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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RACHEL CONDRY, JANCE HOY, CHRISTINE ENDICOTT, LAURA BISHOP, FELICITY BARBER, and RACHEL CARROLL on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UnitedHealth Group Inc.; UnitedHealthcare, Inc.; United Healthcare Insurance Company; UnitedHealthcare Services, Inc.; and UMR, Inc.,

Defendants.

Case No. 3:17-cv-00183-VC

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO INTERVENE

Honorable Vince Chhabria

Date: November 21, 2019

Time: 10:00 a.m.

Place: Courtroom 4

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I. INTRODUCTION

On September 9, 2019, Plaintiffs filed their renewed motion for class certification, seeking certification under Rule 23(b)(1) and (2) of three nationwide, multi-year classes of present and former UnitedHealth members who allegedly were denied access to lactation services and harmed as a result. Recognizing that the remaining named Plaintiffs with lactation claims are no longer UnitedHealth plan members and that those named Plaintiffs therefore lack Article III standing to obtain the prospective relief they seek on behalf of the putative classes, Plaintiffs simultaneously ask this Court to add Teresa Harris—a current UnitedHealth plan member—as a named Plaintiff. The Court should deny Plaintiffs' motion as untimely and prejudicial.

Plaintiffs should have known of their standing problem long ago. Plaintiff Condry was not a plan member when she filed this suit in January 2017, and neither she nor Plaintiff Hoy were members when Plaintiffs filed an Amended Complaint adding the rest of the named Plaintiffs in March 2017. When Plaintiffs filed their Second Amended Complaint in September 2017, Plaintiffs Condry, Hoy, and Carroll were no longer plan members.

Even setting these facts aside, Plaintiffs' motion comes nearly four months after the Court denied Plaintiffs' original motion for class certification and, in the process, flagged the named Plaintiffs' lack of Article III standing. It also comes almost 1.5 years after this Court first raised concerns about the standing of the named Plaintiffs to seek prospective relief. It further follows years of extensive discovery, which now has been closed for both class and merits purposes for nearly six months. Moreover, Plaintiffs' motion comes long after this Court's adjudication of Defendants' motion to dismiss, as well as the parties' cross-motions for summary judgment on the named Plaintiffs' claims. Plaintiffs offer no viable reason for their delay in seeking Ms. Harris's intervention, nor could they, given that the same attorneys who represent the named Plaintiffs also represent Ms. Harris.

Plaintiffs' lack of diligence raises a significant risk of unfair prejudice to Defendants—prejudice that far outweighs any harm to Ms. Harris that could result from the Court's denial of Plaintiffs' motion. Notwithstanding all the work that has been done in this case, Ms. Harris's intervention would require the parties to reopen fact and expert discovery (including third-party discovery) and would entitle Defendants to litigate summary judgment on Ms. Harris's individual

claims. Further, given the importance of summary judgment to this Court's original class certification analysis, allowing Ms. Harris to intervene would necessarily prolong briefing on Plaintiffs' renewed motion for class certification. By contrast, Ms. Harris will not be prejudiced if the Court does not allow her to intervene in this action. The purported basis for Ms. Harris's intervention is to protect her rights in litigation, yet Plaintiffs do not explain why ***class-wide*** injunctive relief (which Plaintiffs cannot obtain in any event due to the myriad deficiencies in their certification motion) would protect Ms. Harris's rights more than ***individualized*** injunctive relief, which she can seek on her own. Ms. Harris is free to assert any purported claims in a proper, separately filed action, if she chooses to do so.

In short, Plaintiffs' motion is tardy and, if granted, would prejudice the Defendants. For these reasons, and as discussed further below, the Court should deny Plaintiffs' motion.

II. BACKGROUND

A. Plaintiffs File Suit, and the Parties Litigate Defendants' Motion to Dismiss and Brief the Parties' Cross-Motions for Summary Judgment.

