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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 )  
9 MICHAEL HALL, and ELIJAH UBER ) CASE NO. C13-2160 RSM  
a/k/a Elijah Hall, and their marital )  
10 community; and AMIE GARRAND and )  
CAROL GARRAND and their marital ) ORDER DENYING IN PART AND  
11 community, ) GRANTING IN PART DEFENDANT’S  
 ) MOTION TO DISMISS  
12 Plaintiffs, )  
13 )  
14 v. )  
 )  
15 BNSF RAILWAY COMPANY, a )  
Delaware Corporation, )  
16 )  
17 Defendant. )

18 **I. INTRODUCTION**

19 This matter comes before the Court on Defendant’s Motion to Dismiss under Federal  
20 Rules of Civil Procedure 12(b)(6) and/or 12(b)(1). (Dkt. #16). Defendant argues that,  
21 accepting all factual allegations as true, Plaintiffs’ claims fail on the merits for a number of  
22 reasons, but primarily because federal law does not provide protection against discrimination  
23 on the basis of sexual orientation. Plaintiffs respond that Defendant has misconstrued and  
24 mischaracterized their claims, and they have demonstrated on the face of the Amended  
25 Complaint that they have valid federal and state claims based on sex discrimination. Dkt.  
26 #20. Amicus curiae Lambda Legal Defense joins Plaintiffs’ opposition to the motion  
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1 pertaining to the Title VII and EPA claim s for sim ilar re asons. For the reason s set f orth  
2 below, the Court agree s in par t with Plai ntiffs and DENI ES IN PART and GRANTS IN  
3 PART Defendant’s motion to dismiss.

4 **II. BACKGROUND**

5 BNSF Northwest Divis ion employees Michael Hall and A mie Garrand lega lly married  
6 their respective same-sex partners in Washington State in 2013. Collectively, Mr. Hall and Ms.  
7 Garrand and their spouses are the Plaintiffs in th is matter. When Mr. Hall m arried his partner,  
8 Elijah Uber, he (Hall) s ought health benefits for him (Uber) under his employer’s h ealth plan.  
9 Defendant denied coverage on the basis that its p lan defined marriage as between one man and  
10 one woman and therefore provided coverage only for spouses of the opposite sex. After getting  
11 married, Am ie Garrand sought health care covera ge for her partner, Carol Garrand, as well.  
12 Defendant denied coverage for Carol for the same reasons. Defendant has since voluntarily  
13 provided coverage for sam e-sex spouses, effective January 1, 2014, and Pl aintiffs do not deny  
14 that they have received health benefits since that date.

15 Plaintiffs now assert claim s under the Equal Pay Act (“EPA”), the Em ployment  
16 Retirement Incom e Security Act (“ ERISA”), and W ashington’s Law Against Dis crimination  
17 (“WLAD”) based on Defendant’s fail ure to cover same sex spouses in the time period between  
18 the dates of their marriage and January of 2014. Dkt. #8. Defenda nt Michael Hall also asserts  
19 a claim under Title VII of the Civil Rights Ac t of 1964 (“Title VII”) on the basis of sex  
20 discrimination.<sup>1</sup> *Id.* On this motion, Defendant seeks to dismiss the Amended Complaint in its  
21 entirety.

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<sup>1</sup> Amie Garrand has not asserted such a claim only because she has not yet received a right-to-  
28 sue le tter f rom the EEOC, but sta tes that she may assert such a claim once that letter is  
provided. Dkt. #20 at 2, fn. 1.

### III. DISCUSSION

#### A. Standards of Review

##### 1. Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6)

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, the court is not required to accept as true a “legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when the Plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Absent facial plausibility, Plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

Though the Court limits its Rule 12(b)(6) review to allegations of material fact set forth in the complaint, the Court may consider documents for which it has taken judicial notice. *See* F.R.E. 201; *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Here, the Court has taken judicial notice of and considers herein Defendant’s Summary Plan Description (“SPD”) and other documents attached to or referenced in the Amended Complaint. Dkts. #8, Ex. 1 and #17, Exs. 1-4. The Court may properly take judicial notice of documents such as these whose authenticity is not contested and which Plaintiffs have relied on in their Amended Complaint.<sup>2</sup> *Swartz*, 476 F.3d at 763; *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotations and alterations omitted).

