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

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

I. INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) requires applicable health insurance plans to offer coverage without cost sharing for certain preventive health services. In this putative class action, plaintiffs Jillian York and Jody Bailey (collectively, Plaintiffs) allege they were wrongly denied coverage and access to comprehensive lactation support and counseling benefits by the administrators of their health care plans, defendants Wellmark, Inc. and Wellmark Health Plan of Iowa, Inc. (collectively, Wellmark). Plaintiffs contend Wellmark's conduct violated the ACA's preventive care requirements.

Wellmark moved for dismissal under Federal Rule of Civil Procedure 12(b)(6), alleging Plaintiffs have failed to state a claim for which relief can be granted. ECF No. 19. The matter came before the Court for hearing on June 23, 2017. Defs.' Mot. Dismiss Hr'g Mins., ECF No. 27. Attorneys Stephanie E. Saunders, Kimberly M. Donaldson Smith, and J. Barton Goplerud represented Plaintiffs. *Id.* Attorneys Rebecca R. Hanson and Angel Anna West represented

Wellmark. *Id.* Both parties argued in support of their respective positions. *Id.* For the reasons stated below, the Court grants in part and denies in part Wellmark's motion.

II. BACKGROUND

In ruling on a Rule 12(b)(6) motion to dismiss, the Court accepts as true the material allegations in the complaint and presents the facts in the light most favorable to plaintiffs. *Barton v. Taber*, 820 F.3d 958, 963 (8th Cir. 2016).

A. Plaintiff Jillian York

Iowa resident Jillian York gave birth in February 2016. Compl. ¶ 14, ECF No. 1. She sought lactation support and counseling for assistance with breastfeeding issues. *Id.* ¶ 68; *see also id.* ¶¶ 27–42 (discussing health and economic benefits associated with breastfeeding newborns and obtaining lactation counseling). York was insured by a non-grandfathered[1] UIChoice Wellmark Blue Cross and Blue Shield of Iowa healthcare plan through her employer, the University of Iowa. *Id.* ¶ 14. After identifying a lactation consultant, York phoned Wellmark to determine if the consultant was covered. *Id.* ¶ 68. A representative told her the consultant was not an in-network provider. *Id.* York next requested a list of in-network lactation consultants. *Id.* The Wellmark representative "was unable to successfully generate a list of comprehensive lactation service providers." *Id.* The representative told York that "since there were no 'in-network' providers[,] . . . she could seek the [lactation counseling] service from any provider and it would be covered as 'in-network.'" *Id.*

York then arranged lactation counseling from a private-practice International Board Certified Lactation Consultant. *Id.* ¶¶ 35, 69. York submitted a claim to Wellmark for the $65

[1] Under the ACA, "[g]randfathered health plan coverage means coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010." 45 C.F.R. § 147.140.

service. *Id.* Wellmark denied the claim as "not covered based on benefits described in [York's] benefits document." *Id.* York appealed the denial of benefits. *Id.* ¶ 70. Wellmark denied the appeal. *Id.* Wellmark informed York that only lactation counseling services accessed through in-network providers were not subject to ACA cost sharing. *Id.* Wellmark also stated York's chosen private lactation consultant was not an eligible in-network provider because "Iowa state law currently does not have a licensure or certification process for lactation counselors." *Id.* York was accordingly responsible for the entire $65 fee. *Id.* ¶ 71.

B. Plaintiff Jody Bailey

Iowa resident Jody Bailey gave birth in August 2015. *Id.* ¶ 15. She was insured by a non-grandfathered Wellmark Blue Cross and Blue Shield of Iowa healthcare plan through her husband's employer. *Id.* Bailey sought lactation counseling and accessed Wellmark's online "Provider Finder" service to find in-network lactation consultants. *Id.* ¶ 72. She was unable to locate any consultants, however, because the online service did not have "lactation, breastfeeding, [International Board Certified Lactation Consultants,] or any other lactation consultation/breastfeeding counseling description as a searchable 'Provider Type' or 'Provider Specialty.'" *Id.* Bailey phoned Wellmark, and a representative "confirmed that there were no 'in-network' providers" for comprehensive lactation support and counseling. *Id.*

Bailey had participated in a prenatal health program at the University of Iowa Hospitals and Clinics (UIHC), which offered lactation counseling along with other prenatal services. *See id.* ¶ 73. Following her discussion with the Wellmark representative, she attempted to schedule a postpartum appointment with a UIHC-based lactation consultant. *Id.* However, the only consultant "was booked and had no availability in the near-term." *Id.* Bailey instead arranged lactation counseling with a private Certified Lactation Counselor. *Id.* She paid $115 for the consultation. *Id.*

Bailey did not submit a claim to Wellmark for the service because, based upon her conversation with the Wellmark representative, she believed it was out-of-network and "pursuit of the administrative remedies would [therefore] have been futile." *Id.* ¶ 74. Bailey was later told Wellmark "would issue a reimbursement for the maximum allowed charge for the service." *Id.* ¶ 75. By the time she learned of the potential reimbursement, however, Wellmark's claim-filing deadline of 180 days had passed. *Id.* Bailey was accordingly responsible for the entire $115 fee. *Id.* ¶ 76.

C. York and Bailey's Lawsuit

York and Bailey filed this action against Wellmark on behalf of themselves and others similarly situated, alleging they were wrongfully denied coverage and access to "breastfeeding support, supplies[,] and counseling" in violation of the ACA. *Id.* ¶ 1. They assert Wellmark "den[ied] Plaintiffs and the members of the Class . . . the ACA mandated access to and coverage for Comprehensive Lactation Benefits from trained providers for insured pregnant and postpartum women." *Id.* ¶ 9. Plaintiffs argue as a result they "and the members of the Class are forced to either forego the Comprehensive Lactation Benefits preventive service or go out-of-network to get it." *Id.* ¶ 10(c). They contend Wellmark denied them access to Comprehensive Lactation Benefits by: 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. *Id.* ¶ 61.

Plaintiffs contend Wellmark's conduct breached its fiduciary duties under the Employee Retirement Income Security Act (ERISA) § 404(a) (Count I), breached its co-fiduciary duties under ERISA § 405(a) (Count II), violated the ACA's anti-discrimination provision prohibiting discrimination based on sex (Count III), and breached Wellmark health plan documents which incorporate by reference the ACA's preventive service provisions (Count IV). *Id.* ¶¶ 106–32. Plaintiffs also contend Wellmark was unjustly enriched as a result of its conduct (Count V). *Id.* ¶¶ 133–37. Plaintiffs "seek monetary and injunctive relief for themselves and the members of the Class to stop and redress the substantial harms inflicted by [Wellmark]." *Id.* ¶ 13. Wellmark filed a motion to dismiss the complaint in its entirety under Rule 12(b)(6). ECF No. 19.

III. LEGAL STANDARD

The Court will grant a Rule 12(b)(6) motion when a pleading fails to state a claim upon which relief can be granted. This method of attack "is the usual and proper method of testing the legal sufficiency of the complaint." *Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981). When a dispute centers solely on a legal—rather than a factual—issue, the Court may resolve the issue on a Rule 12(b)(6) motion. *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989).

"To survive a Rule 12(b)(6) motion to dismiss, the complaint must include sufficient factual allegations to provide the grounds on which the claim rests." *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "A motion to dismiss does not," however, "test the facts to support the claim." *Peck*, 660 F.2d at 374. Although the plaintiff need not allege facts in painstaking detail, "the facts alleged 'must be enough to raise a right to relief above the speculative level' and must 'state a claim to relief that is plausible on its face.'" *Drobnak*, 561 F.3d at 783 (quoting *Twombly*, 550 U.S. at 555, 570). "Determining whether a complaint states a plausible claim for relief . . . [is] context-specific[,] . . . requir[ing]

the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The plausibility standard applies only to the facts pleaded. *Id.* at 678–79.

To ascertain the facts pleaded for purposes of a motion to dismiss, "[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010). The court must "accept as true the factual allegations contained in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Drobnak*, 561 F.3d at 781. "[T]he court is free," however, "to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002); *accord Iqbal*, 556 U.S. at 678.