Plaintiff Condry filed this case on January 13, 2017 after her plan membership had already lapsed. (Dkt. 1; Dkt. 176, Declaration of A. Seay ("Seay Decl."), ¶ 7 (membership lapsed on July 31, 2015).) On March 10, 2017, Plaintiffs filed an Amended Complaint adding the rest of the named Plaintiffs. (Dkt. 29.) When Plaintiffs filed the Amended Complaint, neither Plaintiff Condry nor Plaintiff Hoy were plan members. (Seay Decl. ¶¶ 3, 7 (Hoy's membership lapsed December 31, 2015).)

Defendants then moved to dismiss the Amended Complaint, (Dkt. 48), and on August 15, 2017, the Court granted that motion in part and denied it in part. (Dkt. 68.) Plaintiffs filed a Second Amended Complaint on September 5, 2017. (Dkt. 78.) On that date, Plaintiffs Condry, Hoy, and Carroll were no longer plan members. (Seay Decl. ¶¶ 3, 5, 7 (Carroll's membership lapsed April 30, 2017).) After conducting discovery on the named Plaintiffs' claims, the parties filed cross-motions for summary judgment.

B. The Court Expresses Concern about the Named Plaintiffs' Lack of Standing in Connection with Summary Judgment.

On April 25, 2018—the day before the hearing on the parties' cross-motions for summary judgment—the Court entered an order in anticipation of oral argument. (Dkt. 132.) Among other

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topics, the Court indicated that the parties should be prepared to discuss the relief sought by each of the named Plaintiffs. (*Id.*) In particular, the Court asked: "If the plaintiffs are seeking prospective injunctive relief, do they have standing to do so?" (*Id.*)

The following day, at the April 26, 2018 hearing on the parties' cross-motions for summary judgment, the Court again expressed concerns about the named Plaintiffs' lack of Article III standing. Specifically, the Court informed Plaintiffs' counsel that it was "doubtful of the [named Plaintiffs'] standing to seek injunctive relief." (Declaration of Abraham J. Souza, filed contemporaneously with this Response, ("Souza Decl."), Ex. A, April 26, 2018 Hr'g. Tr., at 17:1.) While Plaintiffs' counsel asserted that standing was appropriate under *Johnson v. Hartford Casualty Ins. Co.*, No. 15-cv-04138, 2017 WL 2224828 (N.D. Cal. May 22, 2017), the Court stated its opinion that the *Johnson* decision "is wrong," explaining that, "at least in federal court, there would be no standing under Article III to seek that sort of injunctive relief if you are not even a policyholder." (Ex. A at 14:18-23.) The Court acknowledged that resolution of the standing issue might not be necessary at the summary judgment stage. (*Id.* at 14:24-25.)

C. The Court's Summary Judgment Ruling Reaches Different Outcomes Based on Each Plaintiff's Facts.

On June 27, 2018, the Court issued an order granting in part and denying in part the parties' cross-motions for summary judgment. (Dkt. 146.) With respect to Plaintiffs' lactation claims under the Affordable Care Act ("ACA"), the Court analyzed the circumstances of each of the six named Plaintiffs, assessing factors such as: (i) whether each Plaintiff attempted to locate in-network providers; (ii) whether "nearby" providers were available; and (iii) whether each Plaintiff contacted customer service, and if so, whether customer service informed each Plaintiff about network providers. (*Id.*) The Court granted summary judgment in favor of two Plaintiffs and granted summary judgment in favor of Defendants with respect to two Plaintiffs. (*Id.*) As to the two other Plaintiffs, the Court denied summary judgment due to factual disputes. (*Id.*)

D. The Court Denies Class Certification and Identifies the Named Plaintiffs' Lack of Standing.

After conducting extensive, class-wide discovery, Plaintiffs filed their motion for class certification on February 20, 2019, seeking certification of three nationwide classes under Rule

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23(b)(1) and (2). (Dkt. 161.) In opposing that motion, Defendants submitted evidence establishing that the remaining Plaintiffs with ACA claims were no longer current UnitedHealth plan members.[1] (Seay Decl. ¶¶ 3-8.) Defendants argued that, in light of these Plaintiffs' lapsed plan membership, they lacked Article III standing to obtain the declaratory and injunctive relief they sought on behalf of the putative classes. (Dkt. 163 at 24.) In their reply in support of their certification motion, Plaintiffs did not dispute that the remaining named Plaintiffs were no longer plan members. (Dkt. 190.) Instead, Plaintiffs merely relied on the *Johnson* case to argue that "a reasonable prospect of future, repeated harm … satisfies the standing requirements for injunctive relief." (*Id.* at 13-14.)

