No. 19-1705

In the United States Court of Appeals *for the* Eighth Circuit

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JILLIAN YORK and JODY BAILEY on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, and WELLMARK HEALTH PLAN OF IOWA, INC.

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civ. No. 16-cv-627 (RGE/CFB),
Hon. Rebecca Goodgame Ebinger

APPELLANT'S CORRECTED BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The ACA's expanded women's preventive care coverage mandate (JA1281, 1448-49) requires health plans administered by the Defendants-Appellees, under which Plaintiffs-Appellants were insured (JA1255, 1264), to provide coverage of comprehensive lactation support and counseling services ("CLS") without cost-sharing (*i.e.,* co-payments, co-insurance and deductibles). (JA1483-85; JA1231, 1252-54, 1281, 1449; 42 U.S.C. § 300gg-13(a)(4)). The point of the ACA mandate was to eliminate cost barriers that prevented women from receiving such preventive care (JA1485). In response, Wellmark did not expand its networks to include lactation consultants (JA1295, 1298-99, 1565-66). Also, Wellmark neither ascertained for, nor identified to, its insureds the identity of its in-network CLS providers, if any (JA1316-17, 1374-75, 1395-96, 1332, 1377-78, 1381-82). Thus, Wellmark was to cover out-of-network CLS claims without cost-sharing, but refused to (JA1485-86; 29 CFR 2590.715-2713(a)(3), JA23 ¶54).

Reversal and remand are required as the District Court erred in: (i) holding on a Motion to Dismiss that informational and disclosure requirements are absent from the ACA preventive coverage mandate (JA447-455); and (ii) granting Defendants and denying Plaintiffs summary judgment on the record presented. (JA1717-1736).

Plaintiffs respectfully request 20 minutes of oral argument per side.

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JURISDICTIONAL STATEMENT

The District Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the laws of the United States, specifically the Employees Retirement Income Security Act ("ERISA"), and The Patient Protection and Affordable Care Act of 2010 (the "ACA") (as amended by the Health Care and Education Reconciliation Act of 2010 and other federal laws).

The District Court has supplemental jurisdiction under 28. U.S.C. § 1367 over all other claims as they are so related to the claims in the action within the District Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Plaintiffs timely filed their notice of appeal on April 3, 2019 from the District Court's March 5, 2019 Judgment in favor of Defendants (JA01737), and appeal the District Court's Order Re: Defendants' Motion to Dismiss (JA431-470) and the Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment (JA01717-1736). *See United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 886-87 (8th Cir. 2014) (reviewing a denial of a motion for summary judgment where the appellant appealed both the denial of its motion for summary judgment and the grant of a cross-motion for summary judgment in favor of the appellee).

STATEMENT OF ISSUES

I. <u>Statement of Issues Concerning the Order Re: Defendants' Motion to Dismiss (JA431-470)("MTD Order"):</u>

Whether the District Court erred in holding, in the context of a Motion to Dismiss and as a matter of law in the MTD Order at JA447-455, that informational and disclosure requirements are absent from the ACA coverage mandate as follows:

1. Whether, on a motion to dismiss, the District Court erred in dismissing Plaintiffs' allegations that the ACA requires, with respect to preventive care coverage for breastfeeding support and counseling services, providing insureds information about and access to network lactation consultants.
2. Whether the District Court erred in holding, on a motion to dismiss, that the ACA "does not require non-Qualified Health Plans to create or provide its insureds with details as to which of its providers offer certified lactation counseling or a separate list of such providers".
3. Whether the District Court erred in holding, on a motion to dismiss, that the ACA does not require the removal of "administrative barriers" that prevent insureds from obtaining

access to and information about breastfeeding support and counseling services.

4. Whether the District Court erred in holding, on a motion to dismiss, that Wellmark did not deny Plaintiffs access to breastfeeding support and counseling services by failing to provide insureds with specific information as to lactation consultants, including a list of in-network providers offering such services and coverage explanations.

The Court is to review the District Court's grant of a Rule 12(b)(6) motion to dismiss *de novo*. *See Sabri v. Whittier All.*, 833 F.3d 995, 998 (8th Cir. 2016). In addition, the District Court's interpretation of the ACA is subject to *de novo* review on appeal. *In re Graven*, 936 F.2d 378, 384-85 (8th Cir. 1991)

The following Apposite Cases and Statutes apply: 42 U.S.C. § 300gg-13(a)(4); 29 CFR 2590.715-2713(a)(3); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987).

II. Statement of Issues Concerning the Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment (JA1717-36, 1737, "SJ Order")

Whether the District Court erred in (i) granting Defendants and (ii) denying Plaintiffs summary judgment pursuant to the SJ Order (JA1717-1736) based on the record as follows:

1. Whether the District Court erred in granting Summary Judgment to Wellmark holding in the SJ Order that Wellmark "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" under the preventive services coverage provisions of the Affordable Care Act ("ACA").

2. Whether the District Court erred in granting Summary Judgment to Wellmark holding in the Summary Judgment Order that "Plaintiffs could receive and did in fact receive comprehensive lactation services from in-network providers at [the University of Iowa Hospitals & Clinics] UIHC" when:

(a) (i) there existed genuine disputes as to material facts, or (ii) viewing the facts in the light most favorable to Plaintiffs, the Plaintiffs could not and did not receive the needed comprehensive lactation services from in-network providers at UIHC; and,

(b) the UIHC hospital-based lactation consultants do not establish Wellmark's compliance with the ACA so as to permit Wellmark to impose cost-sharing on insureds under

the ACA who received services from out-of-network lactation consultants.

3. Whether the District Court erred in granting Summary Judgment to Wellmark holding that Wellmark "satisfied its comprehensive lactation services coverage obligations by having in-network providers of lactation support and counseling without cost-sharing" under the ACA, Section 2713 to the Public Health Service Act, when Wellmark was not relieved of its financial responsibility to insureds because Wellmark did not have a network of providers to provide comprehensive lactation services (29 CFR 2590.715-2713(a)(3)).

As to the foregoing issues 1-3, the Court is to review the District Court's grant of summary judgment *de novo*. *See Porter v. Sturm*, 781 F.3d 448, 451 (8th Cir. 2015). As to the foregoing issues 1-3, the following Apposite Cases and Apposite Statutes apply: 42 U.S.C. § 300gg-13(a)(4); 29 CFR 2590.715-2713(a)(3); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987).

4. Whether the District Court erred in its Summary Judgment Order in holding that:

(a) Plaintiff Bailey's ERISA-based claim is not a statutory challenge, but rather a denial of benefits claim.

(b) Statutory ERISA claims are subject to the exhaustion requirement.

(c) The futility exception does not apply to Plaintiff Bailey's ERISA-based claim, whether it is a denial of benefits claim or a statutory challenge.

As to the foregoing issue 4, the Court is to review the District Court's grant of summary judgment *de novo*. *See Porter v. Sturm*, 781 F.3d 448, 451 (8th Cir. 2015). As to the foregoing issue 4, the following Apposite Cases and Apposite Statutes apply: *Stevens v. PBGC*, 755 F.3d 959, 965 (D.C. Cir. 2014); *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017).