IV. DISCUSSION

The ACA requires applicable health insurance plans to cover certain preventive health services without cost sharing.[2] 42 U.S.C. § 300gg-13(a). According to the ACA's implementing regulations, "[i]f a plan or issuer does not have in its network a provider who can provide [a listed preventive service], the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service." 29 C.F.R. § 2590.715-2713(a)(3)(ii). In regards to preventive services for women in particular, the ACA mandates coverage for "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

[2] The ACA defines cost sharing as "deductibles, coinsurance, 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)(i)–(ii).

HRSA published the Women's Preventive Services Guidelines (HRSA Guidelines) in 2011.[3] The HRSA Guidelines mandate coverage without cost sharing for "[c]omprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment." *Women's Preventive Services Guidelines*, Health Res. & Servs. Admin., https://www.hrsa.gov/womensguidelines (last visited Aug. 24, 2017).

Plaintiffs' putative class action alleges Wellmark violated the ACA by denying them access and coverage to comprehensive lactation support and counseling, as set forth in the HRSA Guidelines. Plaintiffs assert their claims under various legal theories—ERISA (Counts I and II), the ACA's anti-discrimination provision (Count III), and state law (Counts IV and V).

Wellmark's motion to dismiss argues multiple grounds for dismissal. First, Wellmark argues the entire complaint should be dismissed because Plaintiffs fail to allege a plausible violation of the ACA. Defs.' Mem. of Law Supp. Defs.' Mot. Dismiss 2–4, 6–13, ECF No. 19-1. Wellmark contends it properly imposed cost sharing on Plaintiffs because its network includes lactation consultants, and the ACA does not address "administrative barriers" or require insurers to provide a separate list of lactation consultants. *Id.* at 6–13. Second, Wellmark argues Plaintiffs fail to identify facts sufficient to allege co-fiduciary liability under ERISA. *Id.* at 14–16. Third, Wellmark argues Plaintiffs fail to allege a claim for ACA sex discrimination because they have not alleged Wellmark's coverage decisions were based on Plaintiffs' sex. *Id.* at 16–17. Fourth, Wellmark argues Plaintiffs' state-law claims for breach of contract and unjust enrichment are

[3] The HRSA Guidelines were updated on December 20, 2016. *See Women's Preventive Services Guidelines*, Health Res. & Servs. Admin., https://www.hrsa.gov/womensguidelines2016 (last visited Aug. 24, 2017). Because the events at issue in this case took place before the 2016 update, this Order references the 2011 version. Regardless, the HRSA Guidelines provisions addressing lactation support and counseling are unchanged between the 2011 and 2016 versions.

claims for ACA violations masquerading as state-law claims. *Id.* at 19–20. Finally, Wellmark argues York's health plan is not governed by ERISA, and Bailey's state-law claims are preempted by ERISA. *Id.* at 13–14, 17–18.

Plaintiffs concede York cannot bring claims under ERISA (Counts I and II) because her government-issued health plan is not governed by ERISA. Pls.' Opps'n Defs.' Mot. Dismiss 14, ECF No. 22; Defs.' Mot. Dismiss Hr'g Tr. 26–27, ECF No. 30; *see also Fromm v. Principal Health Care of Iowa, Inc.*, 244 F.3d 652, 653–54 (8th Cir. 2001) (per curiam) (finding a health insurance plan purchased by a city for its employees, where the city paid the insurance premiums, was a "governmental plan" exempt from ERISA). Plaintiffs also concede Bailey cannot bring claims for unjust enrichment and breach of contract under state law (Counts IV and V) because the claims are preempted by ERISA. ECF Nos. 19, 22; *see also* ECF No. 30 at 33; *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (stating ERISA bars "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy"). These aspects of Wellmark's motion to dismiss are therefore granted. The Court will consider in turn Plaintiffs' remaining claims and Wellmark's corresponding arguments for dismissal.

A. Violation of the ACA's Preventive Service Requirements (All Counts)

The Court first addresses whether Plaintiffs have alleged a plausible violation of the ACA—the premise underlying each of their claims. Plaintiffs contend Wellmark violated the ACA's preventive service requirements in multiple ways: by "failing to establish a network of lactation consultants"; improperly characterizing lactation consultants as out-of-network and imposing cost sharing for their services; erecting "major administrative barriers" to prevent insureds from receiving information and access to lactation consultants; and failing to provide

insureds with specific information as to lactation consultants, including a separate list of providers offering such services and coverage explanations. ECF No. 1 ¶ 61.

Wellmark argues Plaintiffs' allegations do not amount to violations of the ACA and the complaint should therefore be dismissed in its entirety. First, Wellmark argues it has "providers in its general provider network who offer, among other services, lactation counseling," and these services were available to Plaintiffs. ECF No. 19-1 at 8. As a result, Wellmark claims, it properly imposed cost sharing on Plaintiffs because the ACA does not require Wellmark to maintain "a separate network of lactation counseling providers." *Id.* at 7–9. Second, Wellmark asserts the ACA does not require Wellmark to remove "administrative barriers" in the manner alleged by Plaintiffs, or "provide a separate list of Wellmark's in-network providers who offer [lactation counseling] services." *Id.* at 9.

1. Wellmark's Network of Lactation Consultants

Plaintiffs' complaint first alleges Wellmark violated the ACA by failing to establish a network of lactation consultants, improperly characterizing lactation consultants as out-of-network, and imposing cost sharing for lactation-counseling services. ECF No. 1 ¶ 61(A)–(B), (F). Wellmark argues these allegations do not amount to an ACA violation because Wellmark's general-provider network offers, among other services, lactation counseling providers. ECF No. 19-1 at 7–9. Wellmark recognizes its network does not include lactation consultants who *mainly* provide lactation counseling, but argues its network includes general providers offering lactation counseling *in addition* to other health services. *Id.* Because its network offers lactation counseling providers, Wellmark argues, "it may deny coverage for, or impose cost-sharing requirements for, services received out-of-network," such as the private lactation consultants Plaintiffs received

services from. *Id.* at 6–7. Wellmark further argues the ACA does not require "a separate network of lactation counseling providers." *Id.* at 7–9.

In response, Plaintiffs deny Wellmark's network offers lactation-counseling services and argues Wellmark therefore cannot impose cost sharing. ECF No. 22 at 7–8. Plaintiffs argue Wellmark failed "to establish policies, procedures[,] and infrastructure to provide Comprehensive Lactation Benefits in accordance with the ACA." *Id.* at 8. Plaintiffs contend they "have alleged that Wellmark specifically denied coverage and imposed cost sharing on both Plaintiffs," and therefore "have sufficiently pled that Wellmark's conduct violated the ACA and plan documents." *Id.*

The Court finds Plaintiffs state a plausible claim that Wellmark violated the ACA by improperly imposing cost sharing on Plaintiffs. The ACA, through the HRSA Guidelines, mandates coverage for comprehensive lactation support and counseling, and prohibits cost sharing if a plan or insurer does not have such providers in its network. 29 C.F.R. § 2590.715-2713(a)(3)(ii) ("If a plan or issuer does not have in its network a provider who can provide an item or service described in paragraph (a)(1) of this section, the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service."). Plaintiffs' complaint alleges Wellmark does not have a network of lactation consultants. ECF No. 1 ¶¶ 10(A), 61(A). York alleges a Wellmark representative told her Wellmark had no in-network lactation counselors, and as a result she had to go out of network and was then charged the full amount for the service. *Id.* ¶¶ 68–71. Bailey alleges a Wellmark representative told her it had no in-network lactation counselors, and that she needed to go out of network to receive the service and would not be reimbursed. *Id.* ¶¶ 72–76. The Court finds these

allegations sufficient to state a claim that Wellmark improperly imposed cost sharing for preventive services under the ACA.