In its May 23, 2019 order denying class certification, this Court once again disagreed with Plaintiffs' view. (Dkt. 213.) Among numerous other deficiencies in Plaintiffs' motion for class certification, the Court explained that "[i]t does not appear that the named plaintiffs have standing to seek prospective relief because they are no longer UHC plan participants." (*Id.* at 4.) The Court indicated that, "[t]o the extent *Johnson* … stands for the contrary proposition, this Court disagrees with it." (*Id.* at 5.) In denying Plaintiffs' certification motion, the Court also referenced the individualized "evidence presented at summary judgment" and found that "the plaintiffs ha[d] not presented adequate evidence that liability could be determined (or that any significant issues could be resolved) on a classwide basis." (*Id.* at 3.)

E. Plaintiffs File the Present Motion Simultaneously with Their Renewed Motion for Class Certification.

On September 9, 2019, Plaintiffs filed their renewed motion for class certification, which, in an almost identical fashion to their original motion, seeks certification of three nationwide, multi-year classes of present and former UnitedHealth members under Rule 23(b)(1) and (2). (Dkt. 222.) Simultaneously with that motion, Plaintiffs filed their so-called "motion to grant request for intervention and for leave to file third amended complaint." (Dkt. 221 ("Pls.' Mot.").) In that motion, Plaintiffs ask the Court to allow Ms. Harris—who they represent—to intervene in this lawsuit and, therefore, cure their Article III standing woes. (*Id.*) Because Plaintiffs' motion is untimely and prejudicial, Defendants now oppose Plaintiffs' request.

[1] Plaintiff Barber is a current plan member, (Seay Decl. ¶ 8), but the Court previously granted summary judgment on her ACA claims in favor of Defendants. (Dkt. 146 at 3-5.)

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III. LEGAL STANDARD

Federal Rule of Civil Procedure 24 permits a non-party to intervene in a case—either permissively or as a matter of right—when the non-party seeks intervention by timely motion. Fed. R. Civ. P. 24(a)-(b). An intervenor seeking intervention as of right must demonstrate that: "(1) [the applicant] has a 'significant protectable interest' relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (quoting *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir 1997)). An intervenor must satisfy three elements to qualify for permissive intervention: "(1) [she] shares a common question of law or fact with the main action; (2) [her] motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Id.* at 412. Permissive intervention also requires consideration of "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). A court should deny intervention if the intervenor fails to satisfy even one of these requirements. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997).

IV. ARGUMENT

A. Plaintiffs' Motion is Untimely and Prejudicial.

The Court should deny Plaintiffs' motion because it is untimely and prejudicial to the Defendants. Timeliness is the threshold requirement for both permissive intervention and intervention as a matter of right. Fed. R. Civ. P. 24(a)-(b). To determine whether intervention is timely, courts in the Ninth Circuit consider three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Lee v. Pep Boys-Manny Moe & Jack of Cal.*, No. 12-cv-05064, 2016 WL 324015, at *5 (N.D. Cal. Jan. 27, 2016). "Timeliness is a flexible concept; its determination is left to the district court's discretion." *Id.* (citation omitted). If a court finds that a motion to intervene is untimely, there is no need to evaluate the remaining elements of Rule 24, and a court should deny the motion for this reason alone. *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*

v. Cont'l Ill. Corp., 110 F.R.D. 608, 609 (N.D. Ill. 1986) ("[I]ntervention is a game in which *one* strike is out." (emphasis in original)). As applied here, each of timeliness factors weighs in favor of denying Ms. Harris's motion.