5. Whether the District Court erred in denying Summary Judgment to Plaintiffs as to Wellmark's failure to comply with the ACA coverage mandate for comprehensive lactation support and counseling when there was no genuine dispute as to the following material facts: (i) Wellmark did not expand its networks to include lactation consultants as eligible provider types; (ii) Wellmark did not have a network of lactation consultants; (iii) the UIHC hospital-based lactation consultants do not establish Wellmark's compliance with the ACA so as to permit it to impose cost-sharing on insureds under the ACA who received services

from out-of-network lactation consultants; or, (iv) Wellmark denied coverage for out-of-network lactation consultations.

As to the foregoing issue 5, the Court reviews *de novo* the grant of summary judgment and attendant denial of summary. *See, e.g., United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 886-87 (8th Cir. 2014). As to the foregoing issue 5, the following Apposite Cases and Apposite Statutes apply: 42 U.S.C. § 300gg-13(a)(4); 29 CFR 2590.715-2713(a)(3); *Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987)

STATEMENT OF THE CASE

A. Summary of the Relevant Facts

1. The ACA's Mandated Preventive Health Benefits Coverage

A key initiative and directive of and The Patient Protection and Affordable Care Act of 2010 (the "ACA") (as amended by the Health Care and Education Reconciliation Act of 2010 and other federal laws) was that all individual and group health plans would provide access to and coverage for certain preventive health care benefits because "too many Americans did not get the preventive care they need to stay healthy, avoid or delay the onset of disease, and reduce health care costs, [and,] [o]ften because of cost, Americans used preventive services at about half the recommended rate." (JA00002 (*quoting* statements by the Department of Health and Human Services ("HHS")); JA472).

Section 2713 of the ACA, which is codified at 42 U.S.C. § 300gg-13, requires that non-grandfathered health plans "must provide coverage for all of the following items and services, and may not impose any cost sharing requirements[1] for …. (iv) with respect to women…evidence-informed preventive care and

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[1] The term "cost sharing" "in general" includes "deductibles, co-insurance, copayments, or similar charges; and any other expenditure required of an insured individual which is a qualified medical expense….with respect to essential health benefits covered under the plan." 42 U.S.C § 18022(c)(3)(A).

screening provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]…." (JA00017-18; JA00488-489; JA01230-1231; JA 1483-1484).

As reflected in 29 CFR 2590.715-2713(a)(3) (titled "Coverage of preventive health services"), insurers are relieved of their financial responsibility to insureds (that is, insurers could impose cost-sharing) ***only if*** the insurer "***has a network of providers to provide [CLS].***" (JA01259, emphasis added; JA01555-56).

The Departments of Health and Human Resources (HHS), Labor, and the Treasury (the "Tri-Departments") were charged with issuing regulations in several phases implementing the ACA, including PHS Act Section 2713. (JA01287 (7/19/10, 75 FR 41726 at 41728)). The Tri-Departments stated that the ACA expanded coverage for preventive services (i) so that "access and utilization of these services [would] increase", (JA01289 (75 FR 41726 at 41730, Table 1)); and, (ii) to address "underutilization of preventive services" due to "market failures" identified as "plans' lack of incentive to invest in these services" and "eliminate cost-sharing requirements, thereby removing a barrier that could otherwise lead an individual to not obtain such services." (JA01290 (75 FR 41726 at 41731)). (*See also,* JA00027 (¶59)).

Also, based on the Congressional mandate, the "[Tri] Departments [ ] released FAQs …to provide guidance related to the scope of coverage required

under the recommendations and guidelines, including coverage of…breastfeeding and lactation counseling…If additional questions arise regarding the application of the preventive services coverage requirements, the Departments may issue additional subregulatory guidance." (JA01293);[2] (*see also* JA00020-23).

2. HRSA Includes CLS in its Guidelines for Women's Preventive Services.

On August 1, 2011, HRSA adopted and released guidelines (the "HRSA 2011 Guidelines") for women's preventive services. (JA01448-49). The HRSA 2011 Guidelines included as a women's preventive service "[b]reastfeeding support, supplies, and counseling" which was described by HRSA as "[c]omprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment," (JA01448-49; JA00003; JA00473). The HRSA Guidelines for women's preventive were reiterated in 2016 as: "[c]omprehensive lactation support services (including counseling, education, and breastfeeding equipment and supplies) during the antenatal, perinatal, and the postpartum period to ensure the successful initiation and maintenance of breastfeeding." (JA1281-1283).

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[2] *See Eternal Word TV Network, Inc. v. Sec'y of the U.S. HHS*, 818 F.3d 1122, 1179 (11th Cir. 2016) ("When Congress enacted the ACA it ceded broad authority to [the Tri-Departments] to promulgate rules governing the availability of women's preventive health services in employer-sponsored health plans.").

The 2011 HRSA Guidelines for CLS were based on recommendations of the independent Institute of Medicine ("IOM", now known as The National Academy of Medicine), which had conducted a review of scientific and medical evidence with respect to effective preventive services to ensure women's health and well-being. (JA 1448). The review was reported in "*Clinical Preventive Services for Women: Closing the Gaps"* and with respect to CLS states (among other things) "Contrary to popular conception, breastfeeding appears to be a learned skill and the mother must be supported to be successful. Nevertheless, a large gap exists in the area of providers discussing breastfeeding with patients prenatally and assisting with breastfeeding issues postnatally." (JA1438-1439; *see also* JA1438-1443). The 2016 HRSA Guidelines referenced implementation considerations developed by the Women's Preventive Services Initiative ("WPSI") (JA01283), which as of 2016 asserts that "multiple barriers discourage breastfeeding including….limited access to appropriate health services." (JA01447).

Defendants' plans set forth in substantially the same manner that each health plan is supposed to provide preventive care benefits for CLS. (JA01276, 1279; JA00496-498).

3. Wellmark Did Not Expand Its Networks to Include Lactation Consultants After the ACA Mandate Became Effective

Notwithstanding recognizing the change in coverage required by the ACA (*see, e.g.,* JA1300 ("this may force our hand a little bit on this type of provider [lactation consultant]")), Wellmark did not establish a network of lactation consultants. Disregarding the mandate's comprehensive coverage construct, in particular CLS for women, families, and children after discharge from the hospital, Wellmark took the position that it "pay[s] for the service currently as provided by hospitals through employed lactation consultants." JA1299; JA1300-01 ("when a consultant [sic] comes in post pregnancy, that is being billed as part of the global bill ....."); JA 1299(Wellmark was not expanding its networks to include "Lactation Consultants as eligible provider types").

In fact, the Gynecology and Maternity Section of Wellmark's Practitioner Guides states that "[l]actation counseling services should be provided by a certified lactation counselor", but Wellmark still did not create a network of lactation consultants or identify network lactation consultants, instead stating that "[l]actation counselors are not eligible provider types for participation in Wellmark's networks." (JA1295, JA1297-98). Further reinforcing the non-compliant coverage, Wellmark's Practitioner Guide dated July 2015, that was in effect when Bailey gave birth, restricts insureds to "two lactation consultations in

the six week post-partum period." JA1295.

