, gender incongruence, or transsexualism; or gender transition.
9 This includes but is not limited to the administration of puberty delaying
10 medication (such as gonadotropin-releasing hormone (GnRH) analogues);
11 exogenous endocrine agents to induce feminizing or masculinizing
12 changes (“hormone replacement therapy”); gender-affirming or “sex-
13 reassignment” surgery or procedures; and other medical services or
14 preventative medical care provided to treat gender dysphoria and/or
15 related diagnoses, as outlined in World Professional Association for
16 Transgender Health, Standards of Care for the Health of Transsexual,
17 Transgender, and Gender Nonconforming People, 7th Version (2012).

- 18 ○ Plaintiff C.P., by and through his parents, is appointed as class
19 representative, and
- 20 ○ Eleanor Hamburger and Daniel Gross of Sirianni Youtz Spoonemore
21 Hamburger, as well as Jennifer Pizer and Omar Gonzalez-Pagan of the
22 Lambda Legal Defense and Education Fund are appointed as class
23 counsel; and
- 24 ● Plaintiffs’ Motion to Strike the Expert Report of Scott Carr (Dkt. 99) **IS DENIED**

WITHOUT PREJUDICE.

19 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
20 to any party appearing *pro se* at said party’s last known address.

21 Dated this 9th day of November, 2022.

22 

23 ROBERT J. BRYAN
24 United States District Judge