1. Plaintiffs' Motion is Untimely Because of the Advanced Stage of the Litigation.

A critical factor in any timeliness analysis is "whether there have been actual proceedings of substance on the merits in the underlying action." *Munoz v. PHH Corp.*, No. 1:08-cv-0759, 2013 WL 3935054, at *7 (E.D. Cal. July 29, 2013). Here, Plaintiffs' request for intervention comes at an extremely advanced stage of the litigation. The parties have litigated a motion to dismiss, cross-motions for summary judgment on the named Plaintiffs' claims, and Plaintiffs' original motion for class certification. The parties are in the midst of briefing Plaintiffs' renewed motion for class certification. (Dkt. 220 (scheduling briefing and argument on Plaintiffs' renewed motion).) Moreover, Plaintiffs have already amended their Complaint twice, and fact and expert discovery on both class and merits issues has been closed for nearly six months. (Dkt. 158 (discovery closed March 29, 2019).) This case "has reached too advanced a stage to permit a finding of timeliness." *Pep Boys*, 2016 WL 324015, at *5.

Plaintiffs' gloss over the advanced stage of the proceedings, citing cases that are plainly distinguishable from the circumstances here. For instance, Plaintiffs cite *Munoz*, but in that case, the court found that the proposed intervenor's motion was timely because, even though the case had been pending for five years, "very little [had] actually been litigated," and the delay in proceedings was at the behest of the parties. *Munoz*, 2013 WL 3935054, at *7. Further, discovery was ongoing with no set cut-off date, and dispositive motions had not been brief and decided. *Id.*

The circumstances of the present case are obviously far different and are more akin to the facts in *Pep Boys*. There, the court denied a motion to intervene based, in part, on the advanced stage of the proceedings, because the case had been pending for more than three years; the plaintiffs had amended the complaint twice; and the parties had litigated a motion to dismiss, a motion for judgment on the pleadings, numerous discovery disputes, and a motion for class certification. *Pep Boys*, 2016 WL 324015, at *5. The court concluded that "the amount of time and work done to date renders [the

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proposed intervenor's] motion to intervene untimely." *Id*. Similarly, in *Smith v. Marsh*, the Ninth Circuit affirmed the district court's finding of untimeliness, given that the parties had litigated motions for summary judgment and partial summary judgment, a motion to bifurcate the trial, and a motion for class certification. *Smith v. Marsh*, 194 F.3d 1045, 1050-51 (9th Cir. 1999). Courts in the Ninth Circuit repeatedly deny untimely motions for intervention when, as here, the litigation has advanced substantially. *See, e.g.*, *Lindblom v. Santander Consumer USA, Inc.*, No. 1:15-cv-00990, 2018 WL 3219381, at *4 (E.D. Cal. June 29, 2018) (motion to intervene untimely when "[s]everal motions to dismiss had been decided, as well as a motion for judgment on the pleadings, a motion for summary judgment, and a motion for class certification, all of which were extensively briefed by the parties"); *Hanni v. Am. Airlines, Inc.*, No. C 08-00732, 2010 WL 289297, at *5-6 (N.D. Cal. Jan. 15, 2010) (same when the court, in its order, was also ruling on the parties' motions for summary judgment and class certification). Likewise, here, the advanced stage of the proceedings warrants denial of Plaintiffs' motion.

2. Ms. Harris's Intervention Will Prejudice Defendants.

Another factor relevant to the Court's timeliness analysis is the extent of any prejudice to the existing parties to the case. *Pep Boys*, 2016 WL 324015, at *6. The prejudice to Defendants here is substantial because intervention would further delay what has already been protracted litigation.

Intervention would require Defendants to reopen and conduct significant additional discovery to flesh out the factual underpinnings of Ms. Harris's claim. Plaintiffs concede that additional discovery would be required but blithely suggest that such discovery would entail the production of documents and a single deposition of Ms. Harris, particularly given that Ms. Harris's claims are practically "identical" to the claims of the current named Plaintiffs. (Pls.' Mot. at 6, 10.) Not so. While Ms. Harris may purport to assert the same, general legal claim as the current named Plaintiffs (lack of full coverage for out-of-network lactation services under ACA), this Court's summary judgment ruling establishes that ACA's requirements mandate an individualized inquiry into the particular facts that show why any given UnitedHealth member sought services out-of-network. Thus, Defendants would be entitled to depose not only Ms. Harris, but also in-network providers available to her to establish that Defendants had no obligation under ACA to cover out-of-network services without cost-shares.