Wellmark contends it was within its rights to impose cost sharing for Plaintiffs' visits to private lactation consultants because Wellmark's general-provider network in fact contains lactation counseling providers, and it can therefore deny coverage or impose cost-sharing requirements for services received out-of-network. ECF No. 19-1 at 6–7. But whether Wellmark's general network includes lactation counseling providers is ultimately an issue of fact disputed by Plaintiffs, as expressed both in their complaint and at the hearing for Wellmark's motion. *See* ECF No. 1 ¶ 10(A) (asserting in Plaintiffs' complaint that "[Wellmark] do[es] not establish a network of trained providers of Comprehensive Lactation Benefits"); *id.* ¶ 61(A) (asserting Wellmark "fail[ed] to establish a network of lactation consultants"); ECF No. 30 at 19 (stating at the hearing that Plaintiffs contest whether "Wellmark has in-network providers of comprehensive lactation support and counseling"). Wellmark brings its motion under Rule 12(b)(6); the Court must accept the factual allegations in the complaint as true and view them in the light most favorable to Plaintiffs. *See Barton*, 820 F.3d at 963.

Wellmark attempts to overcome this factual hurdle at the motion-to-dismiss stage by urging the Court to consider documents and websites outside the pleadings. "[T]he court has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003) (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366, at 491 (2d ed. 1990)). "While courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public

record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned'; without converting the motion into one for summary judgment." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)).

Wellmark cites the following materials as evidence that it offers in-network lactation counseling: 1) the UIHC Breastfeeding Clinic website, *Breastfeeding Clinic*, Univ. of Iowa Hosp. & Clinics, https://uihc.org/breastfeeding-clinic (last visited Aug. 28, 2017) (UIHC Website); 2) the coverage manuals for Plaintiffs' health plans, Defs.' Ex. A, ECF No. 19-2 (York's coverage manual); Defs.' Ex. B, ECF No. 19-3 (Bailey's coverage manual); and 3) a screenshot from Wellmark's "Find a Facility" website, Defs.' Ex. C., ECF No. 19-4 (Find-a-Facility Website). Wellmark argues the Court may consider Plaintiffs' coverage manuals because they are "referenced in the [c]omplaint and are central to Plaintiffs' claims," and also may take judicial notice of the UIHC Website and the Find-a-Facility Website. ECF No. 19-1 at 3–4 & n.2. The UIHC Website states:

> We offer breastfeeding support and guidance to women with breastfeeding questions, feeding difficulties, or other concerns related to breastfeeding. Our experts specialize in the clinical management of breastfeeding and are dedicated to helping new and experienced mothers, pregnant or postpartum, who have questions or concerns regarding breastfeeding or pumping.

(UIHC Website). Wellmark argues the UIHC Breastfeeding Clinic is included in Plaintiffs' health plans. Wellmark cites to the coverage manual for York's UIChoice health plan, which states the UIHC is included under York's health plan as "Benefit Level 1." Defs.' Ex. A at 3, ECF No. 19-2. Wellmark also cites to a printout from its Find-a-Facility Website, which states the UIHC accepts "Alliance Select" health plans. Defs.' Ex. C at 1, ECF No. 19-4. The coverage manual for Bailey's health plan identifies her plan as an "Alliance Select" plan. Defs.' Ex. B at 1, ECF No.

19-3. Wellmark contends this evidence together demonstrates its network includes lactation consultants accessible to Plaintiffs, and that Wellmark therefore did not violate the ACA by imposing cost sharing on Plaintiffs' out-of-network claims. ECF No. 19-1 at 7–9.

The Court declines to consider Wellmark's proffered evidence at this stage of the proceedings for two reasons. First, Wellmark fails to demonstrate the Court may consider the evidence without converting the motion into one for summary judgment. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion *must* be treated as one for summary judgment under Rule 56." (emphasis added)); *accord Gorog v. Best Buy Co.*, 760 F.3d 787, 791 (8th Cir. 2014) (considering whether a district court erred by considering matters outside the pleadings without converting the motion to dismiss into one for summary judgment).

As to the coverage manuals, Plaintiffs' complaint does not quote, reference, attach, or allege the contents of the manuals. *See Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) ("Documents necessarily embraced by the pleadings include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'" (quoting *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003))); *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459–60 (8th Cir. 2010) (stating "documents attached to or incorporated within a complaint are considered part of the pleadings"). Moreover, although the coverage manuals may be relevant to Plaintiffs' claims, it is unclear whether they are the sole documents on which the complaint rests. *See BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 688–89 (8th Cir. 2003) (finding, in an insurance dispute, that insurance agreements and an insurance quote produced by defendant in support of its motion to dismiss were "matters outside of the pleading" because the documents "may or may not be the

only legal agreements relevant" to the contract and their significance is disputed); *Sioux Biochemical, Inc. v. Cargill, Inc.*, 410 F. Supp. 2d 785, 791 (N.D. Iowa 2005) ("[T]he court may consider documents outside of the pleadings where . . . the plaintiffs' claims are based solely on the interpretation of the documents [submitted] and the parties do not dispute the actual contents of the documents." (second alteration in original)).

In regards to the UIHC Website and Find-a-Facility Website, Wellmark provides no explanation as to why the websites contain information that is "generally known" or "can be accurately and readily determined" sufficient for the Court to take judicial notice of the websites' contents. *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). The cases cited by Wellmark for support demonstrate only that courts take notice of government websites, or commercial websites to determine jurisdiction. *See Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (taking judicial notice of the Missouri Secretary of State website and the IRS website to determine that the plaintiff remains a political organization in good standing) (citing *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011) (recognizing "the authority of a court to take judicial notice of government websites")); *Johnson v. Gawker Media, LLC*, No. 4:15-CV-1137, 2016 WL 193390, at *1 n.2 (E.D. Mo. Jan. 15, 2016) (taking judicial notice of the place of incorporation, principal place of business, and domicile of the parties through the parties' "widely available" websites).

Second, the Court declines to consider Wellmark's proffered evidence because the inference Wellmark argues the evidence supports—that its network offers lactation counseling providers—is a material fact disputed by Plaintiffs. *See* ECF No. 19-1 at 3–4; ECF No. 1 ¶¶ 10(A),

61(A). As stated above, Wellmark's motion is brought under Rule 12(b)(6). The Court must accept as true Plaintiffs' factual allegations in the complaint and view them in the light most favorable to Plaintiffs. *See Barton*, 820 F.3d at 963. The factual conclusion Wellmark seeks to establish through its proffered evidence directly conflicts with Plaintiffs' allegations. The Court accordingly declines to consider the evidence and the factual inferences Wellmark seeks to draw from it. *See Kushner*, 317 F.3d at 832 (holding the district court did not abuse its discretion in declining to take judicial notice of documents because there was a dispute over the facts in the documents and the inferences to be drawn from them); *Cynergy Ergonomics, Inc. v. Ergonomic Partners, Inc.*, No. 4:08-cv-243, 2008 WL 2064967, at *2 (E.D. Mo. May 14, 2008) (declining to take judicial notice of various commercial websites attached to a 12(b)(6) motion while noting "defendants are [improperly] attempting to shortcut the discovery process and reach the substantive, factual issue at the heart of this case").

Wellmark alternatively argues Plaintiffs' complaint admits Wellmark's network contains providers of lactation support and counseling, referring to paragraphs 64, 65, and 73. ECF No. 19-1 at 3 (citing ECF No. 1 ¶¶ 64–65, 73). In paragraphs 64 and 65, Plaintiffs allege Wellmark instructs its members to access preventive care services through certain providers:

> 64. []Wellmark Health Plan of Iowa tells women who [are] insured in its products (Blue Advantage, Blue Choice[,] and Blue Access) that preventive care must be provided from a limited group of providers identified, which lists blatantly ignore[] (or forget[]) that those providers are not providers of Comprehensive Lactation Benefits[.]
>
> 65. [Wellmark has] also wrongly erected significant administrative barriers that prevent and deter women from obtaining timely Comprehensive Lactation Benefits. Among these barriers, [Wellmark has] failed to establish a network of providers and failed to provide plan participants with any list or directory that clearly disclose the in-network providers (if any) of Comprehensive Lactation Benefits. In addition, insureds seeking the identity of a covered Comprehensive Lactation Benefit provider have been told to try to find one in a hospital or clinical practice group (obstetricians – gynecologists, pediatricians, and other providers of maternal and

> child care), *see supra*, without disclosure as to which hospital or clinical practice group, if any, provide lactation services.