In 2015, the Wellmark Provider Eligibility Steering Committee's position on lactation consultants was as follows:

> At this time, the Committee determined that we will not be expanding our networks to include Lactation Consultants as eligible provider types.

JA1565.[3] The Committee specifically "denied" including lactation consultants in the network (JA1566), having noted competitor activity and that "[Blue Cross Blue Shield of Nebraska] does contract with lactation consultants." (JA1569). Nevertheless, the "Wellmark Product Development Activity" for lactation consultants was "None at this time." (JA1569).

4. The Plaintiffs-Appellants Received CLS From Out-of-Network Lactation Consultants

Both Bailey and York needed CLS shortly after giving birth at the University of Iowa Hospitals and Clinics ("UIHC") on August 22, 2015 and February 12, 2016, respectively.[4] Neither had received CLS while in-patient

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[3] It was also stated that "Today these services are considered to be included in the provider reimbursement for the covered maternity services settled for our members made by Wellmark" and "Lactation Consultant services can be billed by the employing hospital, physician or certified nurse midwife." (JA1565).

[4] Dr. Temitope Awelewa, who conducted a discharge assessment which included a general breastfeeding assessment of Plaintiff York and her son, testified that while she is an International Board Certified Lactation Consultant ("IBCLC"), breastfeeding assistance during a physician visit is just a part of a routine assessment. (JA1334, Tr. 74:3-18). Dr. Awelewa does "not see patients solely for

following the birth of their children. (JA01306-1307, Tr. at 66:7-71:15, "I do not recall getting any breast-feeding support from the staff in the labor -- or mother and baby unit"); (JA01325, Tr. at 45:16-46:10) (Before being discharged York began experiencing discomfort from breastfeeding and her nipples started to bleed, but the issues were not resolved prior to discharge and no care plan was provided).

Upon discharge from the hospital, Plaintiffs-Appellants' breastfeeding difficulties manifested. (JA1311-1312, Tr. at 88:21-89:12, "[a]bout four weeks postpartum, I became engorged and then he started refusing the breast and refusing to nurse and would squall and struggle and push away. And it was pretty upsetting."); (JA01325, Tr. at 46:18-47:21, 56:28-58:24, At about three weeks postpartum, York's son was not gaining weight because he "wasn't transferring milk effectively", did not have a good latch, and York had bleeding nipples).

Plaintiffs-Appellants had briefly met Deborah Hubbard, IBCLC, RN, the lactation consultant who operates the breastfeeding clinic at UIHC, during prenatal appointments at the Midwifery Clinic at UIHC. (JA01323-1324, Tr. at 38:8-15, 40:1-42-9); (JA1307-1308, Tr. at 72:6-10, 73:1-74:16). Therefore, needing breastfeeding support after her child's August 2015 birth, Bailey tried to, "over the

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breastfeeding". (JA01334-1335, Tr. 77:21-78:25). In addition, Wellmark's Provider Finder search results for Dr. Awelewa omit any reference to her IBCLC certification or lactation training. (JA1336-1337, Tr. 116:12-122-1); (JA1339-1343).

course of several days," schedule a lactation consultation with Ms. Hubbard; however, she was "never able to get [Ms. Hubbard] on the phone" or to schedule an appointment. (JA01309-10, 1313-1314, Tr. at 78:23-82:2, 94:10-99:17)). The lack of Ms. Hubbard's availability and ability to receive CLS at the UIHC clinic was confirmed by Ms. Hubbard, who testified that the UIHC clinic is closed when she is not available. (JA1353, 1355, Tr. 141:1-11; 143:10-14, Ms. Hubbard stated that at the time Plaintiffs sought to receive CLS she was the only lactation consultant a majority of the time "providing services through the [UIHC] breastfeeding clinic" and the clinic is closed when she is not available); (JA01345-46, 1348-50, Tr. at 57:11-58:3, 60:6-17; 65:15-18; 79:16-24).

After giving birth in February 2016, York searched on the "University web site" and found the name of Mary Johnson, RN, IBCLC, a lactation consultant in the mother-baby unit at UIHC. (JA01325-26, Tr. at 48:10-49:18); (JA01367, Tr. 119:8-23). Ms. Johnson "suspected" that York's son was not transferring milk properly because of a possible tongue-tie, but Ms. Johnson instructed York to "seek help elsewhere." (JA1460, Tr. at 61:1-21, 100:2-13). The provider who performed York's son frenectomy (tongue-tie) revision recommended that York follow up with Jen Pitkin, an IBCLC (not employed at UIHC) (JA1370) who had experience providing breastfeeding support to mothers with tongue-tie babies (JA01331, Tr. at 97:23-98:9).

In need of CLS, both Plaintiffs-Appellants sought to receive CLS from Wellmark's in-network lactation consultants. None, however, were identifiable as such. Wellmark's online "Provider Finder Tool" did not state that Wellmark had a network of lactation consultants, or identify any network lactation consultants, and lactation or breastfeeding-related categories were not available search options for the provider type or specialty searches allowed. (JA01316-1317, Tr. at 123:19-125:8); (JA01374-1375, Transcription of York's Apr. 12, 2016 Call with Wellmark, at 4:12-5:16, the customer service representative used the Provider Finder Tool, but "lactation consultant" was not an available search option). The same condition persisted into at least late 2018. (JA01395-96, Wellmark's Provider Finder Tool screen shots as of Nov. 18, 2018). (*See also,* JA00031-32, ¶¶68-71; and JA00032-34, ¶¶72-76).

Plaintiffs-Appellants' interactions with Wellmark's customer service representatives also evidence that Wellmark: did not identify it had a network of CLS providers, and did not identify in-network CLS providers. (JA01386-1394, Transcription of Bailey's Nov. 6, 2016 Call; and, JA01371-1385, Transcription of York's Apr. 12, 2016 Call); (*see also,* JA00031-32, ¶¶68-71; and JA00032-34, ¶¶72-76). Wellmark's customer service was not able to identify in-network certified lactation consultants or in-network providers that offered lactation

services. (JA1332); (JA1315, Tr. 102:6-103:8, Wellmark customer service was "unable to refer me to any [CLS] providers, so that was not helpful").

During her call with Wellmark's representative, York was first placed on hold for five minutes in response to her simple inquiry as to Ms. Pitkin's status as a Wellmark network provider. (JA1372-1374). In response, Wellmark's representative admitted that "trying to find providers is a whole different scenario here." (JA01374-1375). By the conclusion of the 28 minute call, Wellmark's representative confirmed that he was "not able to find anything for lactation consultants" in Wellmark's system and was unable to provide York with the name of even one in-network provider of CLS because there was no "selection in the provider list for that" service. (JA1377-78, 1381-82).

York and Bailey sought the necessary CLS care from lactation consultants and paid out of pocket $65 and $115, respectively, for the one-on-one consultation sessions. (JA1398, JA1397). York had an hour-long lactation consultation with Ms. Pitkin during which Ms. Pitkin observed her breastfeed, addressed post-frenectomy care, reviewed various feeding and pumping techniques, positioning and schedules, as well as nipple care. (JA01329, Tr. at 71:2-73:9). Similarly, during Bailey's hour-long lactation consultation with Kimberly Hendricks, IBCLC, Bailey was observed breastfeeding, her son's latch was assessed, engorgement and oversupply issues were discussed, and various feeding techniques and positions

were demonstrated and practiced. (JA01320, Tr. 158:20-160:18); (JA01399-1400). Following the consultations, the Plaintiffs-Appellants received comprehensive lactation care plans to help them implement a successful breastfeeding plan and strategy. (JA1399-1400; JA1401-1402; JA1320-1321; JA01331).

