IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JILLIAN YORK and JODY BAILEY on behalf of themselves and all others similarly situated, Plaintiffs, v. WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA; and WELLMARK HEALTH PLAN OF IOWA, INC., Defendants.	**No. 4:16-cv-00627-RGE-CFB** **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs Jillian York and Jody Bailey allege their health plan and its administrator failed to have in-network providers of comprehensive lactation services and imposed cost-sharing on lactation support and counseling services they received from out-of-network providers in violation of the Affordable Care Act (ACA). The undisputed factual record before the Court shows Plaintiffs had access to in-network providers of comprehensive lactation services and in fact received comprehensive lactation services from those providers. Defendant Wellmark, Inc., through the health plan it administers, Defendant Wellmark Health Plan of Iowa, Inc. (collectively, "Wellmark"), thus satisfied its obligation to have in-network providers of comprehensive lactation services and could impose cost-sharing on lactation support and counseling services Plaintiffs received out-of-network. Moreover, Bailey failed to exhaust her administrative remedies before filing suit, thereby barring her claim. Accordingly, and for the reasons set forth below, the Court grants Wellmark's motion for summary judgment as to Plaintiffs' remaining claims and denies Plaintiffs' motion for summary judgment on the same grounds.

II. BACKGROUND

Because the Court ultimately determines there is no genuine dispute as to any material fact and Wellmark is entitled to judgment as a matter of law, the following facts are either uncontested or viewed in the light most favorable to Plaintiffs. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

Plaintiffs are members of health benefits plans administered by Wellmark. Pls.' Resp. Defs.' Statement Material Facts ¶¶ 1–2, ECF No. 81-1. Their plans identify lactation support and counseling services as a covered service when received from an in-network provider. *Id.* ¶ 3. Their plans also specify claims procedures for seeking reimbursement for charges incurred from out-of-network providers. *Id.* ¶ 4. Both York and Bailey have received services at the University of Iowa Hospitals & Clinics (UIHC), whose providers are in-network under Plaintiffs' plans. *Id.* ¶ 11; *see* Defs.' App. Supp. Defs.' Mot. Summ. J. at A.0450, Newton Decl. ¶ 7, ECF No. 75-3. Among other medical care, UIHC offers lactation support and counseling services during a patient's pregnancy, inpatient stay associated with delivery, and postpartum period. ECF No. 81-1 ¶ 9. The parties' dispute centers on Plaintiffs' receipt of postpartum lactation support and counseling services.[1]

[1] It does not appear genuinely disputed UIHC provided Plaintiffs lactation support and counseling services during pregnancy. *See* Johnson Dep. 65:22–66:16, 72:21–73:2, ECF No. 75-3 at A.0206–07, A.0209–10; Bailey Dep. 71:21–72:4, ECF No. 75-3 at A.0392–93; York Dep. 40:1–9, ECF No. 75-3 at A.0328. It also does not appear genuinely disputed UIHC provided Plaintiffs with the lactation support and counseling services they requested during inpatient stays associated with delivery. *See id.*; *see also* York Dep. 42:10–43:1, ECF No. 75-3 at A.0329–30; Bailey Dep. 66:15–68:9, ECF No. 75-3 at A.0389–91 (noting Bailey did not request any lactation support and counseling services from UIHC during her inpatient stay). Plaintiffs were denied coverage for out-of-network lactation support and counseling services received after being released from their inpatient stays associated with delivery. *See, e.g.*, Compl. ¶¶ 68–76, ECF No. 1; ECF No. 81 at 6–9. Their claims therefore primarily relate to postpartum lactation support and counseling services.

There are four International Board Certified Lactation Consultants ("Certified Lactation Consultants") who work at UIHC's main hospital, including Deborah Hubbard and Mary Johnson. *See* Johnson Dep. 111:10–112:4, ECF No. 75-3 at A.0276–77; ECF No. 81-1 ¶¶ 31–32.[2] Hubbard runs a breastfeeding clinic at UIHC that primarily provides postpartum lactation support and counseling services. *See* Hubbard Dep. 95:23–96:19, ECF No. 75-3 at A.0271–72 (noting the breastfeeding clinic's postpartum focus); Hubbard Dep. 64:5–7, ECF No. 75-3 at A.0253 (noting services at the breastfeeding clinic are available for as long as a mother is lactating). Hubbard provides one-on-one appointments at the breastfeeding clinic. *See* Hubbard Dep. 58:4–9, 59:7–24, ECF No. 75-3 at A.0249, A.0250. Hubbard has never had to turn away a patient who desired an appointment at the breastfeeding clinic. Hubbard Dep. 90:25–91:17, ECF No. 75-3 at A.0266–67. The breastfeeding clinic also organizes a support group, which Hubbard described as primarily a "social gathering." Hubbard Dep. 58:5–9, ECF No. 75-3 at A.0249. Finally, Certified Lactation Consultants at UIHC train mother–baby nurses on lactation-related issues. *See* Hubbard Dep. 43:1–44:21, ECF No. 75-3 at A.0237–38. Both York and Bailey have received lactation support and counseling services at UIHC. *See* ECF No. 81-1 ¶¶ 36–37, 39–46, 66–68, 82.