ECF No. 1 ¶¶ 64–65. In paragraph 73, Plaintiffs allege Bailey received lactation consulting at the UIHC during her pregnancy, along with other prenatal services:

> 73. By Wellmark failing to establish in-network trained lactation providers, Plaintiff Bailey was required to seek lactation support and counseling out-of-network. In an attempt to effectively manage costs, Plaintiff Bailey participated in a prenatal program at the University of Iowa Hospital which bundled the cost of lactation consultations with other prenatal services. Following the consultation at the University of Iowa Hospital, Plaintiff Bailey attempted to schedule another lactation consultation from a hospital-based lactation consultant, but the sole consultant was booked and had no availability in the near-term. Due to the extremely time-sensitive nature of the service, Plaintiff Bailey sought lactation support and counseling from a private Certified Lactation Counselor ("CLC") from Seva Center for Healing Arts on September 24, 2016. Plaintiff Bailey was charged and paid $115 for the consultation.

Id. ¶ 73. Wellmark argues these paragraphs admit its network includes lactation consultants. The Court finds no such admission. Paragraphs 64 and 65 expressly allege Wellmark's network does *not* contain providers of comprehensive lactation benefits. *See id.* ¶ 64 (alleging Wellmark tells insureds they must receive preventive services from providers that "are not providers of Comprehensive Lactation Benefits"). While portions of the text allude to the existence of lactation consultants in Wellmark's network, such language is clearly hypothetical. *See id.* ¶ 65 ("[Wellmark has] failed to establish a network of providers and failed to provide plan participants with any list or directory that clearly disclose the in-network providers (*if any*) of Comprehensive Lactation Benefits." (emphasis added)). Paragraph 73 suggests UIHC provides lactation counseling, but nothing in the paragraph or the rest of the pleadings shows such services are part of Wellmark's network. In addition, paragraph 73 discusses prenatal lactation counseling at UIHC, rather than the postpartum benefits which Plaintiffs allege Wellmark denied them.

Furthermore, as discussed above, whether Wellmark's network contains lactation consultants is an issue of fact, not law. Plaintiffs dispute making such an admission in their

complaint, and the rest of their filings argue to the contrary. *See* ECF No. 1 ¶¶ 10(A), 61(A); ECF No. 22 at 9–10. Accepting Plaintiffs' factual allegations as true and construing them in their favor as the Court must, the Court concludes Plaintiffs' allegations are sufficient to state a claim that Wellmark improperly imposed cost sharing on the Plaintiffs under the ACA.[4]

2. Information and Disclosure Requirements under the ACA

Plaintiffs next allege Wellmark violated the ACA by erecting "major administrative barriers" to prevent insureds from receiving information and access to lactation consultants, and by failing to provide insureds with specific information about lactation consultants, including a separate list of such providers. ECF No. 1 ¶ 61. Wellmark argues these claims should be dismissed because the ACA does not require it to remove "administrative barriers" or "provide a separate list of [Wellmark's] in-network providers who offer [lactation counseling] services." ECF No. 19-1 at 9.

a. "Administrative barriers"

Plaintiffs contend Wellmark violated the ACA by erecting "administrative barriers" that prevent insureds from obtaining access to lactation counseling benefits, as well as information as to those benefits' cost, availability, and payment options. ECF No. 1 ¶¶ 61(C), (F), 63, 65. Plaintiffs argue Wellmark's conduct consists of procedural "abuses" that include "inconsistent guidance from [Wellmark]'s representatives, lack of timely responsiveness for pre-authorization or provider requests[,] and changing purportedly applicable codes for Comprehensive Lactation Benefits." *Id.* ¶ 63. Wellmark asserts this claim should be dismissed because "the 'administrative

[4] To the extent Wellmark argues Plaintiffs' claims should be dismissed because the ACA does not require a "separate network" of lactation counselors, *see* ECF No. 19-1 at 7–9, the Court declines to address this argument because Plaintiffs do not make such an allegation in their complaint. Plaintiffs contest whether Wellmark's existing network offers lactation counseling benefits; they do not argue a "separate network" is required.

barriers' Plaintiffs allege are not addressed by [the] ACA's detailed requirements." ECF No. 19-1 at 9. Plaintiffs respond to Wellmark's argument by reiterating that the ACA requires insurers to provide coverage for "'trained provider[s]' of '[c]omprehensive lactation support' and for 'provider[s] who can provide [the] item or service.'" ECF No. 22 at 8 (alterations in original) (quoting in part 29 C.F.R. § 2590.715-2713(a)(3)(ii)).

The Court finds Plaintiffs' arguments are not supported by the text of the ACA. 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." *See* ECF No. 22 at 5–6; ECF No. 1 ¶¶ 61(C). The only ACA provision identified by Plaintiffs for support is 29 C.F.R. § 2590.715-2713(a)(3)(i)–(ii). *See* ECF No. 22 at 8 n.4, 10. That provision, entitled "Coverage of preventive health services," states:

> (i) Subject to paragraph (a)(3)(ii) of this section, nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.
>
> (ii) If a plan or issuer does not have in its network a provider who can provide an item or service described in paragraph (a)(1) of this section, the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service.

25 C.F.R. § 2590.715-2713(a)(3)(i)–(ii). This language does not mention—or imply—rules relating to the erection of "administrative barriers."

The text of the ACA requires insurers make available comprehensive lactation benefits without cost sharing. *See* 42 U.S.C. § 300gg-13. 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. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). Because the ACA does not mandate removal of "administrative barriers" in the manner alleged by Plaintiffs, the Court grants this portion of Wellmark's motion to dismiss.[5]

b. "Separate list" of in-network lactation consultants

Plaintiffs next allege Wellmark violated the ACA by "failing to construct a list of in-network providers of Comprehensive Lactation Benefits" and "failing to provide any list of in-network providers of Comprehensive Lactation Benefits including failing to provide such list by mail, through customer representatives that provide phone consultation to members, or through [Wellmark's] website." ECF No. 1 ¶¶ 53(A), 61(D)–(E).

In making this claim, Plaintiffs rely primarily on a list of frequently asked questions (FAQ) jointly prepared and issued by the Department of Labor, the Department of Health and Human Services, and the Treasury Department. *Id.* ¶¶ 50–53; ECF No. 22 at 12–14. Plaintiffs contend these three departments "are the federal entities specifically charged with establishing regulations and guidelines to implement the ACA." *Id.* at 12. Questions one through five of the FAQ address comprehensive lactation benefits, while Question one specifically addresses the listing of lactation counseling providers:

[5] Following the hearing on Wellmark's motion to dismiss, Plaintiffs filed two notices of supplemental authority. *See* ECF Nos. 31 & 33. Plaintiffs attached orders on motions to dismiss from two ongoing cases involving lactation counseling benefits under the ACA—*Ferrer v. CareFirst, Inc.*, No. 1:16-cv-2162 (D.D.C.), and *Condry v. UnitedHealth Group, Inc.*, No. 3:17-cv-183 (N.D. Cal.). *See* ECF Nos. 31-1 & 33-1. Upon review of this supplemental authority, the Court finds the *Ferrer* order inapplicable here because Wellmark has not raised lack of standing as a ground for dismissal. In addition, based upon the reasoning set forth in this Order, the Court respectfully declines to follow the *Condry* order.

> **Q1: Are plans and issuers required to provide a list of the lactation counseling providers within the network?**
>
> Yes. The HRSA guidelines provide for coverage of comprehensive prenatal and postnatal lactation support, counseling, and equipment rental as part of their preventive service recommendations, including lactation counseling. While the preventive services requirements under PHS Act section 2713 do not include specific disclosure requirements, provisions of other applicable law require disclosure of lactation counseling providers available under the plan or coverage. Under PHS Act section 2715 and implementing regulations, group health plans and health insurance issuers offering group or individual health insurance coverage must provide a Summary of Benefits and Coverage (SBC) that includes an Internet address (or other contact information) for obtaining a list of the network providers.
>
> With respect to group health plans subject to [ERISA], ERISA section 102 and the Department of Labor's implementing regulations provide that a group health plan must provide a Summary Plan Description (SPD) that describes provisions governing the use of network providers, the composition of the provider network, and whether, and under what circumstances, coverage is provided for out-of-network services. For those plans with provider networks, the listing of providers can be furnished in a separate document accompanying the SPD, as long as the SPD describes the provider network and states that provider lists are furnished automatically, without charge, as a separate document.
>
> Finally, issuers of qualified health plans (QHPs) in the individual market Exchanges and the SHOPs currently must make their provider directories available online. For plan years beginning on or after January 1, 2016, a QHP issuer must publish an up-to-date provider directory, including information on which providers are accepting new patients, as well as the provider's contact information, specialty, medical group, and any institutional affiliations, in a manner that is easily accessible to plan enrollees, prospective enrollees, the State, the Exchange, HHS, and OPM.