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<sup>2</sup> The Court also considers the Declaration of A. Kenneth Gradia and the Exhibits thereto to the extent they provide jurisdictional evidence in support of Defendant’s 12(b)(1) motion. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

2. *Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1)*

Federal courts are courts of limited jurisdiction. *Gunn v. Minton*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1059, 1064 (2013) (citation omitted). As such, this Court is to presume “that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994) (citations omitted); *see also Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be either “facial” or “factual.” *See Safe Air for Everyone*, 373 F.3d at 1039. A facial attack on subject matter jurisdiction is based on the assertion that the allegations contained in the complaint are insufficient to invoke federal jurisdiction. *Id.* “A jurisdictional challenge is factual where ‘the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.’” *Pride v. Correa*, 719 F.3d 1130, 1133 n.6 (9th Cir. 2013) (quoting *Safe Air for Everyone*, 373 F.3d at 1039)). Defendant asserts a facial challenge to certain claims in the Amended Complaint under 12(b)(1).

**B. Mr. Hall’s Title VII Claim**

Michael Hall alleges that Defendant violated Title VII by discriminating against him on the basis of his sex. Dkt. #8 at ¶¶ 112-116. Specifically, Mr. Hall alleges that he “is a male properly performing his job, who experienced adverse employment action in the denial of the spousal health benefit, due to his sex, where similarly situated females were treated more favorably by getting the benefit. If Michael Hall were female, the benefit would be provided; BNSF provides it to female employees who are married to males but denied it to Hall who is married to a male.” *Id.* at ¶ 114. Defendant argues that this claim fails as a matter of law

1 because Mr. Hall is really alleging a claim of discrimination based on his sexual orientation,  
2 not his sex, which cannot be maintained under Title VII. Dkt. #16 at 9-11. While  
3 acknowledging that it is often difficult to distinguish sex discrimination claims made by people  
4 identifying as homosexual from those claims based solely on alleged sexual orientation  
5 discrimination, the Court disagrees with Defendant's interpretation of the instant claims.  
6

7 As an initial matter, Mr. Hall's Amended Complaint sets forth, *inter alia*, the following  
8 factual allegations, which clearly frame his Title VII claim as one based on sex:

9 ¶ 7. Michael Hall and Elijah Uber (also known as Elijah Hall and referred  
10 to herein as Elijah Hall) are males residing in Pierce County, Washington  
11 who legally married in Washington State on January 21, 2013. . . . Michael  
Hall . . . [is a] BNSF employee[].

12 22. BNSF pays spousal health coverage throughout its enterprise where a  
13 male employee is married to a female spouse and where a female employee  
14 is married to a male spouse.

15 23. Starting in early 2013, Michael Hall repeatedly requested that BNSF  
16 cover Elijah's health care costs.

17 24. Michael Hall has provided documentation of marriage required by  
18 BNSF or its authorized agent for health care benefits, United Healthcare.

19 25. BNSF has failed and refused to cover the health care costs of Michael  
20 Hall's legal spouse, Elijah Hall.

21 26. This failure to pay is based solely on the fact Michael is male.

22 27. If Michael Hall were female, married to a male, BNSF would pay him  
23 the spousal health coverage benefits as it does to all employees who are  
24 female married to male spouses, or males married to female spouses.

25 28. BNSF pays in its enterprise many female employees the health care  
26 benefits concerning their male spouses, including many locomotive  
27 engineers who are female.