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Defendants would also need to reopen expert discovery so that Defendants' experts can offer opinions about, among potentially other things, any network care that Ms. Harris received. (*See, e.g.*, Dkt. 175 (expert report of Dr. Henry Lee offering opinions on the network services obtained by Plaintiffs Carroll and Endicott).) Based on the results of that additional fact and expert discovery, Defendants would further be entitled to move for summary judgment on Ms. Harris's individual claims if the facts supported such a motion. And, given the Court's reference to the summary judgment record in its order denying Plaintiffs' original motion for class certification, pursuing summary judgment on Ms. Harris's individual claims would necessarily entail a delay in briefing Plaintiffs' renewed motion for class certification.

Once again, *Pep Boys* is directly on point. In that case, the proposed intervenor argued, like Plaintiffs here, that:

> there is no prejudice to Defendants because [the intervenor's] substitution as class representative "will not inject new issue[s] and matters into the litigation that exceed the scope of the operative Complaint[,]" her claims have already been part of the case since the beginning, and [the proposed intervenor] will make herself available for deposition to prevent delay on a renewed motion for certification.

Pep Boys, 2016 WL 324015, at *7. The *Pep Boys* court rejected this argument, finding that, while the complaint contained the same general legal claim asserted by the proposed intervenor, there were issues particular to the proposed intervenor's claim that likely would be the subject of discovery and motion practice if the court permitted her intervention. *Id*. at *7. In *Lindblom*, the court similarly found prejudice where intervention would lead to additional depositions and written discovery to determine whether the proposed intervenor was a suitable class representative, and intervention would require additional motion practice. *Lindblom*, 2018 WL 3219381, at *4.

For the reasons discussed above, the same is true here. *League of United Latin Am. Citizens*, 131 F.3d at 1304 ("[E]ven if [intervenor] does in fact limit itself, as it has promised, to filing motions and conducting discovery regarding future issues, its admission as a party will have the inevitable effect of prolonging the litigation to some degree"); *Valley View Health Care, Inc. v. Chapman*, No 1:13-cv-0035, 2013 WL 4541602, at *4 (E.D. Cal. Aug. 27, 2013) (finding prejudice where intervention would inevitably lead to additional discovery and motion practice); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 414 (N.D. Cal. 2004) (same because intervention would

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"necessitate the consideration of extraneous legal and factual issues that [the original] lawsuit would not otherwise invoke").

Plaintiffs rely on *Munoz* for the proposition that there is no prejudice to Defendants, (Pls.' Mot. at 6), but in that case the court determined that intervention was appropriate, at least in part, based on the fact that the only practical change to the operative complaint was to add the intervenor's name as a plaintiff and where the intervenor was accepting the allegations of the operative complaint in their entirety. *Munoz*, 2013 WL 3935054, at *6. That is not the case here, as demonstrated by the proposed Third Amended Complaint, which includes numerous factual allegations that relate solely to Ms. Harris. While Ms. Harris's legal claim may be, broadly construed, generally the same as the other Plaintiffs, her factual allegations are unique to her and will require additional discovery and motion practice. Plaintiffs' reliance on *Home Builders Association of Northern California* is equally unavailing. There, the court noted that intervention raised no "new issues or matters," and instead raised the same arguments premised on the same facts as those already raised in the litigation. *Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv.*, No. S-05-629, 2006 WL 1455430, at *2 (E.D. Cal. May 24, 2006).

Had Harris intervened earlier, Defendants could have explored these issues while discovery was still open and resolved them via summary judgment prior to class certification. Those options are no longer available, and Defendants are prejudiced as a result. *Pep Boys*, 2016 WL 324015, at *7 (finding prejudice on similar facts); *Harris v. Vector Mktg. Corp.*, No. C-08-5198-EMC, 2010 WL 3743532, at *5-6 (N.D. Cal. Sept. 17, 2010) (finding prejudice where permitting intervention would cause the parties to engage in additional discovery and other work that would necessarily delay class certification); *Hanni*, 2010 WL 289297, at *6 ("The purpose of intervention is to allow outsiders with an interest in a lawsuit to come in as a party, not to allow an outsider to side-step discovery rules and deadlines in order to assert new claims and facts.").