FAQs About Affordable Care Act Implementation (Part XXIX) and Mental Health Parity Implementation, U.S. Dep't of Labor, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxix.pdf (Oct. 23, 2016) (footnotes omitted) (citing 26 C.F.R. § 54.9815-2715(a)(2)(i)(K); 29 C.F.R. § 2590.715-2715(a)(2)(i)(K); 45 C.F.R. § 147.200(a)(2)(i)(K); 29 C.F.R. § 2520.102-3(j)(3); 45 C.F.R. § 156.230(b)(2)); *see also* ECF No. 1 ¶ 52 (reprinting excerpts of the FAQ in the complaint).

The parties disagree as to the FAQ's significance. Wellmark contends "the Court should accord no deference to the FAQ, as the reasoning underlying its position is flawed and unpersuasive." ECF No. 19-1 at 10. Wellmark argues the C.F.R. provisions in the FAQ do not support a requirement for a separate list of lactation counseling providers, and contends "the FAQ attempts to add requirements to [the] ACA without any support in the underlying statutory or regulatory scheme." *Id.* at 11–12. Plaintiffs respond the FAQ's reasoning is "straightforward and inescapably logical: without such [a] list, in-network trained providers of Comprehensive Lactation Benefits simply cannot be identified in a timely fashion by the insureds via [Wellmark's] provider directory, [Wellmark's] online portal, or by [Wellmark's] customer service department." ECF No. 22 at 13.

"Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Hemminghaus v. Missouri*, 756 F.3d 1100, 1109 (8th Cir. 2014) (footnote omitted) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)) (considering the persuasiveness of an opinion letter from the Department of Labor in an FMLA case). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 332 U.S. 134, 140 (1944)). This less-deferential standard is known as "*Skidmore* deference." *See Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850 (8th Cir. 2008); *see also, e.g.*, *Moorestown Twp. Bd. of Educ. v. South Dakota*, 811 F. Supp. 2d 1057, 1075–76 (D.N.J. 2011) (applying *Skidmore* deference to FAQs published by the New Jersey Department of Education). Under *Skidmore*, the amount of deference afforded an agency "turns on several factors, including: (1) the thoroughness of the agency's consideration, (2) the validity of its

reasoning, (3) consistency with earlier and later pronouncements, (4) formality, (5) expertise of the agency, and (6) all those other factors 'which give it power to persuade, if lacking power to control.'" *Draper v. Colvin*, 779 F.3d 556, 560–61 (8th Cir. 2015) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228–29 (2001)). The FAQ at issue here is not the product of formal adjudication or notice-and-comment rulemaking, and Plaintiffs do not contend the FAQ warrants *Chevron* deference. Accordingly, the FAQ is entitled to deference only to the extent it has the "power to persuade" under *Skidmore*. *See Hemminghaus*, 756 F.3d at 1109.

The Court finds the FAQ unpersuasive as to the proposition advanced by Plaintiffs, as the FAQ's plain language and the authority it relies upon do not support the breadth of Plaintiffs' position. The FAQ states "plans and issuers [are] required to provide a list of the lactation counseling providers within the network." When taken in context, this phrase means plans and issuers must provide a list of all in-network providers—and include in this list any providers who offer lactation counseling. The FAQ does not, as Plaintiffs contend, require an insurer to create a *separate* list of lactation counseling providers, or require a health plan to divide and organize provider lists by the types of services offered.

This interpretation is evident in the regulations on which the FAQ relies. The first ACA provision cited, 45 C.F.R. § 147.200(a)(2)(i)(K), states a health plan with "one or more networks of providers" must "provide a written summary of benefits and coverage" that includes "an internet address (or similar contact information) for obtaining a list of network providers." *See also* 29 C.F.R. § 2590.715-2715(a)(2)(i)(K) (repeating same requirement). Under this language, a health plan need only provide a list of network providers, which the FAQ opines must include any lactation counselors; the regulation does not require lactation counselors to be separately identified. Next, the FAQ cites an ERISA provision, 29 C.F.R. § 2520.102-3(j)(3), which states an

employee health plan shall provide a "summary plan description" including a description of "provisions governing the use of network providers, the composition of the provider network, and whether, and under what circumstances, coverage is provided for out-of-network services." 29 C.F.R. § 2520.102-3(j)(3). Again, under this language the health plan need only provide a list of network providers and describe when out-of-network services are covered—not specify which of those providers offer certain services such as lactation counseling.

The last regulation cited by the FAQ, 45 C.F.R. § 156.230(b)(2), pertains to Qualified Health Plans.[6] This ACA provision requires Qualified Health Plans publish "provider directories" with explicit content requirements:

> For plan years beginning on or after January 1, 2016, a [Qualified Health Plan] must publish an up-to-date, accurate, and complete provider directory, including information on which providers are accepting new patients, the provider's location, contact information, *specialty*, medical group, and any *institutional affiliations*, in a manner that is easily accessible to plan enrollees, prospective enrollees, the State, the Exchange, HHS and OPM.

Id. (emphases added). Focusing on the terms "specialty" and "institutional affiliations," Plaintiffs argue this requires Wellmark to disclose "the precise information about the providers of Comprehensive Lactation Benefits that [Wellmark] admit[s] they omit." ECF No. 22 at 13. Plaintiffs do not attempt to define the term "specialty," nor do they cite any cases supporting their interpretation. *See id.*

Wellmark contends "specialty" in 45 C.F.R. § 156.230(b)(2) refers to "certification by a major medical accreditation organization," and argues that "none of these organizations recognize lactation counseling as a 'specialty.'" Defs.' Reply Supp. Mot. Dismiss 4, ECF No. 24. For support, Wellmark points to provisions from two federal laws, the Radiation Exposure

[6] Qualified Health Plans are plans offered through an ACA Exchange. *See* 45 C.F.R. § 155.20 ("Qualified health plan or QHP means a health plan that has in effect a certification that it meets the standards . . . issued or recognized by each Exchange through which such plan is offered.").

Compensation Act and the Social Security Act, that use the term "specialty." *See id.* at 4, n.13 (citing 28 C.F.R. § 79.51(s) (requiring for "board certification" the passage of a board exam in a relevant field or "specialty," which "include [those] listed by the American Board of Medical Specialties"); 42 C.F.R. § 412.96(c)(3) (requiring, to be classified as a Medicare referral center, that "[m]ore than 50 percent of the hospital's active medical staff [be] specialists who . . . [a]re certified as specialists by one of the Member Boards of the American Board of Medical Specialties")).

Regardless of the meaning of "specialty" in the provider-directory requirements in 45 C.F.R. § 156.230(b)(2), the provision is inapplicable to Plaintiffs' claims here because Plaintiffs do not allege their health plans are Qualified Health Plans sold on an Exchange. The requirements in 45 C.F.R. § 156 are not general requirements for all health plans; rather, they are specified criteria a plan must satisfy to be certified as a Qualified Health Plan and, as such, eligible to be offered on an Exchange. *See Blue Cross & Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457, 463 (Fed. Cl. 2017) ("All plans offered through the Exchanges must be [Qualified Health Plans], meaning that such a plan must provide 'essential health benefits' and comply with other regulatory parameters such as provider network requirements, benefit design rules, and cost sharing limitations."); *see also Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 442 (Fed. Cl. 2017) ("[The ACA] gave insurers . . . access to a large new customer base, but insurers also had to comply with the ACA's rules if they wanted to offer [Qualified Health Plans] on the Exchanges.").