York submitted her CLS claim for services by Ms. Hendricks to Wellmark for coverage, and received from Wellmark an Explanation of Benefits ("EOB") that fully denied the $65 claim on the basis that, "[t]hese services are not covered based on benefits described in your benefits document." (JA1403-1404). In response to York's appeal (JA1405-1411), Wellmark issued a "Final Internal Appeal Determination Notice" that upheld the initial claim decision on the grounds. (JA01412-1413). The Notice did not cite to any purported in-network lactation consultants available to York (nor did Wellmark ever investigate as much at that time), instead, Wellmark acknowledged that:

- "[l]actation counseling services is a covered benefit under [York's] UIChoice plan and the Affordable Care Act"; and
- "[l]actation counseling services should be provided be a certified lactation counselor",

but stated that lactation counselors are not eligible network providers (JA01412-1413). Although Wellmark admits that it did not have and had not created a network of lactation consultants, it nevertheless denied the claim in full. *Id.* Bailey

did not submit a claim for the lactation consultation with Ms. Hendricks because doing so would have been futile. (JA1318-1319, Tr. 132:14-133:22).

B. Summary of Pertinent Procedural History

On December 6, 2016, Plaintiffs-Appellants filed the Complaint (JA00001-51).

On April 24, 2017, Wellmark filed a Motion to Dismiss (JA00052-00266). On May 17, 2017, Plaintiffs-Appellants filed an opposition to Wellmark's Motion to Dismiss (JA00267-00342). On May 31, 2017, Wellmark filed a reply in support of the Motion to Dismiss (JA00343-00350). On June 23, 2017, the Court held a hearing on the Motion to Dismiss (Transcript at JA00352-00397). On September 6, 2017, the District Court issued an Order re: Defendants' Motion to Dismiss (JA00431-00470, "MTD Order"), granting in part and denying in part Defendants' Motion to Dismiss. The MTD Order is a ruling presented for review discussed *infra* at ***C***.

On September 20, 2017, the Defendants filed their Answer and Affirmative Defenses to the Complaint ("Answer"), JA00471-00526.

The parties proceeded with discovery and, among other discovery disputes brought before the Magistrate Judge (*see, e.g.,* JA00529-00534), the parties disputed the scope of discovery.

Relying on the MTD Order, the Magistrate Judge's February 26, 2018

Discovery Order denied the lion's share of Plaintiffs-Appellants' propounded discovery (JA00532-00533, emphasis added):

> The sole issue at this point is whether Wellmark provided the level of service required by the ACA; i.e., whether it had lactation providers for the Preventative Care available in Plaintiffs' health insurance plans. Plaintiffs' Requests and Interrogatories seek information that goes well beyond that issue. It is not clear what relevance Wellmark's advertisements, customer searches of Wellmark's website, or *Wellmark's determination of the scope of its duty under the ACA have to do with whether Wellmark met its legal duty*.

Plaintiffs-Appellants filed Objections to the February 26 Discovery Order (JA00585-00644), which Objections Defendants opposed (JA00665-686). In their opposition, Defendants argued that the District Court substantially narrowed the case in the MTD Order (JA00670-00671) because the District Court dismissed with prejudice the allegations that:

- "the purported erection of 'administrative barriers' constituted an ACA violation" (JA00670-671), and
- "Wellmark violated ACA by 'failing to construct a list of in-network providers of Comprehensive Lactation Benefits' …" (JA00671).

Defendants also argued that the "present suit" is limited to a "single issue: whether 'Wellmark's general-provider network…contains lactation counseling providers,' such that it did not violate ACA when it imposed cost-shares on Plaintiffs' out-of-network services." (JA00671).

On April 17, 2018, the District Court issued its Order re: Plaintiffs' Objections to the February 26 Discovery Order (JA00687-00704) stating that it had "determined that Plaintiffs alleged three theories under which 'Wellmark denied them access to Comprehensive Lactation Benefits . . . : 1) 'failing to establish a network of lactation consultants,' improperly characterizing lactation consultants as out-of-network, and imposing cost sharing for lactation counseling services; 2) erecting 'major administrative barriers' to prevent insureds from receiving information and access to lactation consultants; and 3) failing to provide insureds with specific information as to lactation consultants, including a separate list of providers offering such services and coverage explanations." (JA00693).

The District Court also stated that it had "dismissed the 'administrative barriers' and 'specific information' theories, concluding they were 'not supported by the text of the [Affordable Care Act.]'…[and] [t]he only remaining questions are therefore: did Wellmark 'establish a network of lactation consultants,' 'improperly characteriz[e] lactation consultants as out-of-network,' or 'impos[e] cost sharing for lactation counseling services.'" (JA00693-00694). The District Court overruled Plaintiffs' Objections except in limited part. *Id.*

Pursuant to the applicable Scheduling Orders (JA00697-701), the parties filed summary judgment motions directed to the named Plaintiffs (which process Plaintiffs-Appellants had opposed). Beginning on November 19, 2018, the parties

filed their respective summary judgment motions, supporting and opposing briefs, and statements concerning proposed undisputed and material facts:

- Defendants' Motion for Summary Judgment (JA00702-704), and Memorandum of Law in Support (JA00705-728), accompanied by their Statement of Material Facts (JA00729-744) and Appendix (JA00745-01199). Plaintiffs opposed Defendants' Motion (JA01495-22), responded to Defendants' Statement of Material Facts (JA01523-53), provided Additional Statements of Undisputed Material Facts (JA01554-61), and submitted a Supplemental Appendix (JA01564-683). Wellmark filed a reply brief (JA01684-93), along with a reply to Plaintiffs' Additional Statements of Undisputed Facts (JA01694-1705).

- Plaintiffs-Appellants Motion for Summary Judgment on Counts I and IV (JA01200-05) and Memorandum of Law in Support (JA01206-29), accompanied by their Statement of Undisputed Facts (JA01230-38), Affidavit (JA01239-42), and Appendix (JA01243-62). Defendants opposed Plaintiffs' Motion (JA01463-82), and responded to Plaintiffs' Statement of Material Facts (JA01483-94). Plaintiffs filed a reply brief (JA01706-15).

On January 24, 2019, the District Court held a hearing on the parties' Motions for Summary Judgment (JA01738-82). On February 28, 2019 the

District Court issued its Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment (JA01717-1736). The SJ Order is a ruling presented for review discussed *infra* at ***C***.

On March 5, 2019 the Court entered Judgment in favor of Defendants. (JA01737).

C. The Rulings Presented For Review

With respect to the District Court's September 6, 2017 MTD Order (JA00431-00470), the ruling presented for review is the District Court's holding that "Plaintiffs' allegations pertaining to information and disclosure requirements under the ACA – that Wellmark erected 'administrative barriers' to certain information and failed to provide a 'separate list' of lactation counseling providers – are dismissed for failing to state a claim." (JA00455).