York gave birth to her son at UIHC in February 2016. *Id.* ¶ 33.[3] York lives approximately seven miles from UIHC, where she also works. *Id.* ¶¶ 34–35. Prior to the birth of her son, York received a prenatal lactation consultation at UIHC, which lasted "two minute[s]." *Id.* ¶ 37.

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[2] Dr. Temitope Awelewa, a pediatrician affiliated with UIHC, is also a Certified Lactation Consultant. ECF No. 81-1 ¶ 22; *see* Awelewa Dep. 39:11–40:25, ECF No. 75-3 at A.0296–97 (noting Awelawa became a Certified Lactation Consultant in January 2017). Awelawa provides lactation support and counseling services only in conjunction with general provider visits. *See* Awelewa Dep. 60:11–61:15, ECF No. 75-3 at A.0301–02.

[3] York also received lactation support and counseling services at UIHC in connection with the births of her two older children. ECF No. 81-1 ¶ 36.

After her son's birth, York received lactation-related services at UIHC, "but the issues were not resolved by the hospital lactation consultants prior to discharge and no care plan was provided." *Id.* ¶ 39. York had a one-on-one lactation consultation with Johnson at UIHC approximately three weeks after her discharge. *Id.* ¶¶ 42–44. York had a second one-on-one lactation consultation with Johnson at UIHC at the end of March 2016, during which Johnson examined York's son's mouth, observed that York was not transferring milk effectively, and advised York that York's son may have a posterior tongue-tie. *Id.* ¶¶ 45–46. York was not charged for any of the lactation support and counseling services she received at UIHC. *Id.* ¶ 61.

After the March 2016 consultation with Johnson, York took her son to a pediatric dentist for a frenectomy to correct the tongue-tie issue noted during her consultation at UIHC. *Id.* ¶¶ 47–48. After performing the frenectomy, the pediatric dentist gave York a list of lactation support and counseling providers, "none of whom [we]re in-network providers with Wellmark or UIHC lactation consultants." *Id.* ¶ 49. York inquired with Wellmark as to whether a lactation consultant on the pediatric dentist's list, Jen Pitkin, was in-network, and Wellmark told her Pitkin was not. *Id.* ¶¶ 49–51, 53.[4] In April 2016, York received lactation support and counseling services from Pitkin, incurring a $65 charge. *Id.* ¶ 55. York submitted a claim to Wellmark for that amount, which Wellmark ultimately denied. *Id.* ¶¶ 62–63.

Bailey gave birth to her son at UIHC in August 2015. *Id.* ¶ 64. Bailey lives approximately ten to fifteen minutes from UIHC. *Id.* ¶ 65. Prior to the birth, Bailey received a prenatal lactation consultation with Hubbard at UIHC, which involved "hold[ing] a teddy bear and practic[ing] hold positions" but which Hubbard told Bailey was "not comparable to the real deal when that day

[4] York communicated on the phone with one of Wellmark's customer service representatives. *See* ECF No. 76-3 at P. App. 126–38. The representative told York he did not see Pitkin in the database, but noted "[t]he actual service itself, I do show that it is covered under the ACA mandate." *Id.* at P. App. 128.

happens." *Id.* ¶ 66 (quoting Bailey Dep. 72:6–10, 73:1–74:16, ECF No. 75-3 at A.0393–95). Four weeks after giving birth, Bailey attempted to contact Hubbard to schedule a lactation consultation. *Id.* ¶ 71. Bailey and Hubbard "were unable to reach one another by phone and exchanged voicemails over the course of several days"—including one voicemail in which Hubbard "offered a date and time for Bailey to come in for an appointment." *Id.* ¶¶ 72, 74. Bailey missed Hubbard's calls because she "'didn't have [her] phone' on her when Hubbard's calls came through." *Id.* ¶ 73 (quoting Bailey Dep. 98:14–17, ECF No. 75-3 at A.0407). Bailey accessed Wellmark's online provider directory and contacted one of Wellmark's customer service representatives to find other in-network lactation support and counseling providers. *Id.* ¶¶ 76–77. The online directory "did not give lactation, breastfeeding, [Certified Lactation Consultant] or any other lactation consultation/breastfeeding counseling description as a searchable 'Provider Type' or 'Provider Specialty.'" *Id.* ¶ 76 (quoting ECF No. 75-3 at A.0432–34). And the customer service representative "told Bailey that Wellmark had 'no in-network providers.'" *Id.* ¶ 77 (quoting Bailey Dep. 125:9–126:3, ECF No. 75-3 at A.0420–21). Bailey eventually received lactation support and counseling services from an out-of-network provider, Kim Hendricks, incurring a $115 charge. *Id.* ¶ 81. Bailey did not submit a claim to Wellmark for the services she received from Hendricks. *Id.* ¶ 84. After her consultation with Hendricks, Bailey received lactation support and counseling services at UIHC on at least two additional occasions. *Id.* ¶ 82. Bailey was not charged for the lactation support and counseling services she received at UIHC. *Id.* ¶ 83; *see* Bailey Dep. 61:7–62:20, 86:5–87:5, ECF No. 75-3 at A.0387–88, A.0400–01 (noting Bailey does not recall "getting a bill for lactation services" and did not "pay any cost shares for breast-feeding services provided by Deb Hubbard").