Thus, the provision cited in the FAQ, 45 C.F.R. § 156.230, relates to plan network adequacy requirements for Qualified Health Plans only. *See* Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for

Employers, 77 Fed. Reg. 18,310, 18,418 (Mar. 27, 2012) ("In § 156.230, [the Department of Health and Human Services] proposed the minimum criteria for network adequacy in order for health plans to be certified as [Qualified Health Plans]."). Indeed, the FAQ's language makes clear those requirements apply only to issuers of Qualified Health Plans in the individual-market Exchanges and the Small Business Health Options Programs. Because Plaintiffs' health plans are not Qualified Health Plans—a fact they acknowledged before the Court at the hearing on Wellmark's motion, *see* ECF No. 30 at 25—the requirement in 45 C.F.R. § 156.230 for certain health plans to disclose the "specialty" of their network providers is inapplicable to Plaintiffs' health plans.

The Court thus finds the interagency FAQ does not support Plaintiffs' position. Plaintiffs do not cite any ACA provisions beyond the FAQ for support. Because 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, the Court grants this portion of Wellmark's motion to dismiss.

The Court concludes Plaintiffs have alleged a plausible ACA violation on the ground that Wellmark failed to provide lactation counseling benefits by improperly imposing cost sharing on Plaintiffs for out-of-network lactation counseling. *See* 29 C.F.R. § 2590.715-2713(a)(3)(ii) ("[I]f a plan or issuer does not have in its network a provider who can provide [a listed preventive service], the plan or issuer must cover the item or service when performed by an out-of-network provider, and may not impose cost sharing with respect to the item or service."). 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.

B. Co-Fiduciary Liability under ERISA (Count II)

The Court next addresses Plaintiffs' claim for ERISA co-fiduciary liability (Count II). Plaintiffs assert the two named Wellmark Defendants (Wellmark Blue Cross and Blue Shield of Iowa and its subsidiary, Wellmark Health Plan of Iowa) are jointly and severally liable as co-fiduciaries under ERISA § 405 (codified at 29 U.S.C. § 1105(a))[7] for providing and administering health plans violating the ACA. ECF No. 1 ¶¶ 112–17. Section 1105(a) provides:

> [A] fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Wellmark contends this claim should be dismissed because "a key component of a claim for co-fiduciary liability is that defendants be fiduciaries of 'the same plan.'" ECF No. 19-1 at 15. Wellmark argues Plaintiffs admit each Wellmark Defendant "is a member of a different plan, and nowhere in their Complaint do Plaintiffs allege that Defendants are fiduciaries of the same plan." *Id.* Additionally, Wellmark argues Plaintiffs' allegations fail to satisfy the Rule 12(b)(6) pleading standards because they only state a legal conclusion. *Id.* at 15–16.

In response, Plaintiffs argue the Wellmark Defendants are "liable as co-fiduciaries because they knowingly participated and/or took no steps to prevent . . . breaches despite knowing of those

[7] ERISA cases sometimes cite sections of ERISA as they appear in both the Statutes at Large, *see* Pub. L. No. 93-406, 88 Stat. 829, and as codified in the United States Code, *see* 29 U.S.C. §§ 1001–1162. The Court will cite to the United States Code provisions.

breaches." ECF No. 22 at 15. Plaintiffs contend whether Wellmark Defendants are fiduciaries "of the same plan" is not a requirement for a co-fiduciary liability claim, because "ERISA also imposes liability on non-fiduciaries for knowingly participating in a fiduciary's breach of its duties." *Id.* Plaintiffs argue that "even if only one Defendant is a fiduciary with respect to a particular plan, the other Defendants would be jointly liable as participating non-fiduciaries." *Id.* at 15–16.

The Court finds Plaintiffs' complaint fails to state a claim for ERISA co-fiduciary liability. The complaint alleges "[e]ach Defendant knowingly participated in and enabled the other Defendant['s] breaches of fiduciary duty by allowing [Wellmark] Defendants to . . . provide and administer health plans that were not in compliance with the . . . ACA." *See* ECF No. 1 ¶ 115. This vague and conclusory statement fails to allege the Wellmark Defendants are co-fiduciaries of the same plan, or any facts sufficient to support a plausible § 1105 claim. *See Iqbal*, 556 U.S. at 678 (stating "'naked assertion[s]' devoid of 'further factual enhancement,'" "labels and conclusions," and factual allegations "merely consistent with" a defendant's liability are not enough to withstand dismissal"); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) ("[The Court does not] blindly accept the legal conclusions drawn by the pleader from the facts."). Plaintiffs cannot allege a claim for ERISA co-fiduciary liability by broadly combining the Wellmark Defendants' actions to create the impression each Defendant "knowingly participated in and enabled" the other's breach of their fiduciary duty.

Plaintiffs' legal arguments against dismissal—the Wellmark Defendants can each be held liable for breaches by other plan fiduciaries who are not parties to the lawsuit, and each Defendant can be held liable as a participating non-fiduciary under 29 U.S.C. § 1132(a)(3)—do not remedy the complaint's factual deficiencies. *See* ECF No. 22 at 15, 15 n.10. At the hearing for Wellmark's motion, Plaintiffs articulated for the first time several factual allegations relating to the relationship

between the two named Wellmark Defendants. *See* ECF No. 30 at 28–30 (arguing the Wellmark Defendants share the same mailing address for receiving claims, the same customer care service center, and the same letterhead). The Court declines to consider these new allegations, as Plaintiffs cannot amend the complaint through their pleadings or arguments in response to a motion to dismiss. *See, e.g.*, *O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss.").[8] Plaintiffs' claim for ERISA co-fiduciary liability is therefore dismissed without prejudice.

C. ACA Sex Discrimination (Count III)

The Court next addresses Plaintiffs' claim for sex discrimination under § 1557 of the ACA (Count III). *See* ECF No. 1 ¶¶ 118–27. Section 1557 provides:

> [A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a) (citations omitted). Plaintiffs argue Wellmark has "violated and continue[s] to violate Section 1557(a) of the ACA on the basis of sex discrimination because . . . [Wellmark] refuse[s] and otherwise fail[s] to provide parity in coverage for women's preventive services required under the ACA." ECF No. 1 ¶ 123. Plaintiffs base their claim on Title IX of the Education

[8] At the hearing on Wellmark's motion, Plaintiffs requested the opportunity to amend their ERISA co-fiduciary claim in Count II if the Court finds dismissal is proper. *See* ECF No. 30 at 30–31. The Court grants Plaintiffs' request to file a motion for leave to amend this portion of their complaint, consistent with Local Rule 15.

Amendments of 1972, 20 U.S.C. § 1681(a), which they argue § 1557 incorporates by reference. *Id.* ¶¶ 120–23.

Wellmark contends Plaintiffs fail to state a claim for sex discrimination under § 1557 because they fail to allege Wellmark's coverage decisions were motivated by Plaintiffs' sex. ECF No. 19-1 at 16–17. Wellmark argues § 1557 of the ACA, by incorporating Title IX, prohibits only intentional sex discrimination. *Id.* at 16 (citing *Wolfe v. Fayetteville Sch. Dist.*, 648 F.3d 860, 865 (8th Cir. 2011) (stating a Title IX deliberate indifference claim requires "underlying intent, and therefore motivation, on the part of the actor to discriminate because of one's sex or gender")). Wellmark argues where "a plaintiff does not plead facts supporting the inference that a 'gender-based motive' was behind the challenged conduct, the claim should be dismissed." *Id.* at 17.