With respect to the District Court's February 28, 2019 Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment (JA01717-1736, "SJ Order"), the rulings presented for review are the District Court's holdings that: "The undisputed factual record before the Court shows Plaintiffs had access to in-network providers of [CLS] and in fact received [CLS] from those providers. Defendant Wellmark [ ] thus satisfied its obligation to have in-network providers of [CLS] and could impose cost-sharing on lactation support and counseling services Plaintiffs received out-of-network."

(JA01717, 1725-1731); and, "Bailey failed to exhaust her administrative remedies before filing suit, thereby barring her claim." (JA01717, 1731-1736).

SUMMARY OF THE ARGUMENT

Defendants-Appellees' conduct is and has been at odds with the ACA-requirement under which they could either establish a network of lactation consultants or not impose cost-sharing on out-of-network lactation consultant claims. The ACA expanded the required preventive CLS coverage beyond prenatal, in-hospital, and education-focused counseling and encounters. It specifically requires insurance coverage for comprehensive CLS in the post-partum period. If Defendants-Appellees had provided insureds coverage via an identified and accessible network of CLS providers, they could have imposed cost-sharing on out-of-network CLS claims, consistent with the ACA mandate. However, Wellmark did not do that; instead, Wellmark devised a policy under which it would impose cost-sharing for out-of-network CLS benefits, even absent establishing a network of lactation consultants or identifying its network CLS providers. By such conduct, Defendants breached their plan documents and fiduciary duties under ERISA.

Taken *in toto* the District Court's Orders reflect a construct for CLS coverage that is statutorily and legally unsupported, and detrimental to coverage for CLS coverage. The District Court's Orders adopt a construct that permits

Wellmark to take no responsibility for compliance with the ACA preventive care mandate. Instead, the provision of "coverage" becomes a matter of an insureds' knowledge about network provider. Or, about the efforts each insured took to hunt down any network CLS providers, irrespective of whether Wellmark actually has any in-network CLS providers identifiable to Plaintiffs. Whether Wellmark complied with the ACA must viewed and determined from the standpoint of Wellmark's conduct; and, the facts impel the conclusion that Wellmark did not have a network of lactation consultants to provide comprehensive breastfeeding support and counseling, did not provide ACA-mandated CLS coverage, and, therefore, could not deny coverage for or impose cost-sharing on out-of-network CLS claims.

ARGUMENT

I. THE COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS CERTAIN OF PLAINTIFFS' CLAIMS.

The District Court erred in its September 6, 2017 MTD Order (JA00431-00470) in holding that "Plaintiffs' allegations pertaining to information and disclosure requirements under the ACA – that Wellmark erected 'administrative barriers' to certain information and failed to provide a 'separate list' of lactation counseling providers" failed to state a claim. (JA00455). With its rulings, the District Court erred in applying an unsupported, implausible interpretation of the

ACA's "coverage" mandate, and by too narrowly viewing the Complaint's allegations and claims in view of Defendants' ERISA and contractual duties to provide CLS coverage.

A. The District Court erred in applying an unsupported, narrow, and implausible interpretation of the ACA's CLS coverage mandate to Plaintiffs-Appellants' Allegations

The District Court was to "accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *McDonough v. Ankoa County*, 799 F.3d 931, 945 (8th Cir. 2015). Indeed, "[t]o survive a motion to dismiss, [the] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" and plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Furthermore, the Supreme Court has directed that courts must not "construe statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828, 81 L. Ed. 2d 680, 104 S. Ct. 2769 (1984). The Supreme Court has directed courts to also consider "the design of the statute as a whole and . . . its object and policy." *Crandon v. United States*, 494 U.S. 152, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132 (1990). Also, as in all cases of statutory construction, the Court's task is to "interpret the words of the statutes in light of the purposes Congress sought to

serve", *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 60 L. Ed. 2d 508, 99 S. Ct. 1905 (1979). Indeed, as this Court stated in *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325, 1332 (8th Cir. 1985), "To ascertain [ ] legislative intent, we may properly consider not only the language of the statute but also the subject matter, the object to be accomplished, the purpose to be served, the underlying policies, the remedy provided, and the consequences of various interpretations".

Nevertheless, contrary to the foregoing, in reaching its holding the District Court stated that "Plaintiffs do not identify—and the Court is not aware of—any ACA provisions addressing 'misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search,' the right of an insured 'to receive care in a timely manner,' or 'major administrative barriers.'" (JA00448).

The District Court also stated that "[t]he text of the ACA requires insurers make available comprehensive lactation benefits without cost sharing. . . . This does not provide grounds to read into the statute procedural requirements Plaintiffs believe necessary to ensure easy access to those benefits, even if the effect would ultimately further the law's apparent objective." (JA00448-449).

The Court also dismissed with prejudice the allegation that Wellmark violated the ACA by '"failing to construct a list of in-network providers of [CLS] and 'failing to provide any list of in-network providers of [CLS] including failing

to provide such list by mail, through customer representatives that provide phone consultation to members, or through [Wellmark's] website.'" (JA00449)

Such holdings are contrary to the Complaint's allegations. Further, critically, such holding are contrary to fundamental, immutable constructs of insurance coverage, which necessarily require the conveyance of accurate and complete information about in-network providers and scope of coverage.

The ACA's preventive services mandate is found in Section § 2713 of the ACA (42 U.S.C. § 300gg-13); it does not enumerate an actual list of preventive services, but states that plans "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements" for, "with respect to women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by HRSA." (JA00017-18, ¶43). The separately enumerated HRSA Guidelines set out CLS as a preventive benefit (JA01448-1450; JA1438-1443) and reference the need for insureds to access to preventive coverage without cost-sharing (JA01448).

The Complaint alleged, citing to HHS, that a key initiative and directive of the ACA was that all individual and group health plans would provide access to and coverage for preventive health care benefits because "too many Americans did not get the preventive care they need to stay healthy, avoid or delay the onset of disease, and reduce health care costs, [and,] [o]ften because of cost, Americans

used preventive services at about half the recommended rate." (JA00002, ¶2).

The Complaint also included allegations explaining the ACA's women's preventive health services and CLS mandates, and the objectives to be accomplished by, the purpose to be served by, and the underlying policies of the ACA's expanded women's preventive services. For example, the Complaint alleged that the mandate was to "usher[] in a new day for women's health when, for the first time ever, women will have access to eight new services at no out-of-pocket costs to keep them heathier….and it's just one of the many benefits of the health care law that let women and their doctors, not insurance companies, make decisions about a woman's care…Instead of letting insurance companies decide hat care women receive, the health care law requires insurers to cover these preventive services…" (JA00003-4, ¶7).

The Complaint also included allegations about: breastfeeding (JA00011-15); trained providers of CLS (JA00015); and the time-sensitive nature of getting a breastfeeding mother and child access to CLS from a trained provider (JA00017) in order to sustain and avoid the cessation of breastfeeding.

The Complaint also alleged the consequences of non-compliance, or, in other words, the consequences of Defendants-Appellees' narrow interpretation of the ACA that was adopted by the District Court; of the many negative consequences is that women who cannot afford to pay out of pocket will forego

needed preventive care, contrary to the very purpose of the ACA's preventive care mandate, *see e.g.,* JA00005-6, ¶10; JA01289 (75 FR 41726 at 41730, Table 1, stating that the ACA expanded coverage for preventive services so that "access and utilization of these services [would] increase").

Further, the Complaint identified the role of the Tri-Departments in the implementation of the ACA's provisions. (JA00020; *see also,* JA00027 (¶59)). It was a Congressional mandate that the "[Tri] Departments [ ] release[] FAQs …to provide guidance related to the scope of coverage required under the recommendations and guidelines, including coverage of…breastfeeding and lactation counseling…If additional questions arise regarding the application of the preventive services coverage requirements, the Departments may issue additional subregulatory guidance." (JA01293).

Even the Eleventh Circuit acknowledged the import of the Tri-Departments with respect to the ACA's implementation: "When Congress enacted the ACA it ceded broad authority to [the Tri-Departments] to promulgate rules governing the availability of women's preventive health services in employer-sponsored health plans." *Eternal Word TV Network, Inc. v. Sec'y of the U.S. HHS*, 818 F.3d 1122, 1179 (11th Cir. 2016); (*See also* JA00020-23).

The Complaint also cited to several of the Tri-Department FAQs (JA00021-22), including an FAQ stating that "while nothing in the preventive services

requirements under section 2713…requires a plan or issuer that *has* a network of provider to provide benefits for preventive services provided out-of-network, these requirements are premised on enrollees being able to access the required preventive services from in-network providers…" (JA00021 (Q2)).

With respect to Bailey and York, the Complaint identifies their efforts at trying to identify through Wellmark available, in-network trained CLS providers that would be covered without cost-sharing (JA00031-34).

At bottom, the Court's narrow interpretation of coverage does not find support in any reading of the ACA and the preventive services mandate. By holding that Plaintiffs-Appellants could not state a claim absent express statements in the ACA addressing "'misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search,' the right of an insured 'to receive care in a timely manner,' or 'major administrative barriers'" (*see* MTD Order JA00448), the District Court's MTD Order wrongly dispensed with concepts that are inherent and vital to the concept of "coverage".

B. The District Court erred in narrowly applying the Complaint's allegations in the context of Defendants' ERISA and contractual duties to provide coverage for CLS

In addition to the ACA mandate, the Defendants-Appellee's plan documents specifically included and contractually provided for coverage of preventive services identified by HRSA, which, as discussed, includes CLS. *See supra,* and

JA00025.

Indeed, Defendants-Appellees readily identify in-network providers for other covered benefits through their provider directory, on-line search tools and inform insureds that the means to access such in-network provider information is through the Defendants' website and customer care center (via phone, email, social media, messaging, etc.). Both York and Bailey's Benefit Booklets state: "To determine if a provider participates with this medical benefits plan, ask your provider, refer to our online provider directory at *Wellmark.com*, or call the Customer Service number on your ID card." (JA00125, JA00218). That is why Plaintiffs-Appellants would expect the same information and disclosures as with respect to other covered benefits.

Nevertheless, Defendants-Appellees failed to identify the professed in-network trained CLS providers because they do not actually account for who any of those in-network trained providers are, if they have any. Either way, the failure to provide for and identify in-network lactation consultants has the direct and immediate consequence of denying women no-cost preventive benefit coverage in contravention of the ACA, ERISA and plan documents' coverage requirements.

The reason for the informational requirement attendant to coverage is clear: without such information, insureds do not know which of all listed providers are able to provide the needed CLS service and to do so as an in-network, no-cost

provider.

Defendants-Appellees' position is that the burden is on the women to hunt down, out of the thousands of "general network providers" such as RNs, OB/GYNs and Pediatricians, the providers who may be qualified to provide CLS and determine if they are in-network. There is no plausible statutory intent or interpretation that shifts such onus to the insureds, so that the insurer, here Wellmark, can forego coverage without cost-sharing of out-of-network CLS. Yet, that is the construct adopted by the MTD Order.

Plaintiffs-Appellants stated a viable claim with respect to information and disclosure requirements concerning CLS coverage, in that such failures wrongly denied Plaintiffs access to and full coverage for CLS. With respect to Plaintiff Bailey (under Count I), Defendants are fiduciaries of her ERISA-governed health care plan. ERISA imposes fiduciary duties of loyalty and prudence on plan fiduciaries, which duties are among "the highest known to the law." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009). The duty of loyalty requires fiduciaries to act with an "eye single" to the interests of participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000). The duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like

character and with like aims." ERISA § 404(a)(1)(B). ERISA's "prudent person standard is an objective standard . . . that focuses on the fiduciary's conduct preceding the challenged decision." *Roth v. Sawyer-Cleater Lumber Co.*, 16 F.3d 915, 917 (8th Cir.1994) (citation omitted). By such conduct of not identifying in-network CLS providers (assuming they had them), Defendants-Appellees did not provide coverage for CLS, in breach of their contractual duties to provide coverage, their fiduciary duties of prudence under ERISA § 404(a)(1)(B), and their duty of loyalty under ERISA § 404(a)(1)(A).

The Complaint's allegations with respect to information and disclosures about CLS coverage and network providers sufficiently pled that Wellmark was not, as it "must", "act[ing] in the best interests of the beneficiaries." *See Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1491 (8th Cir. 1988).

Finally, the District Court's MTD Opinion with respect to the information and disclosures claims and allegations: caused Plaintiffs-Appellants' discovery to be materially and substantially curtailed (*see, supra,* Procedural History in the Statement of the Case); and, impacted Plaintiffs-Appellants' entitlement to Judgment, as the District Court dispensed with certain of Plaintiffs-Appellants' legal and factual arguments about the impropriety of Wellmark's conduct of not disclosing purported CLS in-network as akin to the dismissed allegations concerning disclosure and information. *See e.g.,* JA01729-1730.

II. THE COURT ERRED IN GRANTING JUDGMENT FOR DEFENDANTS.

The District Court erred in its February 28, 2019 SJ Order (JA01717-1736) which granted Summary Judgment to Defendants-Appellees holding that: "The undisputed factual record before the Court shows Plaintiffs had access to in-network providers of [CLS] and in fact received [CLS] from those providers. Defendant Wellmark [ ] thus satisfied its obligation to have in-network providers of [CLS] and could impose cost-sharing on lactation support and counseling services Plaintiffs received out-of-network." (JA01717, 1725-1731); and, "Bailey failed to exhaust her administrative remedies before filing suit, thereby barring her claim." (JA01717, 1731-1736).

A. The District Court Erred In Granting Summary Judgment to Defendants-Appellees And Denying Summary Judgment to Plaintiffs

The District Court held that "on the same grounds", the "[District] Court grants Wellmark's motion for summary judgment …and denies Plaintiffs' motion for summary judgment." (JA01717). In rendering that holding the District Court erred in finding that: "Plaintiffs could receive and did in fact receive comprehensive lactation services from in-network providers at [the University of Iowa Hospitals & Clinics] UIHC" (JA01724); and "satisfied its [CLS] coverage obligations by having in-network providers of lactation support and counseling without cost-sharing" (JA01730).