In December 2016, Plaintiffs filed a five-count putative class action[5] complaint alleging Wellmark failed to comply with the ACA requirement that it provide coverage for comprehensive lactation services without cost-sharing. ECF No. 1. The Court partially dismissed Plaintiffs' complaint on Wellmark's motion. ECF No. 35. Two counts remain: Count I (alleging Wellmark breached its ERISA fiduciary duties to Bailey by failing to comply with the comprehensive lactation services coverage mandate) and Count IV (alleging Wellmark breached its contract with York by failing to comply with the comprehensive lactation services coverage mandate, incorporated by reference in York's plan documents). *See id.* at 39–40. Both counts remain only on the theory Wellmark did not have providers of comprehensive lactation services in its network, improperly characterized lactation consultants as out-of-network, and imposed cost-sharing for lactation support and counseling services. *Id.* at 4, 39–40.

Now before the Court are the parties' cross-motions for summary judgment. Defs.' Mot. Summ. J., ECF No. 75; Pls.' Mot. Summ. J., ECF No. 76. Wellmark moves for summary judgment, arguing there is no genuine dispute that its network contains lactation consultants satisfying the ACA mandate. ECF No. 75; *see* Defs.' Br. Supp. Defs.' Mot. Summ. J. 13–15, ECF No. 75-1. Plaintiffs resist Wellmark's motion. ECF No. 81. Plaintiffs also move for summary judgment, arguing there is no genuine dispute that "Wellmark did not establish a network of lactation consultants." ECF No. 76-1 at 12; *see id.* at 12–18. Defendants resist Wellmark's motion. ECF No. 80.

Additional facts are set forth below as necessary.

[5] Plaintiffs have not moved to certify any class.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, the Court must grant a party's motion for summary judgment if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322−23 (1986). A genuine issue of material fact exists where the issue "can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "On a motion for summary judgment, 'facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts.'" *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042–43 (8th Cir. 2011) (quoting *Ricci*, 557 U.S. at 586).

To defeat a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (omission in original) (quoting a prior version of Fed. R. Civ. P. 56(e)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Furthermore, a court "may consider only the portion of the submitted materials that is admissible or useable at trial." *Moore v. Indehar*, 514 F.3d 756, 758 (8th Cir. 2008) (quoting *Walker v. Wayne Cty.*, 850 F.2d 433, 434 (8th Cir. 1988)).

In general, "the filing of cross motions for summary judgment does not necessarily indicate that there is no dispute as to a material fact, or have the effect of submitting the cause to a plenary determination on the merits." *Wermager v. Cormorant Twp. Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983); *accord* 10A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2720 (4th ed. 2013 & Supp. 2018). Nonetheless, the parties' cross-motions here are mirror images of each other—each asserting the undisputed material facts entitle them to summary judgment as a matter of law on the remaining claims. Moreover, each side incorporates by reference its affirmative arguments and appendices in its resistance to the other side's motion. *See, e.g.*, Defs.' Resp. Pls.' Mot. Summ. J. 1 n.2, ECF No. 80; Pls.' Resp. Defs.' Mot. Summ. J. 1 n.1, ECF No. 81. Accordingly, the Court considers and addresses the arguments and facts cited in favor and in resistance to each motion.

IV. DISCUSSION

The Court first addresses the primary remaining issue in this case: whether Wellmark has providers of comprehensive lactation services in its network. If so, Wellmark could deny reimbursement for the lactation support and counseling services Plaintiffs received from out-of-network providers without running afoul of the ACA requirement Wellmark provide coverage for comprehensive lactation services without imposing cost-sharing. The Court determines the undisputed facts show Wellmark has satisfied its obligations to provide coverage for comprehensive lactation services. Specifically, the undisputed facts show Plaintiffs could receive and did in fact receive comprehensive lactation services from in-network providers at UIHC. Thus, Wellmark could deny coverage for the lactation support and counseling services Plaintiffs received from out-of-network providers Pitkin and Hendricks. Wellmark is therefore entitled to summary judgment on both remaining claims.

