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 HEATH CARE SERVICE CORPORATION'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs hereby respectfully submit this Response to Defendant Health Care Service Corporation's ("HCSC") Notice of Supplemental Authority (Dkt. 189) which directs this Court to a United States Court of Appeals for the Eighth Circuit decision in *York v. Wellmark, Inc.,* No. 29-1705, 2020 WL 3955697, at *1 (8th Cir. July 13, 2020) (the "*Wellmark Decision"*).

First, the *Wellmark Decision* is solely addressed to the District Court's rulings on Wellmark's Motions to Dismiss and for Summary Judgment, and not to any class certification motion or ruling, as none was filed in *Wellmark*.

Second, putting aside the obvious distinctions between Wellmark and this case (*e.g.,* different insurers and lactation policies), at the core the Iowa District Court and Eighth Circuit traversed a path that mischaracterized the plaintiffs' claims there and ignored the plain language and objectives of the ACA's preventive services mandate as to lactation coverage. In contrast,

from the inception of this case, this Court has clearly understood both plaintiffs' claims and the import of the ACA lactation policies. As this Court held:

> Plaintiffs do not identify any specific ACA provisions that address, for example, "inconsistent guidance" from a health plan's customer service staff or "administrative barriers" more generally. ***But that does not mean*** that the Plaintiffs seek to circumvent rules of statutory construction by grafting potentially useful (but non-existent) requirements to the ACA.

12/4/17 Motion to Dismiss Order, Dkt. 50 ("MTD Order") at 12 (emphasis added). Further, the Court recognized that,

> "Among other tactics, Defendants argue that Plaintiffs' claims fail because the ACA does not require health plans to maintain a 'separate network' of lactation counseling providers…Plaintiffs ***do not allege*** that the ACA requires a separate network; they instead challenge whether BCBSIL's existing network satisfies the ACA (for example, because BCBSIL does not provide a list of in-network providers that offer lactation counsel)."

MTD Order at 6, fn. 2 (emphasis added). Also, this Court held that "[e]ven if this Court accords no deference to the FAQs, however, Plaintiffs ***state a plausible ACA violation*** based upon the alleged failures of [Provider Finder] and Defendants' representatives to identify any in-network lactation consultation providers." *Id.* at 13, fn. 3 (emphasis added).[1]

Likewise, this Court's January 21, 2020 Order Denying Class Certification (Dkt. 138, "CC Order"), at 9, held that "Plaintiffs[']legal theory ostensibly presents a potential classwide practice capable of generating a common answer…And courts have found commonality based upon such systemwide practices" (citations omitted). Indeed, this Court's CC Order at 9 also recognized that

[1] Moreover, this Court's MTD Order did not follow the *Wellmark* motion to dismiss decision with respect to the issues under consideration by the Eighth Circuit or relevant to Plaintiffs' renewed motion for class certification. This Court cited to the *Wellmark* motion to dismiss opinion solely with respect to dismissing Counts III and IV, the co-fiduciary and discrimination claims (MTD Order at 18, 22), and upholding Count V (*id.* at 22-23, holding that "the ACA does not preempt consumers like Magierski [non-ERISA plan participants] from vindicating their rights under state contract law"). None of those claims or issues are relevant to the pending Class Certification Motion, nor were they before the Eighth Circuit.

"Plaintiffs' theory that Defendants violate the ACA by employing overly restrictive coding to CLS [ ] could generate classwide answers to the question of whether Defendants comply with the ACA" (citation omitted).

No matter how HCSC contorts the *Wellmark Decision* and asserts its belief as to what the decision "necessarily means", the *Wellmark Decision* finds no application nor relevance to the facts and claims in this Action, which are grounded in this Court's MTD and CC Orders, and, thus, is irrelevant to Plaintiffs' renewed Motion for Class Certification.

Plaintiffs' renewed Class Certification Motion addressed specifically the issues raised in this Court's CC Order, including through seeking certification of narrowed classes, thereby meriting the application of the law and legal principles cited in this Court's CC Order to the Plaintiffs' claims and proposed to grant Plaintiffs' Motion. Accordingly, Plaintiffs request that this Court overrule HCSC's unfounded assertions, and grant Plaintiffs' Motion for Class Certification.

DATED: July 15, 2020

CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP

By: */s/ Kimberly Donaldson-Smith*
Nicholas E. Chimicles (admitted *pro hac vice*)
Kimberly Donaldson Smith (admitted *pro hac vice*)
Stephanie E. Saunders (admitted *pro hac vice*)
361 W. Lancaster Avenue
Haverford, PA 19041
(610) 642-8500
NEC@Chimicles.com
KMD@Chimicles.com
SES@Chimicles.com

Proposed Class Counsel

Paul D. Malmfeldt, Esq.
BLAU & MALMFELDT
566 West Adams Street, Suite 600
Chicago, Illinois 60661-3632
Phone: (312) 443-1600
Fax: (312) 443-1665

Jonathan W. Cuneo (to seek admission *pro hac vice)*
Pamela B. Gilbert (to seek admission *pro hac vice)*
Monica E. Miller (to seek admission *pro hac vice)*
Katherine Van Dyck (to seek admission *pro hac vice)*
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Ave. NW, Suite 200
Washington, DC 20016
Phone: (202) 789-3960
Fax: (202) 789-1813

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Kimberly M. Donaldson Smith, an attorney, hereby certify that on July 15, 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
Kimberly M. Donaldson-Smith