In response, Plaintiffs argue § 1557's incorporation of Title IX allows for not only intentional sex discrimination claims, but also disparate impact claims. ECF No. 22 at 16–17. Plaintiffs rely on *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015), and regulations from the Department of Health and Human Services (HHS) for support that disparate impact claims are actionable on the basis of any of the criteria enumerated in § 1557. *Id.* at 16–17. Plaintiffs' briefing casts their allegations of sex discrimination in terms of disparate impact, arguing Wellmark's policies "impose a significant burden on breastfeeding and lactating women." *Id.* at 18. Plaintiffs assert Wellmark's "practice is unlawful and discriminatory irrespective of motivation or intent." *Id.*

The Court agrees with other district courts that § 1557 provides a private right of action. *See Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 848 (D.S.C. 2015); *Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015); *Rumble*, 2015 WL 1197415, at *7 n.3. Section 1557 references and incorporates four different civil rights statutes: Title VI of the

Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits discrimination based on race, color or national origin; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., which prohibits discrimination based on sex; the Age Discrimination in Employment Act of 1975, 29 U.S.C. § 621 et seq., which prohibits discrimination based on age; and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), which prohibits discrimination based on disability. 42 U.S.C. § 18116(a). The parties do not dispute Wellmark is a "health program or activity" within the meaning of § 1557. *Cf. Callum*, 137 F. Supp. 3d at 849–53 (determining whether defendant is a "health program or activity" under the statute). Rather, the parties disagree on whether Plaintiffs have sufficiently pled a sex-based disparate impact claim.

Section 1557 states "[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a). Of these four statutes, only Title IX forbids sex discrimination. *See* 20 U.S.C. § 1681. Courts agree—and Plaintiffs here do not contest—that in the aftermath of the United States Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), a Title IX plaintiff cannot assert a disparate impact theory. *See, e.g.*, *Doe v. Univ. of Colo., Boulder*, No. 16-cv-1789, 2017 WL 2311209, at *12 n.10 (D. Colo. May 26, 2017); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 184 (D.R.I. 2016); *Tsuruta v. Augustana Univ.*, 4:15-CV-04150, 2015 WL 5838602, at *3–4 (D.S.D. Oct. 7, 2015); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 367 (S.D.N.Y. 2015); *see also* ECF No. 30 at 31–32 (conceding at the hearing on Wellmark's motion that Title IX does not allow disparate impact claims). The question thus becomes whether Plaintiffs can bring a sex-based disparate impact claim under § 1557 even though it expressly incorporates the enforcement mechanism of Title IX. 42 U.S.C. § 18116(a).

To date, neither the Eighth Circuit nor any other circuit court of appeals has analyzed discrimination claims under § 1557. However, two district courts have considered the applicable burden and framework for such claims. In *Rumble*, the plaintiff alleged discrimination under § 1557 based on his sex. 2015 WL 1197415, at *7. Relying on principles of statutory interpretation, the court found the language of § 1557 "ambiguous, insofar as each of the four [cited federal civil rights] statutes utilize different standards for determining liability, causation, and a plaintiff's burden of proof." *Id.* at *10. The court noted that reading § 1557 to require "different enforcement mechanisms and standards . . . depending on whether the plaintiff's claim is based on her race, sex, age, or disability" leads to "an illogical result." *Id.* at *11. The court concluded Congress "likely intended that the same standard and burden of proof to apply to a Section 1557 plaintiff, regardless of the plaintiff's protected class status." *Id.* at *12. The court declined, however, to determine the precise standard and burden of proof. *Id.* at *12, 18.

In *Southeastern Pennsylvania Transportation Authority*, the plaintiff alleged discrimination under § 1557 based on race and disability. 102 F. Supp. 3d at 695–97. The court disagreed with *Rumble*'s holding that the same standard and burden of proof apply to all § 1557 claims regardless of the type of discrimination alleged. *Id.* at 699 n.3. Instead, the court held, "Congress's express incorporation of the enforcement mechanisms from those four federal civil rights statutes, as well as its decision to define the protected classes by reference thereto, manifests an intent to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue." *Id.* at 698–99. Thus, the court applied the Title VI elements to the plaintiff's race claim and the Rehabilitation Act elements to the plaintiff's disability claim. *Id.* at 699–701.

Since the decisions in *Rumble* and *Southeastern Pennsylvania*, the HHS Office for Civil Rights (OCR) promulgated regulations implementing § 1557 following public notice and comment. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016); 45 C.F.R. § 92.1. During the notice-and-comment period, the agency stated in response to public comments regarding the *Rumble* decision that "OCR interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation." 81 Fed. Reg. at 31,439–40. This interpretation, while published in the Federal Register, is absent from the codification of the Final Rule in 45 C.F.R. § 92.301, which instead only repeats the language found in § 1557:

> (a) The enforcement mechanisms available for and provided under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975 shall apply for purposes of Section 1557 as implemented by this part.
>
> (b) Compensatory damages for violations of Section 1557 are available in appropriate administrative and judicial actions brought under this rule.

45 C.F.R. § 92.301. Plaintiffs argue the Court should adopt the interpretation of the *Rumble* court and OCR that a private litigant may bring a sex-based disparate impact discrimination claim under § 1557. ECF No. 22 at 16–17. At the hearing for Wellmark's motion, Plaintiffs argued the Court should afford the OCR interpretation *Chevron* deference. ECF No. 30 at 32.

As discussed briefly above, *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Congress explicitly granted HHS (and by extension, its OCR division) rule-making authority to implement § 1557, *see* 42 U.S.C.

§ 18116(c), and there are factors to suggest the OCR interpretation was promulgated in the exercise of that authority.[9]

Chevron deference to an agency's interpretation of a statute applies only when the statute is ambiguous, as "[d]eference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). "Under *Chevron*, if from the plain meaning of the statute Congressional intent is clear, except for rare instances, 'that is the end of the matter.'" *In re Old Fashioned Enters., Inc.*, 236 F.3d 422, 425 (8th Cir. 2001) (quoting *Chevron*, 467 U.S. at 842); *see also Elwell v. Okl. ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012) (Gorsuch, J.) ("[W]hatever *Chevron* deference we owe to an agency's interpretations and regulations when a statute is ambiguous, we are never permitted to disregard clear statutory directions in favor of administrative rules."). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

[9] The OCR interpretation was in response to a public comment regarding the implementation of § 1557. *See* 81 Fed. Reg. at 31,440. However, the interpretation was not part of the regulatory text and therefore not subjected to notice-and-comment rulemaking, although it was published in the Federal Register and made during the notice-and-comment process. *See Mead Corp.*, 533 U.S. at 230 ("[T]he overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (discussing additional factors relevant to determining application of *Chevron*, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *TeamBank, N.A. v. McClure*, 279 F.3d 614, 618 (8th Cir. 2002) ("*Chevron* deference is generally reserved for interpretations reached through 'relatively formal' administrative procedures." (quoting *Mead Corp.*, 533 U.S. at 230)).

When interpreting a statute, the Court must consider "the text of the statute as a whole by considering its context, object, and policy." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc). The ultimate objective is to effectuate Congressional intent. *Id.* The Court begins "with 'the assumption that the ordinary meaning of the language' chosen by Congress 'accurately expresses the legislative purpose.'" *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 101 (2011) (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). Words are given "their 'ordinary, contemporary, [and] common meaning' absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)).

Applying these rules of statutory interpretation here, the Court finds Congress has clearly spoken in regards to the applicable standard for discrimination claims under § 1557. Subsection (a) of the statute addresses discrimination claim procedures and is comprised of two sentences. The first sentence reads in pertinent part: "[A]n individual shall not, on the ground prohibited under title VI . . . , title IX . . . , the Age Discrimination Act . . . , or section 504 of the Rehabilitation Act . . . , be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity . . . ." 42 U.S.C. § 18116(a). The next sentence then states "[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection." *Id.* The plain meaning of these two sentences combined is clear and unambiguous—claims for discrimination are available on the grounds prohibited in the four listed federal civil rights statutes, and are to be addressed under the provided for and available corresponding enforcement mechanisms of the four statutes.

Congress, by expressly listing these specific civil rights statutes, understood each offered protection from discrimination on different grounds. Moreover, by listing the statutes twice in two separate sentences—one dealing with the grounds protected from discrimination and the other with enforcement mechanisms—Congress clearly intended to incorporate the statutes' specific enforcement mechanisms rather than create a general catch-all standard applicable to all discrimination claims. It would be superfluous to repeat the four statutes if Congress meant to use the statutes solely to identify the grounds protected from discrimination. The Court thus agrees with the reasoning in *Southeastern Pennsylvania*. *See* 102 F. Supp. 3d at 698–99 ("Congress's express incorporation of the enforcement mechanisms from those four federal civil rights statutes, as well as its decision to define the protected classes by reference thereto, manifests an intent to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue."). Section 1557 clearly identifies both the grounds on which claims for discrimination may be brought and the mechanisms for bringing such claims.