First, the District Court articulated the "primary remaining issue in this case [as] 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." (JA1724). "A proper comprehensive analysis [] reads the parts of a statutory scheme together, bearing in mind the congressional intent underlying the whole scheme." *See Linquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987). Defendants-Appellees sought 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. If any level of availability of services whatsoever constitutes "a network" or "a provider who can provide. . . a service," these terms are out of the regulation. That position is irresponsible and antithetical to the purpose behind the ACA's preventive coverage of CLS by trained providers. It has resulted directly in the precise discouragement of preventive care sought to be avoided by the ACA. *See* JA01289. Defendants-Appellees' policy to rely on UIHC and its four lactation consultants and to place to burden on insureds to hunt down any purported network CLS providers conflicts with the ACA mandate to

"increase access and utilization." (JA01289). The District Court's SJ Order errs in its adoption of the foregoing construct.

Next, with evidence from the record, Plaintiffs-Appellants refuted Wellmark's assertion that the existence UIHC hospital-based lactation consultants satisfied Wellmark's compliance with the ACA; Wellmark, therefore was not permitted to impose cost-sharing on insureds under the ACA who received services from out-of-network lactation consultants and Wellmark was not relieved of its financial responsibility to insureds because Wellmark did not have a network of providers to provide comprehensive lactation services (29 CFR 2590.715-2713(a)(3)).

Plaintiffs-Appellants demonstrated Wellmark's failure to comply with the ACA CLS coverage mandate when there was no genuine dispute as to the following material facts: (i) Wellmark did not expand its networks to include lactation consultants as eligible provider types; (ii) Wellmark did not have a network of lactation consultants; (iii) the UIHC hospital-based lactation consultants do not establish Wellmark's compliance with the ACA so as to permit it to impose cost-sharing on insureds under the ACA who received services from out-of-network lactation consultants; or, (iv) Wellmark denied coverage for out-of-network lactation consultations. Courts should neither weigh evidence nor make credibility determinations when ruling on a motion for summary judgment. *See,*

e.g., Kenney v. Swift Transp., Inc., 347 F.3d 1041, 1044 (8th Cir. 2003).

As discussed *supra*, in response to the ACA, Defendants-Appellees' identified CLS coverage relative only to hospital-based lactation consultations and then unequivocally provided that Wellmark would not expand its network to include lactation consultants. *See supra*, Statement of the Case. On that basis alone, Plaintiffs were entitled to Summary Judgment. Wellmark was not entitled to impose cost-sharing under the ACA CLS preventive care coverage mandate.

Also, in seeking Summary Judgment, Wellmark relied on its after-the-fact identification of four hospital-based lactation consultants who worked at UIHC during the relevant time period in 2015-2016. During 2015-2016 there were five IBCLCs at UIHC's main hospital who were assigned to specific roles. (JA01007, Tr. at 82:9-15). Mary Johnson and another IBCLC were assigned to in-hospital care in the mother-baby unit where they provided general breastfeeding guidance to patients following delivery, and handled the breastfeeding orientation for the new staff. (JA01367, Tr. at 119:8-23); (JA957-958, Tr. at 72:21-73:2); (JA1573-74, Tr. at 81:14-82:15). Ms. Johnson along with the two other IBCLCs also lead a once a week UIHC support group which Deborah Hubbard described as being "more of a social gathering" (JA1345-46, Tr. at 57:20-58:11). The fourth hospital IBCLC was responsible for covering the 70-bed NICU which during 2015-2016 was also covered by another IBCLC. (JA01013-14, Tr. at 89:23-90:12); (JA01572,

Tr. at 40:23-25); (JA01584, Tr. at 91:18-22).

Since the breastfeeding clinic at UIHC opened in the second half of 2015, it has been operated by Ms. Hubbard and she is primarily the only lactation consultant who "provid[es] [one-on-one antepartum and postpartum] services through the [UIHC] breastfeeding clinic"; therefore, when she is not available the clinic is generally closed. (JA01024, Tr. at 111:16-20); (JA01345-46, 1348-1350, 1355, Tr. at 57:11-58:3, 60:6-17; 65:15-18; 79:16-24; 143:10-14). Further, Ms. Johnson testified that since the clinic opened, she does not offer one-on-one appointments (with the exception of one occasion) but rather refers patients to the clinic. (JA01582-83, Tr. at 73:3-74:12). Thus, post-partum discharge services are subject to Ms. Hubbard's availability. In order to schedule an appointment with Ms. Hubbard, patients are to call the number on the UIHC breastfeeding clinic magnet (JA1358) which goes to Ms. Hubbard's office, but if she is not there it goes to voicemail (JA01348, Tr. at 60:6-17); (JA-1576-77, Tr. at 84:9-85:1). Wellmark identified by name only one other provider, Dr. Awelewa, *see* fn. 4, *supra.* It is, therefore, disputed that the UIHC lactation consultants suffice to meet the ACA mandate.

In addition, Plaintiffs-Appellants' experiences detailed in the record refute Wellmark's purported evidence that post-partum services offered at UIHC suffice. (*See* Statement of Case, *supra; see also,* JA01578-80, Tr. 144:24-146:7, stating

that a non-UIHC patient would have to go through registration to get a Medical Record Number, which rarely happens).

Furthermore, the Plaintiffs-Appellants' interactions with Wellmark's customer service representatives also refuted Wellmark's contention that it has network lactation consultants. (JA1386-1394; 1371-1385). When Plaintiffs contacted Wellmark customer service by phone, no in-network certified lactation consultants or in-network providers that offered CLS could be identified. (JA01332, Tr. at 104:3-11); (*see also* JA1315, Tr. 102:6-103:8, Wellmark customer service was "unable to refer me to any [CLS] providers, so that was not helpful").

During her 28 minute call with Wellmark's customer service representative, York did not just inquire specifically as to the status of one IBCLC she had identified through a referral as an in-network provider but she also requested a list of lactation consultants in her area; Wellmark's representative, however, was "not able to find anything for lactation consultants" in Wellmark's system and was unable to provide her with the name of even one in-network provider because there was no "selection in the provider list for that" service (JA01377-78, 1381-82, Tr. at 7:19-8:14, 11:10-12-2); (JA01332, Tr. at 104:3-11).

Additionally, Plaintiffs-Appellants asserted that there is no standard by which four hospital-based lactation consultants (even assuming they were full-

time, readily accessible and provide full complement of CLS) would suffice to establish Wellmark's compliance with the ACA (from both the standpoint of each Plaintiff and of its membership generally) so as to permit it to impose cost-sharing on insureds under the ACA for having received services from out-of-network lactation consultants. Wellmark's unsupported assertions about coverage and the import of possibly having 4 in-hospital lactation consultants as in-network CLS providers is further undermined when viewed in the context of the approximate number of geographically relevant births: UIHC handles annually over 2,000 births (JA01595), and, the residents of Johnson County, Iowa, where UIHC and the clinic are located, had 1,806 live births in 2015 (of which 861 were in Iowa City) (JA1591-1594).

Finally, contrary to the District Court's holding, it is disputed as to whether Wellmark imposed cost-sharing on in-network CLS services. Wellmark cites only to a declaration of its employee, Mr. Newton, who states that there was not a fee or cost to members associated with the breastfeeding support and counseling services at UIHC whether billed as a separate service or under the "labor and delivery services" (JA01198-99). However, what Wellmark's Gynecology and Maternity Section of the Practitioner Guide states is that "lactation (breastfeeding) counseling is included in the APR-DRG payment when provided during the maternity care in the inpatient hospital setting". (JA1295, JA1298). That does not address coverage

without cost-sharing for CLS rendered post-partum, post-discharge in a setting other than an inpatient hospital setting.

B. The District Court Erred In Granting Summary Judgment With Respect to Bailey's Claim.

The District Court erred in its Summary Judgment Order in holding that Bailey failed to exhaust her claim before filing suit (JA01731).

The Third, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits have all held that "exhaustion is not required when plaintiffs seek to enforce *statutory* ERISA rights rather than contractual rights created by the terms of a benefit plan." *See, e.g.*, *Stevens v. PBGC*, 755 F.3d 959, 965 (D.C. Cir. 2014); *see also* JA01731-32.

The District Court erred in not considering or addressing, and ultimately following, such apposite cases from other Circuit Courts, and specifically the Sixth Circuit's decision in *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017), which highlighted that actions to enforce the terms of a plan are not comparable to actions brought to assert rights granted by the federal statute. *See, Stephens*, 755 F.3d at 965 (citing *Zipf v. AT&T*, 799 F.2d 889, 891 (3d Cir. 1986)).

The Court's reliance on *Galman v. Prudential Ins. Co. of Am.,* 254 F.3d 768, 770 (8th Cir. 2001) is misplaced. (JA 01732, 34). Unlike the principles espoused *Galman* about the importance of exhausting administrative remedies, here, the

issue will not resolve by giving Wellmark a chance to address it; this is not a matter of fixing a claims processing error or giving Wellmark the opportunity to review more information from medical records. Bailey's claims are directed to the "*legality* of a plan, not to a mere *interpretation* of it . . ." *Hitchcock*, 851 F.3d at 562. It stands to reason that the interpretation here of the guarantees of ERISA and the ACA with respect to CLS coverage as a preventive benefit are matters for the judiciary at this point, and that there is little to be gained by requiring exhaustion in this context save another opportunity for Wellmark to continue to evade legal requirements and responsibility. *See, e.g.*, *id.* (citing *Zipf*, 799 F.2d at 893).

Contrary to the District Court's holding and reliance on case law that goes against the weight of apposite Circuit Court authority (JA01734), Wellmark's breaches of fiduciary duty have resulted in the improper adjudication of out-of-network CLS claims, which CLS claims need to be reprocessed under the corrected construct that complies with the ACA mandate. *See e.g.,* 29 U.S.C. § 1132(a)(3). Even if Plaintiffs were to also seek relief in the form of an equitable surcharge, or "monetary 'compensation' for a loss resulting from a trustee's breach of duty or to prevent the trustee's unjust enrichment", *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011), the Eighth Circuit Court of Appeals recognized equitable surcharge as an appropriate equitable remedy under ERISA Section 502(a)(3) for breaches of fiduciary obligations by plan administrators in *Silva v. Metro Life Ins. Co.*, 762

F.3d 711, 722 (8th Cir. 2014) (quoting *Amara*, 563 U.S. at 441). Such statutory claims are not, under the majority of Circuit Courts having addressed the issue, subject to the exhaustion requirement. (JA07131-32).

In addition, the District Court erred in not applying the futility exception to Bailey's claim. (JA01735). The record is clear that it would have been futile for Bailey either to seek through the claims and/or appeal processes to persuade Defendants-Appellees to change their policies and practices with respect to CLS out-of-network coverage. As discussed *supra,* Wellmark's position was that it would not expand its network to include lactation consultants and it viewed the UIHC lactation consultants as sufficient to afford it the ability to deny coverage for out-of-network CLS claims. While futility is a difficult standard to meet, *see Chorosevic v. MetLife Choices*, 600 F.3d 934, 941 (8th Cir. 2010), it should not be impossible. Wellmark was not going to entirely change its practices and policies upon receipt of Bailey's out-of-network CLS claim; its treatment of York's claim proves as much. *See, e.g.*, *Roche v. Aetna, Inc*., 681 F. App'x 117, 125 (3d Cir. 2017) (futility of requiring exhaustion can be demonstrated by the "existence of a fixed policy denying benefits"); *Tex. Gen. Hosp., LP v. United HealthCare Servs.*, Civ. Act. No. 3:15-CV-02096-M, 2016 U.S. Dist. LEXIS 84082, at *18 (N.D. Tex. June 28, 2016) (with respect to an ERISA claim, the Court held that exhaustion was futile "based on, either or both [of]: United's failure to provide meaningful

access to administrative remedies and the futility of further efforts by Plaintiffs.").

CONCLUSION

Plaintiffs-Appellants respectfully request that the Court reverse the holding in the District Court's September 6, 2017 MTD Order (JA00431-00470) that "Plaintiffs' allegations pertaining to information and disclosure requirements under the ACA – that Wellmark erected 'administrative barriers' to certain information and failed to provide a 'separate list' of lactation counseling providers – are dismissed for failing to state a claim" (JA00455), find that Plaintiffs-Appellants do state a claim with respect to the ACA mandate of coverage for CLS requiring information and disclosure about CLS and CLS network providers, and to remand the case with instruction that Plaintiffs-Appellants can proceed with discovery and litigation of their claims against Wellmark for failure to comply with the ACA-mandate, including in terms of the information and disclosure requirements under the ACA.

Plaintiffs-Appellants respectfully request that the Court reverse the District Court's SJ Order (JA01717-1736) in its entirety, permitting the Plaintiffs to proceed with discovery and litigation of their claims against Wellmark as set forth above, and to be permitted to file, upon completion of such discovery, a renewed motion for summary judgment. In the alternative, Plaintiffs-Appellants

respectfully request that the Court reverse the District Court's SJ Order and enter Judgment for the Plaintiffs-Appellants on the grounds that: the identified UIHC hospital-based lactation consultants do not establish Wellmark's compliance with the ACA so as to permit Wellmark to impose cost-sharing on insureds under the ACA who received services from out-of-network lactation consultants; and Wellmark did not satisfy its ACA CLS coverage obligations by having in-network providers of lactation support and counseling accessible, and Wellmark was not relieved of its financial responsibility to insureds because Wellmark did not have a network of providers to provide comprehensive lactation services (29 CFR 2590.715-2713(a)(3)). In addition, Plaintiffs-Appellants respectfully request that the Court reverse the District Court's Summary Judgment Order and hold that Bailey's claims were not subject to the exhaustion requirement and/or the futility exception applies to Bailey's ERISA-based claim, whether it is a denial of benefits claim or a statutory challenge.

CERTIFICATE OF COMPLIANCE FOR WORD OR LINE LIMITS AND SCANNING FOR VIRUSES

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 9,787 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 14-point Times New Roman.

3. The brief has been scanned for viruses and it is virus free. *See* 8th Cir. R. 28A(h)

DATED: June 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2019, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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