28 29. BNSF has directly and through its apparent and authorized agent United  
Healthcare stated its reason for not covering Elijah is it has a "policy" that  
"marriage is one man, one woman"; although Michael Hall and Elijah Hall  
have explained many times this definition of marriage is not the law in

1 Washington state, and Elijah is the spouse and husband of Michael Hall,  
2 factually, and legally.

3 30. The one man/one woman definition of spouse used by BNSF to limit its  
4 liability to cover spousal health benefits amounts to a BNSF policy to  
5 discriminate against Michael Hall simply because he is male; under this  
6 policy, if he were a female married to Elijah, the benefit would be paid.

7 Dkt. #8 at ¶¶ 7 and 22-30.

8 Defendant tries desperately to cast these allegations solely in terms of sexual  
9 orientation, emphasizing that Plaintiffs are comparing “only *homosexual* men to *heterosexual*  
10 women (and vice versa).” Dkt. #16 at 11 (emphasis in original). This reading not only ignores  
11 the plain language of the Amended Complaint, it improperly restricts the class of employees  
12 affected by the policy at issue in which Plaintiff Michael Hall is a member. But a careful  
13 reading of the Amended Complaint, construed in favor of the Plaintiff as the non-moving party,  
14 demonstrates that Plaintiff alleges disparate treatment based on his sex, not his sexual  
15 orientation, specifically that he (as a male who married a male) was treated differently in  
16 comparison to his female coworkers who also married males.

17 Ninth Circuit Judge Stephen Reinhardt, writing for the Ninth Circuit Judicial Council,  
18 concluded the same in a nearly identical dispute involving the denial of benefits to the same-  
19 sex partner of a male federal public defender. *In re Levenson*, 537 F.3d 925 (9th Cir. 2009).

20 Judge Reinhardt explained:

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22 As I stated in my previous order, the denial of Levenson’s request that Sears  
23 be made a beneficiary of his federal benefits violated the EDR Plan’s  
24 prohibition on discrimination based on sex or sexual orientation. Levenson  
25 was unable to make his spouse a beneficiary of his federal benefits due  
26 solely to his spouse’s sex. If Sears were female, or if Levenson himself  
27 were female, Levenson would be able to add Sears as a beneficiary. Thus,  
28 the denial of benefits at issue here was sex-based and constitutes a violation  
of the EDR Plan’s prohibition of sex discrimination.

1 *Id.* at 929 (em phasis added). While Judge Reinhardt found alternatively that the denial of  
2 benefits to Mr. Levenson’s partner had also constituted discrimination based on sexual  
3 orientation, he specifically recognized the primary sex-based discrimination claim.

4 Other federal courts have reached similar conclusions. In *Heller v. Columbia*  
5 *Edgewater Country Club*, 195 F. Supp.2d 1212 (D. Or. 2002), a lesbian sued her employer  
6 alleging a discriminatory termination of employment under Title VII. Specifically, she alleged  
7 that, after learning the plaintiff was a lesbian, the plaintiff’s supervisor began subjecting her to  
8 harassing comments about her sexual orientation. *Heller*, 195 F. Supp.2d at 1217-1219. The  
9 supervisor ultimately terminated the plaintiff after she complained about the harassing  
10 behavior. After the plaintiff sued, the employer moved for summary judgment arguing that  
11 Title VII was inapplicable because the claim was based on sexual orientation discrimination not  
12 sex discrimination. *Id.* at 1222. The Court disagreed, explaining:

15 Nothing in Title VII suggests that Congress intended to confine the benefits  
16 of that statute to heterosexual employees alone. Rather, Congress intended  
17 that all Americans should have an opportunity to participate in the  
18 economic life of the nation. . . . A jury could find that [the supervisor]  
19 would not have acted as she (allegedly) did if Plaintiff were a man dating a  
woman, instead of a woman dating a woman. If that is so, then Plaintiff  
was discriminated against because of her gender.

20 *Id.* at 1222-23.

21 Likewise, in *Foray v. Bell Atlantic*, 56 F. Supp.2d 327, 329 (S.D.N.Y. 1999), the  
22 employee plaintiff alleged that an employee benefits policy designed to provide certain  
23 employees in same-sex relationships with coverage equivalent to that enjoyed by married  
24 employees was actually unlawful discrimination against him on the basis of sex under Title  
25 VII. Plaintiff (a heterosexual male) alleged that the employer had discriminated against him  
26 because “all things being equal, if [the plaintiff’s] gender were female, he would be entitled to  
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1 claim his domestic partner as an eligible dependent under the benefits plan.” The defendant  
2 employer moved to dismiss the claim under Rule 12(b)(6). The court ultimately dismissed the  
3 Title VII claim, but not because there was any question as to whether the Complaint alleged sex  
4 discrimination or sexual orientation discrimination. *Id.* at 329-30. Indeed, both the Equal  
5 Employment Opportunity Commission and the Court appear to have accepted the Title VII  
6 claim as one based on sex, not sexual orientation. *Id.*

7  
8 While the Court makes no comment with respect to the validity of Plaintiff Hall’s Title  
9 VII claim in the instant matter, it does find that Plaintiff has satisfied the initial burden of  
10 stating a claim that is plausible on its face. Accordingly, the Court denies Defendant’s motion  
11 to dismiss the Title VII claim.

### 12 **C. Plaintiffs’ Equal Pay Act Claim**

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14 Defendant next moves to dismiss Plaintiffs’ EPA claims for essentially the same  
15 reasons it has moved to dismiss Mr. Hall’s Title VII claim. Dkt. #16 at 12-13. Significantly,  
16 Defendant has also acknowledged that “the Equal Pay Act’s substantive protections are a  
17 subset of Title VII’s, and as to sex discrimination, they are co-extensive.” Dkt. #16 at 12.  
18 Accordingly, for the same reasons set forth above, the Court finds that Plaintiffs have satisfied  
19 their initial burden of stating an EPA claim that is plausible on its face, and denies Defendants’  
20 motion to dismiss those claims.

### 21 **D. ERISA Preemption**

22  
23 Defendant next argues that Plaintiffs’ claims under the WLAD should be dismissed  
24 because they are preempted by Section 514(a) of ERISA, which provides that ERISA shall  
25 “supersede any and all State laws insofar as they may now or hereafter relate to any employee  
26 benefit plan. . . .” Dkt. #16 at 14 (quoting 29 U.S.C. § 1144(a)). Defendant notes that “the  
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1 ERISA preemption analysis for a state antidiscrimination law turns on ‘whether employment  
2 practices [that] are unlawful under a broad state law . . . are prohibited by Title VII. If they are  
3 not, the state law will be superseded. . . .’” Dkt. #16 at 15 (quoting *Shaw v. Delta Air Lines* ,  
4 463 U.S. 85, 105-06 (1983)). Defendant then engages in the three part analysis for determining  
5 ERISA preemption and argues that because the conduct is not prohibited under Title VII and  
6 the EPA, the state law claims must be preempted. Dkt. #16 at 15-16. However, Defendant’s  
7 arguments are based on its faulty assertions that Plaintiffs do not have valid sex discrimination  
8 claims under Title VII or the EPA. As discussed above, this Court finds that Plaintiffs have  
9 met their initial burden of making plausible Title VII and EPA claims. Accordingly, the Court  
10 also declines to dismiss Plaintiffs’ WLAD claims as preempted at this stage of the matter.  
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#### 12 **E. Claims Subject to RLA Arbitration**

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14 Defendant next moves to dismiss the Fifth Cause of Action in the Amended Complaint  
15 on the basis that it is subject to arbitration under the Railway Labor Act (“RLA”). Under the  
16 Fifth Cause of Action, Plaintiffs assert claims for benefits under ERISA. Dkt. #8 at ¶¶ 123-  
17 131. Defendant alleges that this cause of action constitutes a dispute over the interpretation and  
18 application of the terms of a collectively-bargained health plan, jurisdiction over which lies  
19 exclusively with an arbitrator pursuant to the RLA. Dkt. #16 at 17-20. Plaintiffs agree that  
20 disputes rooted firmly in collective bargaining agreement terms, both major and minor, fall  
21 within the exclusive jurisdiction of an arbitrator. However, Plaintiffs respond that their ERISA  
22 claims have three bases independent from and outside of the terms of the plan at issue, and  
23 therefore proper jurisdiction lies within this Court. Dkt. #20 at 17-20. The Court is not  
24 persuaded by Plaintiffs.  
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1 A review of Plaintiffs' ERISA claims as alleged in the First Amended Complaint's Fifth  
2 Cause of Action reveals the following basis for the claims:

3 The 2013 denial of the spousal health benefit to plan participant Michael  
4 Hall and beneficiary Elijah Hall and to plan participant Amie Garrand and  
5 beneficiary Carol Garrand violated the terms of the plan which provided  
6 that the benefit was to be paid to the employee's "wife or husband." This  
7 violates ERISA. The denial of benefits was deliberate, intentional and  
8 malicious and constitutes an abuse of discretion or was an arbitrary and  
capricious denial of rights under the plan. The ongoing position that the  
benefit need not legally be paid constitutes an ongoing violation of the plan  
and ERISA.

9 Dkt. #8 at ¶ 125 (emphasis added). The remainder of the allegations related to this cause of  
10 action pertain to jurisdiction and alleged damages. See Dkt. #8 at ¶¶ 123-131. While Plaintiffs  
11 now try to characterize the claims as alleging interference, breach of fiduciary duty, or a  
12 violation of the Equal Protection Clause, there are no such allegations set forth in support of the  
13 Fifth Cause of Action. Nowhere under the Fifth Cause of Action do Plaintiffs discuss alleged  
14 interference with vested rights, who held a fiduciary duty and how it was breached, or how the  
15 facts in the Amended Complaints support an Equal Protection Claim. *Id.* Accordingly, the  
16 Court agrees with Defendant that jurisdiction over the Fifth Cause of Action, as currently  
17 alleged, lies with an arbitrator and not this Court, and therefore the claim is dismissed for lack  
18 of jurisdiction.  
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#### 21 **F. Plaintiffs' Prospective Claims**

22 Finally, Defendant moves to dismiss Plaintiffs' claims for prospective relief as moot  
23 based on the fact that it now provides health benefits for same-sex spouses effective January 1,  
24 2014. (Dkt. #16 at 21-23). Defendant further asserts that the cessation of such benefits is not  
25 likely to reoccur because the changes to the plan were made through collective bargaining with  
26 the unions that represent the railroads' employees and Defendant is prohibited from unilaterally  
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1 changing the coverage except through the collective bargaining process. *Id.* Defendants  
2 appear to misconstrue Plaintiffs' claim for prospective relief. Plaintiffs seek, *inter alia*, a n  
3 Order determining whether health benefits for same-sex spouses in states where same-sex  
4 marriage is legal are mandated under current law and directing Defendant to provide health  
5 benefits to such same-sex spouses as a matter of right in the future. Because Plaintiffs have  
6 alleged plausible federal and state claims as discussed above, the Court cannot find at this time  
7 that the *irreparable* claims for such prospective relief are moot. Accordingly, the Court denies  
8 Defendant's motion to dismiss Plaintiff's prospective claims.  
9

10 **IV. CONCLUSION**

11 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,  
12 and the remainder of the record, the Court hereby ORDERS:  
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- 14 1) Defendant's Motion to Dismiss (Dkt. #16) is GRANTED IN PART and DENIED  
15 IN PART as set forth above.  
16 2) Plaintiff's Fifth Cause of Action is DISMISSED for lack of jurisdiction. The  
17 remainder of Plaintiffs' claims survive Defendant's motion to dismiss.  
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19 DATED this 22 day of September 2014.  
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22 RICARDO S. MARTINEZ  
23 UNITED STATES DISTRICT JUDGE  
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