The Court concludes the plain language of § 1557 unambiguously allows discrimination claims under the enforcement mechanisms of the four identified statutes only. Plaintiffs' claim is for sex discrimination; Title IX's remedial scheme applies. As discussed above, Title IX does not allow for disparate impact claims. Because Plaintiffs fail to allege a sex-discrimination claim other than disparate impact, they fail to state a plausible claim for sex discrimination under § 1557 of the ACA. The Court accordingly dismisses this claim.

D. State-law Claims (Counts IV and V)

Finally, the Court addresses Plaintiffs' state-law claims for breach of contract (Count IV) and unjust enrichment (Count V). *See* ECF No. 1 ¶¶ 128–37. In Count IV, Plaintiffs allege

Wellmark breached its contract with York,[10] which guarantees her comprehensive lactation benefits consistent with the ACA's preventive service requirements. *Id.* ¶¶ 128–32. In Count V, Plaintiffs allege Wellmark was unjustly enriched when it violated the ACA by improperly imposing cost sharing on York's claim for lactation counseling benefits. *Id.* ¶¶ 133–37. The complaint does not identify under what state's law the claims are alleged.

Wellmark contends Counts IV and V should be dismissed on the same ground: Plaintiffs cannot use state law to circumvent federal law that does not provide a private right of action. ECF No. 19-1 at 19–20. The parties agree the ACA provides no private right of action. *Id.* at 19; ECF No. 30 at 36. Wellmark argues where "Congress has chosen not to enact a private right of action, a plaintiff may not circumvent that decision by styling its federal claims as state-law causes of action." ECF No. 19-1 19. Wellmark asserts Plaintiffs "do not identify a non-ACA basis" for their claims of unjust enrichment and breach of contract. *Id.* Accordingly, Wellmark argues, "Counts IV and V are an 'impermissible "end run" around' [the] ACA's lack of private right of action and should be dismissed with prejudice." *Id.*

In response, Plaintiffs insist Counts IV and V are not "impermissible attempts to bypass Congressional intent of the ACA." ECF No. 22 at 19. Plaintiffs contend courts dismiss state-law claims only when other remedies are available under state and federal regulatory schemes. *Id.* at 19–20. In contrast to such cases, Plaintiffs argue, "here, there is no analogous ACA enforcement mechanism." *Id.* at 20. Plaintiffs argue "Counts IV and V assert viable claims and seek important protections and remedies on behalf of insureds who are non-ERISA plan participants, and who have been denied their contractual and just entitlement to Comprehensive Lactation Benefits." *Id.*

[10] As previously stated, ERISA preempts Bailey's state-law claims.

Individual parties cannot enforce violations of a federal law with no private cause of action by simply casting their claim in the language of a breach of contract or other state common law claim. *See Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081, 1086 (8th Cir. 2012) (recognizing "[i]n the absence of . . . [contractual language] specifying an independent right to the [relief] they seek," a plaintiff cannot use "claims for breach of [contract] to circumvent . . . administrative remedies and create a private right of action when the legislature has not"); *MM&S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 911 (8th Cir. 2004) ("Given Congress's grant of exclusive jurisdiction to federal courts to hear all claims for breach of duties created under the Exchange Act, we doubt Congress intended to allow [plaintiff] to avoid Congress's decision not to provide an express right of action and pursue instead a common-law breach of contract claim."). The question before the Court is whether Plaintiffs' claims in Counts IV and V rely on a cause of action other than the ACA.

Plaintiffs label Count IV "Violation of the Patient Protection and Affordable Care Act through Incorporation by Reference in HSCS Plan Documents Against Defendants." ECF No. 1 at 47. Plaintiffs allege their "plan documents specifically reference and track the preventive care provisions of the ACA, including the women's preventive care provisions set forth in 42 U.S.C. § 300gg-13(a)(4)." *Id.* ¶ 130. At the hearing on Wellmark's motion, Plaintiffs asserted "York is enforcing her contract. The contract sets forth that she's to have coverage for preventive services as set forth in the HRSA. . . . [W]e are claiming that . . . pursuant to the contract, she is not receiving that benefit due to defendants' conduct and not providing a means or the identity of being in-network providers." ECF No. 30 at 35.

Based on the language in the complaint and Plaintiffs' assertions at the hearing, the Court finds Count IV seeks to assert York's rights under her contract with Wellmark. The ACA does not

afford consumers a private right of action under federal law, but neither does it preempt or restrict consumers' traditional ability to vindicate their rights under the insurance laws of their state. *See* 15 U.S.C. § 1011 (stating in the McCarran-Ferguson Act of 1945 that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"); 42 U.S.C. § 300gg-22 (delegating enforcement of Exchange requirements to the states and HHS); *Heart of Am. Grain Inspection Serv., Inc. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1103 (8th Cir. 1997) ("In the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption."). The ACA contains an express preemption provision, but the Eighth Circuit interprets it narrowly and Wellmark does not argue for its application here. *See* 42 U.S.C. § 18041(d) ("Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title."); *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015) ("[The ACA] preemption clause is a narrow one, and only those state laws that 'hinder or impede' the implementation of the ACA run afoul of the Supremacy Clause."). Thus, assuming Wellmark's health plan expressly guarantees York lactation counseling benefits in accordance with the ACA and provides a contractual remedy, the Court finds Plaintiffs state a plausible claim for breach of contract under state law.

Turning to the unjust enrichment claim, the complaint alleges Wellmark has "been unjustly enriched by the conduct alleged herein," and repeats the assertion that Plaintiffs were denied access to comprehensive lactation benefits in violation of the ACA. *Id.* ¶ 134. "As a result," the complaint states, "Plaintiffs and members of the Class conferred an unearned tangible economic benefit upon

[Wellmark] by paying out-of-pocket for a preventive service, namely, Comprehensive Lactation Benefits." *Id.* ¶ 136. The complaint identifies no other legal basis for the claim except the ACA.

The Court finds Plaintiffs fail to state a plausible claim for unjust enrichment because their claim constitutes an attempt to enforce the ACA, which does not allow a private right of action. In their resistance to Wellmark's motion, Plaintiffs argue they can bring an unjust enrichment claim to enforce their rights because the ACA contains no private remedy. *See* ECF No. 22 at 19–20. But the lack of such a private remedy is why Plaintiffs' unjust enrichment claim fails. Allowing private litigants to claim their insurer was unjustly enriched because it violated the ACA would be tantamount to recognizing a private right of action to enforce the ACA where Congress has not provided one; this would thus circumvent congressional intent. *See Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 118 (2011) ("'[R]ecognition of any private right of action for violating a federal statute,' currently governing decisions instruct, 'must ultimately rest on congressional intent to provide a private remedy.'" (alteration in original) (quoting *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991))); *Palmer*, 666 F.3d at 1086; *MM&S Fin.*, 364 F.3d at 912–911. Because Plaintiffs' unjust enrichment claim arises wholly from Wellmark's alleged failure to comply with the ACA, and Plaintiffs do not express any legal basis for the cause of action except for a violation of the ACA, the Court dismisses Plaintiffs' claim for unjust enrichment.

V. CONCLUSION

For the above reasons, Wellmark's motion to dismiss, ECF No. 19, is **GRANTED IN PART** and **DENIED IN PART**. Count I (ERISA breach of fiduciary duty) is dismissed with prejudice as to Plaintiff Jillian York. Count II (ERISA co-fiduciary liability) is dismissed without prejudice. Count III (ACA sex discrimination) and Count V (unjust enrichment) are dismissed in entirety and with prejudice. Count IV (breach of contract) is dismissed with prejudice as to Plaintiff

Jody Bailey. The remaining counts, Count I as to Bailey and Count IV as to York, are dismissed with prejudice in part as to the claims Wellmark violated the ACA by erecting "administrative barriers" and failing to create or provide a "separate list" of lactation counseling providers.

IT IS SO ORDERED.

Dated this 6th day of September, 2017.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE