IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAURA BRISCOE, KRISTIN MAGIERSKI, and EMILY ADAMS on behalf of themselves and all others similarly situated, Plaintiffs, v. HEALTH CARE SERVICE CORPORATION and BLUE CROSS AND BLUE SHIELD OF ILLINOIS, Defendants.	**No. 1:16-cv-10294** **Honorable John Robert Blakey**

PLAINTIFFS' RESPONSE TO DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs hereby respectfully submit this Response to Defendant Health Care Service Corporation's (HCSC) Notice of Supplemental Authority (Dkt. 131, "HCSC's Notice") which directs this Court to the ruling in *Condry, et al. v. UnitedHealth Group, Inc., et al.*, Case No. 17-cv-00183-VC (N.D. Cal.) which granted in part and denied in part plaintiffs' motion for class certification. (Dkt. 131-1, "*Condry* Order"). This Response counsels that any consideration given to the *Condry* Order be tempered by distinctions between the cases and the fundamental errors of law and fact committed by the *Condry* court.

First, Plaintiffs have already stated why the *Condry* matter is distinguishable with respect to class certification determinations. *See* Dkt. 95 at 15, n. 23; *see also* Dkt. 123 at 10-11.

Second, the *Condry* Order erroneously ignores United Healthcare's express written policy that out-of-network lactation claims were not eligible for the ACA-mandated coverage. *See Condry* Order at 3, 10 (reflecting the clear and absolute prohibition, contained in United Healthcare's Coverage Determination Guide, against coverage for out-of-network lactation services). Here, HCSC's uniform written policies on coverage of preventive lactation services cannot be ignored. *See* Dkt. 95 at 6-10; *see also* Dkt. 123 at 2, 8-11. The pertinent inquiry and bedrock of Plaintiffs' pending class certification motion are HCSC's policy and conduct that are violative of the ACA. *See id.*

Third, HCSC's reliance on the percentage of paid lactation claims is misplaced (HCSC's Notice at 1-2), and is just as equally astounding and wrong as the reliance in the *Condry* Order[1] on such data which is in contravention of fundamental class certification principles. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (rejecting the notion that individual manifestations of a defect precluded resolution of the claims on a class-wide basis). In *Wolin*, the Ninth Circuit concluded that the district court "erred when it concluded . . . that certification is inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's vehicles. . . ." *Wolin*, 617 F.3d at 1173; *see also Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (holding that the possibility of including people who have not been injured by defendant's conduct does not preclude class certification "because at the outset of

[1] In *Condry*, it is counterintuitive that the finding of a uniform policy and practice was undercut because 12% of out-of-network lactation claims were covered, especially given the district court judge's conclusion that occasional ACA-compliant claims processing instances were "accidental". *See Condry v. Unitedhealth Grp., Inc.*, No. 17-cv-00183-VC, 2019 U.S. Dist. LEXIS 106254, at *11-12 (N.D. Cal. May 23, 2019) ("It seems clear that UHC's compliance with the Affordable Care Act's mandate to provide lactation services has been spotty at best. In fact, it almost seems as if the instances of compliance were accidental.").

the case many members may be unknown, or the facts bearing on their claims may be unknown"); *see also* Dkt. 95 at 9-11, and Dkt. 123 at 9-10. HCSC's analysis also ignores that numerous (and easily identifiable, *see* Dkt. 95 at 17, n. 27; Dkt. 123 at 10, n. 17) insureds did not file claims because of HCSC's policy that expressly refused ACA-compliant preventive care coverage for lactation claims which necessarily deterred insureds from submitting eligible lactation claims. *See* Dkt. 95 at 11-13.

Fourth, Plaintiffs can fairly and typically represent class members who did not submit claims. The claims arise from the same practice and course of conduct, and are grounded in the same legal theory. *See* Dkt. 95 at 6-9, 17, and n. 27 (discussing the relative ease of identifying Class members who did not submit eligible claims for lactation services). No evidence was offered here (or in *Condry*) demonstrating lack of typicality, thereby precluding HCSC's hollow assertion that a plaintiff who submitted a lactation claim is not typical of a member who did not.

Finally, Plaintiff Magierski, who is and has been at all relevant times insured under an HCSC health benefit plan subject to the ACA's preventive services requirements, has Article III standing to seek injunctive relief. *See* Dkt. 99 at 10.[2] *See* HCSC's Notice at 2; *see also* Dkt. 57,

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[2] As of the date that the *Condry* Order was issued on Dec. 23, 2019, none of the six named plaintiffs were insured under a health benefit plan administered or underwritten by defendants. But this factual distinction between the two cases is not the principal reason the Court should choose not to follow the *Condry* Order with respect to Plaintiffs' standing to seek injunctive relief here. It is repugnant to the notion of a court doing equity, as is being requested here, to conclude that it is helpless to enjoin and impose corrective measures. *Compare Condry* Order at 3 ("United Healthcare's misconduct, which appears to be ongoing, would presumably support a classwide claim for prospective relief—specifically, an injunction requiring the company to adopt reforms to better ensure coverage for lactation services in the future") *with Laurent v. PricewaterhouseCoopers LLP*, No. 18-487-cv, 2019 U.S. App. LEXIS 38178, at *3-4 (2d Cir. Dec. 23, 2019) (on appeal the Second Circuit vacated and remanded the district court's holding, finding that "reformation of the plan and the recalculation of benefits in accordance with the reformed plan" is an equitable remedy under ERISA).

HCSC Answer, at ¶110. Indeed, contrary to HCSC's Notice, Plaintiff Magierski testified about the ongoing impact of HCSC's non-compliant lactation policy, in that due to HCSC's failure to cover her lactation claim for her first child, she forewent lactation services for her second child because she did not want to incur out-of-pocket expenses again. *See* Dkt. 101, Ex. Q, Magierski Tr. at 40:7-43:3.

Accordingly, Plaintiffs request that the Court disregard HCSC's contentions with respect to the pertinence of the *Condry* Order to the pending class certification motion, and grant such other relief as the Court deems just and proper.

DATED: January 3, 2020

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CERTIFICATE OF SERVICE

I, Kimberly M. Donaldson Smith, an attorney, hereby certify that on January 3, 2020, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kimberly M. Donaldson- Smith
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