By contrast, there is no prejudice to Ms. Harris in denying her motion to intervene because she could file her own suit if she chooses to do so. *See Pep Boys*, 2016 WL 324015, at *7 (no prejudice to intervenor who retained the right to file an independent action). Plaintiffs claim that denying their motion will impair Ms. Harris's "interest in injunctive relief," but they do not explain why Ms. Harris

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could not seek ***her own*** injunctive relief in a separate suit, including on a class basis if she desires. (Pls' Mot. at 8); *see Pep Boys*, 2016 WL 324015, at *7 (noting that the putative intervenor could pursue another class action). In light of the substantial prejudice intervention causes Defendants, and the corresponding lack of prejudice to Ms. Harris in denying her request to intervene, this Court should deny Ms. Plaintiffs' motion.

3. Ms. Harris's Motion was Inexplicably Filed after Unreasonable Delay.

Plaintiffs' motion is further untimely because Plaintiffs filed it after unreasonable delay, for which they fail to provide any persuasive justification. "A party must intervene when he 'knows or has reasons to know that his interests might be adversely affected by the outcome of the litigation.'" *United States v. Alisal Water Corp.*, 370 F.3d 915, 923 (9th Cir. 2004) (quoting *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990) (affirming district court's denial of intervention; cited by Ms. Harris in her Motion)). The Ninth Circuit has held that courts should focus on the date the person attempting to intervene ***should have been aware her interests would no longer be protected adequately by the parties or adversely affected by the outcome of the litigation***, rather than the date the person learned of the litigation. *SEC v. Small Bus. Capital Corp.*, No. 5:12-cv-03237, 2014 WL 3749900, at *4 (N.D. Cal July 29, 2014) (citing *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 934 F.2d 1092, 1095 (9th Cir. 1991)). "Even a lengthy delay, however, 'is not as damaging as a failure to adequately explain the reason for the delay.'" *Pep Boys*, 2016 WL 324015, at *7 (citations omitted).

Here, Plaintiffs claim that Ms. Harris had "no need" to file the present motion until the Court issued its order on Plaintiffs' original class certification motion. Plaintiffs say that this is so, because prior to the Court's class certification ruling, Ms. Harris could assume, based on the *Johnson* case, "that the existing Plaintiffs, irrespective of their status as current or former UHC health benefit plan members or beneficiaries, adequately represented her claim for injunctive relief." (Pls.' Mot. at 5.)

That argument is disingenuous at best, particularly given that the same attorneys who represent Ms. Harris also represent the current named Plaintiffs. As discussed above, Plaintiff Condry was not a plan member when she filed this suit in January 2017, and neither she nor Plaintiff Hoy were members when Plaintiffs filed an Amended Complaint adding the rest of the named Plaintiffs in March

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2017. When Plaintiffs filed their Second Amended Complaint in September 2017, Plaintiffs Condry, Hoy, and Carroll were no longer plan members. This Court also raised concerns about the named Plaintiffs lack of Article III standing ***in April 2018***.

Plaintiffs do not explain why they did not seek Ms. Harris's intervention at least at that point and, instead waited more than a year to do so. *Pep Boys*, 2016 WL 324015, a *7 (denying motion to intervene filed a few months after the intervenor (who was represented by the plaintiff's counsel) was deemed to know of the deficiencies relating to the named plaintiff, finding that "[a]n attorney's knowledge, whether actually told to a client or not, is imputed to the client." (citations omitted)). Plaintiffs' counsel should not be rewarded for their litigation tactics. *Pep Boys*, 2016 WL 324015, at *8 (observing that the proposed intervenor had waited until shortly before the defendants' opposition to class certification was due as a "back-up plan in case their first, years-long litigation strategy of [the current named plaintiff] as class representative failed"); *Kamakahi v, Am. Soc'y for Reproductive Med.*, No. 11-cv-0178, 2015 WL 1926312 (N.D. Cal. Apr. 27, 2015) (finding "[t]he rationale that attorneys who fail to select appropriate class representatives should not be given unwarranted do-overs").