The Court then turns to an alternate basis for resolving Bailey's claim in particular: exhaustion. The Court first concludes ERISA's exhaustion requirement applies to all ERISA claims. The Court then determines, even if statutory claims do not need to be exhausted prior to filing suit, Bailey's ERISA claim is nonetheless subject to ERISA's exhaustion requirement because her claim in substance seeks redress for denied benefits. Because Bailey failed to exhaust her claim prior to filing suit as required, Wellmark is entitled to summary judgment on Count I to the extent it is not otherwise entitled to summary judgment on the merits.

A. In-Network Providers of Comprehensive Lactation Services

The ACA requires health plans to "provide coverage for and . . . not impose any cost sharing requirements for . . . preventive care and screenings," 42 U.S.C. § 300gg-13(a), including "[c]omprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment." *Women's Preventive Services Guidelines*, Health Res. & Servs. Admin., https://www.hrsa.gov/womens-guidelines/index.html;[6] *see also* ECF No. 35 at 6–7 (discussing ACA requirements). "If a plan or issuer does not have in its network a provider who can provide [comprehensive lactation services], the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service." 29 C.F.R. § 2590.715-2713(a)(3)(ii). The parties agree Plaintiffs' health plans are subject to the ACA's comprehensive lactation services coverage requirement. *See* Defs.' Reply Pls.' Add'l Statement Material Facts Resp. Defs.' Mot. Summ. J. ¶ 1, ECF No. 82-1. The primary remaining issue in this case is whether Wellmark adequately

[6] The HRSA guidelines were updated in December 2016. As the Court noted in its dismissal order, "[b]ecause the events at issue in this case took place before the 2016 update, [the Court] references the 2011 version. Regardless, the HRSA Guidelines provisions addressing lactation support and counseling are unchanged between the 2011 and 2016 versions." ECF No. 35 at 7 n.3.

provided coverage for comprehensive lactation services through in-network providers and thus permissibly imposed cost-sharing on lactation support and counseling services received from out-of-network providers. *See* ECF No. 35 at 4, 39–40.

The undisputed facts show the Certified Lactation Consultants at UIHC satisfied Wellmark's obligation to provide Plaintiffs coverage for comprehensive lactation services.[7] First, Certified Lactation Consultants are capable of providing the types of lactation support and counseling services that comprise comprehensive lactation services. *See, e.g.*, Hubbard Dep. 24:5–27:1, ECF No. 75-3 at A.0232–35 (describing Certified Lactation Consultant training); ECF No. 81-1 ¶ 31 (describing Hubbard's services as "provid[ing] one-on-one antepartum and postpartum services through UIHC's midwifery clinic"). Second, Certified Lactation Consultants at UIHC were readily available to provide those services to

[7] In its briefs, Wellmark appears to accept the proposition that comprehensive lactation services must be—and were in fact here—primarily or exclusively provided by Certified Lactation Consultants. *See, e.g.*, Defs.' Statement Material Facts Supp. Mot. Summ. J. ¶¶ 13–18, 31–32, ECF No. 75-2 (stating the services provided by Certified Lactation Consultants at UIHC's breastfeeding clinic). The Court notes 42 U.S.C. § 300gg-13(a) and 29 C.F.R. § 2590.715-2713(a) do not specifically require insurers to cover comprehensive lactation services through Certified Lactation Consultants. Rather, the statute and its implementing regulations require insurers to cover "preventive care." 42 U.S.C. § 300gg-13(a)(3); *see also* 29 C.F.R. § 2590.715-2713(a)(1)(iv). As articulated by 29 C.F.R. § 2590.715-2713(a)(3)(ii), an insurer meets this obligation if it has "in its network a provider who can provide" comprehensive lactation services. *See also Women's Preventive Services Guidelines*, Health Res. & Servs. Admin., https://www.hrsa.gov/womens-guidelines/index.html (specifying that comprehensive lactation services must be provided "by a trained provider"). The record suggests some non-Certified providers may be capable of satisfying this mandate. For instance, UIHC's mother–baby nurses are trained by the breastfeeding clinic's Certified Lactation Consultants to provide some lactation support and counseling services during inpatient stays associated with delivery. *See* Johnson Dep. 65:22–66:16, 72:21–73:2, ECF No. 75-3 at A.0206–07, A.0209–10; Hubbard Dep. 43:1–44:21, ECF No. 75-3 at A.0237–38. Even so, in light of Wellmark's briefing position and taking the facts in the light most favorable to Plaintiffs, the Court determines it is at least genuinely disputed that mother–baby nurses, standing alone, do not satisfy Wellmark's obligation to provide comprehensive lactation services. *Cf.* Johnson Dep. 65:22–66:16, 72:21–73:2, ECF No. 75-3 at A.0206–07, A.0209–10; Hubbard Dep. 43:1–44:21, ECF No. 75-3 at A.0237–38.