Plaintiffs also argue that, "[a]t the time the complaints were filed, all six named Plaintiffs were members or beneficiaries of health benefit plans sold, underwritten, or administered by one of the Defendants." (Pls.' Mot. at 2.) That is false. (*See* Seay Decl. ¶¶ 3, 7 (establishing that Hoy's and Condry's plan membership had lapsed prior to the filing of original and amended complaints).) Plaintiffs' revisionist history highlights their lack of a legitimate explanation for seeking to add Ms. Harris as a named Plaintiff at this juncture. Plaintiffs' motion should be denied.

B. Ms. Harris Does Not Meet Other Requirements for Intervention.

Even if Plaintiffs had timely sought intervention (they have not), the Court should still deny Plaintiffs' motion for failure to meet other requirements under Rule 24. With respect to intervention as a matter of right, Plaintiffs have not demonstrated that Ms. Harris has a significant protectable interest in the lawsuit that would be impaired if intervention is denied. *Donnelly*, 159 F.3d at 409 (stating that a "significant protectable interest" is a required element of Rule 24(a)). If the Court denies Plaintiffs' renewed motion for class certification, that ruling does not affect Ms. Harris's ability to file

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a separate action. *Harris*, 2010 WL 3743532, at *6 ("the proposed intervenors admitted that they would still be able to file an independent class action"). Plaintiffs claim that filing a new lawsuit will be inefficient, but they do not cite any authority holding that perceived inefficiencies alone constitute impairment of a proposed intervenor's interest. (Pls.' Mot. at 8) As the Court in *Pep Boys* explained, "to hold as much would require courts to find impairment every time a motion to intervene is filed." *Pep Boys*, 2016 WL 324015, at *3.

With respect to permissive intervention, Plaintiffs have failed to show that Ms. Harris's claims share a common question of law or fact with the named Plaintiffs' claims. *Donnelly*, 159 F.3d at 412. As discussed above, Ms. Harris's claims may be based on the same, general legal theory as the named Plaintiffs' claims (namely, an alleged violation of ACA's lactation services requirements), but Defendants' liability to Ms. Harris depends upon the resolution of a complex matrix of factual and legal inquiries. The unique circumstances of Ms. Harris's claims render any commonality arguments nonstarters. *Id.* (affirming district court's holding that the proposed intervenor's claim "share[d] no common factual proof" with the current plaintiffs' claims); *Cohen v. Trump*, No. 3:13-cv-2519, 2017 WL 1135556, at *4 (S.D. Cal. Mar. 27, 2017) (same). For these reasons, too, the Court should deny Plaintiffs' motion.

C. Plaintiffs Do Not Meet the Requirements for Amendment.

Lastly, Plaintiffs seek leave to file a third amended complaint to add Ms. Harris as a named Plaintiff pursuant to Federal Rule of Civil Procedure 15(a)(2). (Pls.' Mot. at 11-12.) Such post-class-certification requests for amendment to add parties are properly presented pursuant to Rule 24, rather than Rule 15. *See Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978); *Barnhart v. FasTax Inc.*, No. 6:14-cv-00482, 2016 WL 7971240, at *3 (D. Ore. May 4, 2016). Regardless, for the reasons discussed above, Plaintiffs have exercised undue, unjustified, and prejudicial delay in waiting until this late stage of the litigation to seek to add Ms. Harris as a named Plaintiff. *See Soto v. Castlerock Farming & Transp., Inc.*, No. 1:09-cv-00701, 2011 WL 3489876, at *3-4, 5-6 (E.D. Cal. Aug. 9, 2011) (denying leave to amend due to "undue delay" and "prejudice to the opposing party"). That undue delay and prejudice to Defendants warrants denial of Plaintiffs' request for leave to amend.

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V. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' "motion to grant request for intervention and for leave to file third amended complaint."

DATED: September 23, 2019

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By: */s/ Rebecca R. Hanson*

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CERTIFICATE OF SERVICE

I, Rebecca R. Hanson, an attorney, hereby certify that on September 23, 2019, I caused a true and correct copy of the foregoing document to be filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

/s/ Rebecca R. Hanson

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