Plaintiffs. *See* Hubbard Dep. 90:25–91:17, ECF No. 75-3 at A.0266–67. Third, Certified Lactation Consultants at UIHC in fact provided such services (including postpartum lactation support and counseling services) to Plaintiffs without charge. *See* ECF No. 81-1 ¶¶ 36–37, 39–46, 66–68, 82.[8] Because those providers are in-network for the purposes of Plaintiffs' plans, *see* Newton Decl. ¶ 7, ECF No. 75-3 at A.0449–50, Wellmark could impose cost-sharing on Plaintiffs' visits to Pitkin and Hendricks.

Plaintiffs argue these facts are insufficient for Wellmark to satisfy its obligations under the ACA. Broadly, Plaintiffs contend the ACA's preventive care coverage mandate requires that insurers do more than make comprehensive lactation services "readily available." *See* ECF No. 81 at 11. Plaintiffs also argue UIHC's employment of four Certified Lactation Consultants does not prove Wellmark covers comprehensive lactation services for all insureds. *Id.* at 12–14. For these reasons, Plaintiffs argue, "Wellmark seeks to reduce the requirements of 29 C.F.R. § 2590.715-2713(a)(3) to almost nothing: insurers would not need to have a network of lactation consultants or cover cost-sharing for anybody so long as one provider at one covered facility was theoretically but not actually available." *Id.* at 13. This argument is unpersuasive. Even if illusory coverage is prohibited by the ACA (a holding the Court need not reach) and even if the four Certified Lactation Consultants at UIHC's main hospital are Wellmark's only in-network providers of lactation support and counseling, prior to class certification, the claims of York and

[8] Plaintiffs' response to Wellmark's statement of material facts suggests Plaintiffs view the prenatal lactation support and counseling they received at UIHC as deficient. *See, e.g.*, ECF No. 81-1 ¶¶ 37 (noting York's prenatal lactation consultation lasted "two minute[s]"), 66 (noting Bailey's prenatal lactation consultation involved "hold[ing] a teddy bear and practice[ing] hold positions," which was "not comparable to the real deal when that day happens"). But Plaintiffs do not appear to genuinely dispute that the prenatal services they received constituted the sort of lactation support and counseling required by the operative provisions of the ACA and its implementing regulations. Rather, it is undisputed UIHC provided Plaintiffs with a range of lactation support and counseling services, both before and after Plaintiffs' babies were born. *See, e.g.*, *id.* ¶¶ 37, 39, 42–46, 66, 82.

Bailey alone govern the Court's analysis. On those claims, the undisputed facts show York and Bailey could receive (and in fact received) lactation support and counseling services at all relevant points during their pregnancies, during their inpatient stays, and after their discharge from the hospital. They received those services without charge from Certified Lactation Consultants at UIHC, an in-network facility seven miles from York's home and ten to fifteen minutes from Bailey's. *See* ECF No. 81-1 ¶¶ 34, 36–37, 39–46, 65, 66–68, 82. Whether 42 U.S.C. § 300gg-13(a) requires an insurer to have a particular number of in-network comprehensive lactation services providers before it imposes cost-sharing is an interesting question. But this case is an inappropriate vehicle to resolve that question, as the undisputed facts here demonstrate Wellmark covered comprehensive lactation services for Plaintiffs by having in-network providers who could (and in fact did) provide Plaintiffs comprehensive lactation services. The Court therefore will not speculate about other individuals' ability to access comprehensive lactation services providers in Wellmark's network.

Because there is no genuine dispute York and Bailey had access to in-network comprehensive lactation services providers, Plaintiffs' other arguments are similarly unavailing. For instance, Plaintiffs argue that Wellmark's decision not to separately credential lactation consultants in its network constitutes a failure to provide coverage for comprehensive lactation services. *See* ECF No. 81-2 ¶ 19 (citing, among other documents, ECF No. 76-3 at P. App. 53; ECF No. 81-3 at P. App. II – 1, 2); *see also* ECF No. 81 at 11–14. But Wellmark's decision not to credential lactation consultants, without more, does not prove Wellmark lacked in-network providers capable of providing comprehensive lactation services. To the contrary, the materials Plaintiffs cite, internal Wellmark communications discussing the (ultimately rejected) possibility of designating lactation consultants as a new provider type, indicate Wellmark's view that its in-network hospital-based providers *already provide* comprehensive lactation services.

See, e.g., ECF No. 76-3 at P. App. 53 ("On lactation consultants in particular, the belief is that we pay for the service currently as provided by hospitals through employed lactation consultants."); *id.* at P. App. 57 ("At this time, the Committee determined that we will not be expanding our networks to include Lactation Consultants as eligible provider types. Today these services are included in the provider reimbursement made by Wellmark for the covered maternity services for our members. Lactation Consultant services can be billed by the employing hospital, physician or certified nurse midwife."); ECF No. 81-3 at P. App. II – 1 (same content; proposed draft internal communication); *id.* at P. App. II – 2 (noting the Eligibility Steering Committee denied a request by lactation consultants to be included as a new provider type in the network).[9] Consistent with the view expressed by Wellmark in those communications, Plaintiffs in fact received comprehensive lactation services from in-network hospital-based providers notwithstanding Wellmark's decision not to separately credential lactation consultants. This separate-credentialing argument is akin to Plaintiffs' administrative barriers and separate list arguments rejected by the Court in its dismissal order. *See* ECF No. 35 at 4, 17–25. The reasoning of the dismissal order applies equally here; Plaintiffs' administrative barriers and separate list arguments are inconsistent with the text of the ACA and do not constitute claims for relief under the statute. *Id.* To the extent Plaintiffs' argument is more than an administrative barriers or separate list argument, Wellmark's decision not to separately credential such providers does not establish a lack of qualified providers in Wellmark's network.

Plaintiffs also assert Bailey's difficulty making an appointment with Hubbard demonstrates Wellmark's noncompliance with the ACA. *See* ECF No. 76-1 at 7. Plaintiffs note "Bailey called

[9] The Court notes Wellmark decided not to list lactation consultants as a new provider type because Iowa does not license lactation consultants. *See* ECF No. 75-3 at A.0101 (stating in a Final Internal Appeal Determination for York's claim, "Iowa state law currently does not have a licensure or certification process for lactation counselors").

the number on Ms. Hubbard's business card 'over the course of several days' to schedule a lactation consultation with her; however, Plaintiff Bailey was 'never able to get [Ms. Hubbard] on the phone' and schedule an appointment." *Id.* (alteration in original) (citing Bailey Dep. 78:23–82:2, 94:10–99:17, ECF No. 76-3 at P. App. 63–64, 67–68). Wellmark responds "there is no dispute that Hubbard returned Bailey's phone calls and left messages, but that Bailey 'didn't have [her] phone' on her when Hubbard's calls came through." ECF No. 80 at 8 (citing Bailey Dep. 94:10–98:17, ECF No. 75-3 at A.0405–07). Wellmark argues "Wellmark's network is not inadequate merely because of Bailey's perceived issues with scheduling an appointment." *Id.*

The fact that Bailey had difficulty scheduling an appointment, without more, does not establish Wellmark lacked qualified in-network comprehensive lactation services providers. Difficulty scheduling appointments is not unique—the record establishes York had such challenges attempting to schedule care with out-of-network provider Pitkin. *See* ECF No. 81-1 ¶ 56. Resolving whether an insurer has in-network providers of comprehensive lactation services cannot turn on a plaintiff's own actions in failing to answer the phone or to respond to a voicemail providing a specific date and time for an appointment. An insurer is obligated to have "in its network a provider who can provide" comprehensive lactation services. 29 C.F.R. § 2590.715-2713(a)(3)(ii). Plaintiffs provide no authority that suggests difficulty scheduling an appointment with a provider demonstrates an insurer's noncompliance with that requirement.

Analyzing only the claims and the record before it as the Court must, Wellmark satisfied its comprehensive lactation services coverage obligations by having in-network providers of lactation support and counseling services available and accessible to Plaintiffs without cost-sharing. Wellmark could therefore properly impose cost-sharing on Plaintiffs for the

lactation support and counseling services they received outside of the network. Accordingly, the Court grants Wellmark's motion for summary judgment and denies Plaintiffs' motion for summary judgment.

B. Claim Exhaustion (Bailey)

The Court also concludes, in the alternative, Bailey has failed to exhaust her claim through Wellmark's internal claims process before filing suit, thereby barring her claim. The Eighth Circuit has held that, "[w]here a claimant fails to pursue and exhaust administrative remedies that are clearly required under a particular ERISA plan, h[er] claim for relief is barred." *Chorosevic v. MetLife Choices*, 600 F.3d 934, 941 (8th Cir. 2010) (quoting *Layes v. Mead Corp.*, 132 F.3d 1246, 1252 (8th Cir. 1998)). ERISA typically requires a plan beneficiary to file a claim with the plan administrator to exhaust remedies, and "the plan beneficiary's failure to exhaust her administrative remedies bars her from asserting *any unexhausted claims* in federal court." *Id.* at 942 (quoting *Burds v. Union Pac. Corp.*, 223 F.3d 814, 817 (8th Cir. 2000)). Here, Bailey's plan provides a member "shall not start legal action" against Wellmark until the member has exhausted the appeal procedure described in the plan. ECF No. 81-1 ¶ 8; ECF No. 75-3 at A.0162. Bailey did not file a claim for reimbursement or complete the appeals process for the charge she incurred receiving out-of-network services from Hendricks. ECF No. 81-1 ¶ 84.

1. Statutory claim exhaustion

Although Bailey concedes denial of benefits claims must be exhausted with plan administrators before filing suit, Bailey argues her ERISA-based claim did not need to be exhausted with Wellmark because her claim is a statutory claim, not a denial of benefits claim. *See* ECF No. 81 at 16–19. There is a circuit split as to whether such a difference permits a plaintiff to avoid the exhaustion requirement. Some circuit courts have held a plaintiff need not exhaust

statutory claims before filing suit. *See Stephens v. Pension Benefits Guar. Corp.*, 755 F.3d 959, 965–66 (D.C. Cir. 2014); *Galvan v. SBC Pension Benefit Plan*, 204 F. App'x. 335, 338–39 (5th Cir. Aug. 23, 2006) (unpublished); *Smith v. Sydnor*, 184 F.3d 356, 364–65 (4th Cir. 1999); *Held v. Mfrs. Hanover Leasing Corp.,* 912 F.2d 1197, 1204–05 (10th Cir. 1990); *Zipf v. Am. Tel. & Tel. Co.*, 799 F.2d 889, 891–94 (3d Cir. 1986); *Amaro v. Cont'l Can Co.,* 724 F.2d 747, 751–52 (9th Cir. 1984). Other circuit courts have held such claims are subject to the same exhaustion requirement applicable to denial of benefits claims. *See Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 649–50 (7th Cir. 1996); *Mason v. Cont'l Grp.*, 763 F.2d 1219, 1226–27 (11th Cir. 1985). The Eighth Circuit has not squarely addressed the issue.

The Court concludes statutory claims are subject to the exhaustion requirement. Governing law in this circuit suggests courts should construe the exhaustion requirement broadly. The Eighth Circuit has emphasized failing to exhaust administrative remedies bars "*any unexhausted claims*" from being raised in federal court. *Chorosevic*, 600 F.3d at 942 (quoting *Burds*, 223 F.3d at 817). And the Eighth Circuit has reasoned:

> Exhaustion serves many important purposes—giving claims administrators an opportunity to correct errors, promoting consistent treatment of claims, providing a non-adversarial dispute resolution process, decreasing the cost and time of claims resolution, assembling a fact record that will assist the court if judicial review is necessary, and minimizing the likelihood of frivolous lawsuits.

Galman v. Prudential Ins. Co. of Am., 254 F.3d 768, 770 (8th Cir. 2001). In light of these guideposts, the Court finds the reasoning of the Seventh and Eleventh Circuits regarding exhaustion persuasive. Exhaustion serves useful purposes in both the statutory and the denial of benefits contexts by enabling more developed factual records, "minimiz[ing] the number of frivolous lawsuits, promot[ing] a non-adversarial dispute resolution process, and decreas[ing] the cost and time of claims settlement." *Lindemann*, 79 F.3d at 650; *compare Chorosevic*, 600 F.3d at 941 (explaining the purposes served by exhaustion in the denial of benefits context),

and Galman, 254 F.3d at 770 (same), *with Lindemann*, 79 F.3d at 650 (explaining the purposes served by exhaustion in both the statutory and denial of benefits contexts), *and Mason*, 763 F.2d at 1227 (same). Because these rationales justify exhaustion in both contexts, the Court declines to carve out an exception to the exhaustion requirement for statutory claims. Accordingly, Bailey's claim is subject to the exhaustion requirement.

Even if the Court were to follow the courts that recognize an exception to the exhaustion requirement for statutory claims, Bailey's claim is not statutory in nature. To be sure, Bailey describes the relief she seeks as equitable, suggesting she may be attempting to vindicate rights guaranteed by a statute. *Cf. Stephens*, 755 F.3d at 966–67 (determining a suit to enjoin a 45-day delay in lump-sum payments was statutory because is asserted a right granted by ERISA regulations). For instance, instead of damages, Bailey requests "equitable surcharge, or 'monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment.'" ECF No. 81 at 18 (*CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011)); *see also* ECF No. 1 at 49–50 (requesting "[a]n order awarding . . . all relief under ERISA . . . and such appropriate equitable relief as the Court may order, including damages, an accounting, equitable surcharge, disgorgement of profits, equitable lien, constructive trust, or other remedy"). Bailey argues such remedies focus on "requiring that Wellmark bring the plan into compliance with the ACA and ERISA on behalf of both other[s] who are similarly situated and on behalf of the plan itself"—rather than merely relief addressing denied benefits. ECF No. 81 at 18. Because she "challenges unfulfilled statutory guarantees rather than mere benefits determinations," Bailey argues, her claim thus disputes the legality of the plan, which, under the approach of her favored side of the circuit split, absolves her of any obligation to first appeal her claim's denial with Wellmark. *Id.* at 17.

Notwithstanding Bailey's characterization, the Court concludes Bailey's claim in substance disputes a denial of benefits. The circuit courts that exempt statutory claims from the exhaustion requirement still generally consider "a claim for breach of fiduciary duty" as a disguised denial of benefits claim subject to the exhaustion requirement "where the basis of the claim is a plan administrator's denial of benefits or an action by the defendant closely related to the plaintiff's claim for benefits, such as withholding of information regarding the status of benefits. Under those circumstances, it is clear that such a claim is a naked attempt to circumvent the exhaustion requirement." *Smith*, 184 F.3d at 362; *accord Galvan*, 204 F. App'x at 339 ("[T]he exhaustion requirement applies to fiduciary claims that are instead disguised benefits claims." (emphasis omitted)); *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 253 (3d Cir. 2002) ("When the facts alleged do not present a breach of fiduciary duty claim that is independent of a claim for benefits, the exhaustion doctrine still applies."). Bailey challenges Wellmark's alleged failure to provide coverage for comprehensive lactation services, a benefit which the parties agree is conferred by Bailey's plan. *See* ECF No. 82-1 ¶ 1. As Wellmark rightly points out, "Bailey seeks reimbursement for the amount she was charged for her out-of-network services." ECF No. 82 at 5 n.10 (citing ECF No. 1 ¶ 76). Indeed, it appears all the equitable relief Bailey seeks is connected to that goal. *See* ECF No. 1 at 49–50. The close relationship between the relief Bailey seeks and the coverage she contends Wellmark erroneously denied her shows Bailey's claim is not "independent of a claim for benefits." *Harrow*, 279 F.3d at 253. Instead, her claim is "actually premised on [Wellmark's] failure to furnish [Bailey] with insurance coverage" for comprehensive lactation services. *Id.* at 254. Thus, her claim would be subject to the exhaustion requirement even under the approach of those courts that carve out an exception for statutory claims.

2. Futility

Bailey was therefore required to follow the claims procedures outlined in her plan documents before filing suit, unless, as Bailey argues, it would have been futile for her to do so. *See* ECF No. 81 at 19–20. Futility is a "'narrow' exception to the exhaustion-of-remedies requirement [that] requires a plan participant to 'show that it is certain that her claim will be denied on appeal, not merely that she doubts that an appeal will result in a different decision.'" *Chorosevic*, 600 F.3d at 945 (quoting *Brown v. J.B. Hunt Transp. Servs., Inc.*, 586 F.3d 1079, 1085 (8th Cir. 2009)). Bailey asserts her claim is subject to this exception "because Wellmark's determined policy with respect to [comprehensive lactation services] was not going to be changed by Plaintiff Bailey filing her claim or completing the appeals process." ECF No. 81 at 20. But Bailey does not show any facts proving that it was certain that her claim would be denied. *Cf. Chorosevic*, 600 F.3d at 945; *Brown*, 586 F.3d at 1085 (framing the futility inquiry as requiring the plaintiff to proffer "facts to show [the defendants] would certainly have denied her claim had she [proceeded through the plan's appeals process]"). To the extent Bailey's assertions indicate she was certain her claim would be denied, her arguments appear to rest on Wellmark's litigation position—that is, on Wellmark's present assertions that UIHC satisfies Wellmark's comprehensive lactation services obligations as to Plaintiffs such that Wellmark can impose cost-sharing on out-of-network lactation support and counseling services. *See* ECF No. 81 at 19–20. A party cannot show futility by reference to a litigation position. *See Chorosevic*, 600 F.3d at 946 ("If a litigation position is enough to show futility, . . . then the futility exception would swallow the exhaustion doctrine. Because exhaustion of administrative remedies serves worthwhile purposes, we decline to apply the futility exception so broadly."

(internal citation omitted)). The Court concludes Bailey has failed to show a genuine dispute as to any material fact showing she knew her claim would be denied before she filed it.

The exhaustion requirement therefore applies. Since Bailey failed to file a claim with Wellmark, her present claims are barred. Accordingly, Wellmark is entitled to summary judgment as a matter of law on Bailey's ERISA claim irrespective of whether Wellmark has satisfied its obligations to cover comprehensive lactation services for Plaintiffs.

V. CONCLUSION

The undisputed facts show Plaintiffs Jillian York and Jody Bailey had access to comprehensive lactation services at an in-network hospital. Moreover, Plaintiffs in fact received those services at that hospital without charge. Plaintiffs have not shown any authority that such an arrangement violates the ACA's requirement Defendants Wellmark, Inc., and Wellmark Health Plan of Iowa, Inc., cover comprehensive lactation services without cost-sharing. Additionally, Bailey failed to exhaust her remedies before filing suit, thereby barring her present claims. The Court therefore **GRANTS** Defendants' Motion for Summary Judgment, ECF No. 75, and **DENIES** Plaintiffs' Motion for Summary Judgment, ECF No. 76.

The Clerk of Court is directed to enter judgment in favor of Defendants on all remaining counts. The parties are responsible for their own costs.

IT IS SO ORDERED.

Dated this 28th day of February, 2019.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE