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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO GRANT REQUEST FOR INTERVENTION AND FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Date: November 21, 2019
Time: 10:00 am
Place: Courtroom 4

Honorable Vince G. Chhabria

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I. INTRODUCTION

Defendants' challenge to Plaintiffs' Motion to Grant Request for Intervention and For Leave to File a Third Amended Complaint (Dkt. 221, "Motion") is based on a contrived premise that Plaintiffs "should have known of their standing problem long ago" (Dkt. 224, Defendants' Opposition to Motion or "Opp." at 1:10-23). To the contrary, the Proposed Intervenor's Motion was timely filed after the Court stated, in the Court's Order on Class Certification, that "[i]t does not appear that the named plaintiffs have standing to seek prospective relief because they are no longer UHC plan participants", and cited its disagreement with the holding in *Johnson v. Hartford Casualty Ins. Co*., No. 15-cv-04138, 2017 U.S. Dist. LEXIS 77482, at *31-32 (N.D. Cal. May 22, 2017). *See* Dkt. 213 ("CC Order") at 4-5. Defendants' reliance on prior case events is factually inapplicable. The case milestones preceding the class certification Order, during which one or more of the existing Plaintiffs were UHC plan participants, did not give rise to notice that would now preclude participation of the Proposed Intervenor. Further, Defendants will not be prejudiced by granting intervention. The proposed Third Amended Complaint ("TAC", Dkt. 221-1) adds no new theories or causes of action, and the facts underlying those causes of action and legal theories are analogous to Plaintiffs, and common questions of law and fact exist between the claims of Proposed Intervenor, Ms. Harris, and those previously asserted by Plaintiffs on behalf of the ERISA Plan Class. Moreover, discovery specific to the Proposed Intervenor is already in Defendants' possession and was produced in the Action months ago (*see* Donaldson-Smith Declaration ("Smith Decl.") submitted herewith, Ex. A, UHC_189910-189943). Any further discovery will be limited. Furthermore, the only thing relevant for purposes of the instant Motion is Proposed Intervenor's standing as a current UHC plan participant, to pursue injunctive relief. Defendants' effort to insinuate the need for extensive discovery on Proposed Intervenor's claim for retrospective relief is a red herring. For all the reasons described in the Motion and herein, intervention is appropriate and should be granted.

II. BACKGROUND

A. Article III Standing Was Not Challenged at the Motion to Dismiss Stage

As of March 10, 2017, when Plaintiffs filed the First Amended Complaint (Dkt. No. 29), four of the six Plaintiffs were current UHC health benefit plan members or beneficiaries. *See* Declaration of Abby Seay ("Seay Decl.") Dkt. 176 at ¶¶3-8 (confirming that Plaintiffs Bishop, Carroll, Endicott and Barber were all insured by Defendants as of March 10, 2017, whereas Plaintiffs Condry's and Hoy's coverage through Defendants expired on July 31, 2015 and December 31, 2015, respectively). When Defendants moved to dismiss the Amended Complaint on April 14, 2017, Defendants did not challenge the standing of any of the Plaintiffs. After the Court denied in substantial part the Defendants' motion to dismiss (Dkt. 68), Plaintiffs filed a Second Amended Complaint ("SAC", Dkt. 78) on September 5, 2017, in accordance with the Court's Order with respect to the Section 1557 claim. On September 19, 2017,[1] Defendants filed their Answer to the SAC that included 18 affirmative defenses, none of which related to Article III standing. *See* Dkt. 82 at 27-30.

B. At Summary Judgment the Court Raised Standing, But Did Not Issue a Ruling on the Matter

On November 20, 2017, Defendants filed a motion for summary judgment as to the named Plaintiffs' claims. Dkt. 100.[2] Defendants did not seek or argue as a basis for summary judgment, Plaintiffs' standing to bring their claims for injunctive relief or otherwise. During the April 26, 2018 summary judgement hearing, Plaintiffs informed the Court that Plaintiff Barber was the only named Plaintiff currently insured by Defendants, but provided reasons that the ERISA Plan Plaintiffs had Article III standing to seek injunctive relief even if not currently insured by Defendants.[3] Dkt. 159 at

[1] As of September 19, 2017, another Plaintiff's coverage through Defendants had lapsed. *See* Seay Decl. at ¶5 (Plaintiff Carroll, the proposed Class representative of the Non-ERISA Plan Class was no longer a plan member of Defendants as of May 1, 2017).

[2] On November 20, 2017, Plaintiffs Endicott and Barber were still insured by Defendants, and by January 5, 2018, the date of Defendants' reply and response to Plaintiffs' cross-motion for partial summary judgment, only Plaintiff Barber remained a UHC insured. *See* Seay Decl. at ¶¶6, 8.

[3] On May 1, 2018, Plaintiffs filed an Unopposed Motion for Leave to Supplement the Record in Connection with Plaintiffs' Cross-Motion for Summary Judgment to introduce evidence, not known

12:20-14:17. In taking matters under submission, the Court averred that standing did not need to be decided presently. Dkt. 159 at 14:18-15:1; 16:19-24. Consistent with the Court's comments during the hearing, the Court's June 27, 2018 summary judgment Order did not address standing as to the named Plaintiffs. *See* Dkt. 146.

C. It Was Not Until the May 23, 2019 Class Certification Order That the Court Determined That the Existing Plaintiffs Lacked Standing to Seek Injunctive Relief

Plaintiffs filed their motion for class certification on February 20, 2019. In their opposition, Defendants challenged for the first time, the Article III standing of the proposed Class representatives seeking to obtain injunctive relief on the grounds that they "are not current plan members." *See* Dkt. 163 at 24:2-16. At the April 25, 2019 class certification hearing, standing for injunctive relief was not addressed. *See* Dkt. 212. On May 23, 2019, the Court issued an order denying class certification without prejudice, finding, *inter alia*, that the existing Plaintiffs do not "have standing to seek prospective relief because they are no longer UHC plan participants." *See* CC Order at 4-5. By granting "plaintiffs leave to take another shot at class certification," Plaintiffs appropriately filed the instant Motion to address the deficiencies raised by the Court and to protect a direct and substantial interest of the Proposed Intervenor and putative members of the Class seeking injunctive relief.

III. ARGUMENT

A. Proposed Intervenor's Motion is Timely and Seeking Intervention is Appropriate at This Time

Reciting a litany of activities the parties have engaged in and case mileposts, Defendants argue that the Motion is untimely because of the "extremely advanced stage of the litigation." Opp. at 6:7-13. Defendants' position is not supported by the facts or procedural history of this Action, which are markedly distinguishable from the cases on which Defendants rely.

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at the time of the April 26, 2018 hearing, that Plaintiff Barber was pregnant and due to give birth on August 5, 2018, and that she intended to breastfeed her newborn. *See* Dkt. 135.

The present case is not "akin to the facts in *Pep Boys*." Opp. at 6:22-23. In *Pep Boys*, there were "serious questions as to whether [proposed intervenor] ha[d] standing to bring a claim or c[ould] state a UCL claim" against the defendant, which was seeking to settle a claim against proposed intervenor's parents, not the proposed intervenor. *Lee v. The Pep Boys-Manny Moe*, No. 12-cv-05064, 2016 U.S. Dist. LEXIS 9753, at *27 (N.D. Cal. Jan. 27, 2016). Accordingly, the court found that that the proposed intervenor did not have a significant protectable interest in the lawsuit because she was "arguably not even a putative member of Plaintiff's proposed UCL class." *Id.* at *8-9.

The other cases cited by Defendants are equally distinguishable. In *Smith v. Marsh*, the denial of the motion to intervene was affirmed as untimely on the grounds that the intervenors, who sought to "inject new issues and matters" well beyond the scope of the operative claims and defenses, and had failed to demonstrate that their interests would not be adequately represented, took "well over a year to apply for intervention" at which time a trial date had already been set. *Smith v. Marsh*, 194 F.3d 1045, 1050-51 (9th Cir. 1999); *see also Hanni v. Am. Airlines, Inc.*, No. C 08-00732, 2010 U.S. Dist. LEXIS 3410, at *15-18 (N.D. Cal. Jan. 15, 2010) (denying motion to intervene as untimely because defendant would be prejudiced by the intervention that sought to add three new causes of action and proposed intervenor's protectable interests would not be impaired). Here, the instant Motion was filed concurrently with the renewed class certification motion that was permitted by this Court to address, *inter alia*, standing to pursue injunctive relief. Moreover, no trial date has been set, and the Proposed Intervenor did not raise any new or matters. *See* Section III.B, *infra*.

Further, Plaintiffs' Motion did not arise because of statute of limitation issues, a markedly different factual circumstance that gave rise to the motions in *Lindblom v. Santander Consumer USA, Inc.*, cited by Defendants. *See* Opp. at11:4-9. In *Lindblom,* the movants were on notice nearly two and a half years prior to the class certification motion that plaintiff's claims may be "barred by the statute of limitations," as asserted by defendant in the answer as the first affirmative defense. *Lindblom v. Santander Consumer USA, Inc.*, No. 1:15-cv-00990, 2018 U.S. Dist. LEXIS 109384, at *19 (E.D. Cal. June 29, 2018). Here, prior to the Court's summary judgment order, Defendants had not challenged standing and there had been no ruling on standing to seek injunctive relief until the class

certification Order. Plaintiffs and Proposed Intervenor reasonably believed that Plaintiffs adequately represented the injunctive relief Class. Given the contrary precedent in this District (*Johnson*, 2017 U.S. Dist. LEXIS 77482, at *31-32), Defendants' argument that Plaintiffs knew or should have known that Plaintiffs lacked standing because of change of status in UHC plan participation during the Action is unpersuasive. Nor can Defendants credibly argue that intervention should have been sought before this Court squarely addressed the standing of the named Plaintiffs; which did not occur at the summary judgment hearing in April 2018, but later in the May 23, 2019 class certification Order.

Further, the "[m]ere lapse of time alone is not determinative" when considering if a proposed intervention is timely, particularly when there is no indication that the passage of time has created additional prejudice, and that a "change of circumstance" may justify intervention. *Oregon*, 745 F.2d at 552. The Court's class certification Order finding on standing was a "change in circumstance" and the Motion was filed without delay to cure a deficiency identified by the Court. Courts have permitted intervention under precisely these circumstances. *See, e.g. Munoz v. PHH Corp*., No. 1:08-cv-0759, 2013 U.S. Dist. LEXIS 106004, at *22-23 (E.D. Cal. July 26, 2013) (holding that intervention following the court's report and recommendation partially denying Plaintiffs' motion for class certification was appropriate to cure a deficiency); *Beach v. Healthways, Inc*., 264 F.R.D. 360, 365 (M.D. Tenn. 2010) ("[I]t was not until the Court ruled on the motion for class certification that CLPF became aware of the need to intervene in this case."); *Shields v. Washington Bancorporation*, 1992 U.S. Dist. LEXIS 4177, at *2 (D.D.C. Apr. 7, 1992) (granting motion for intervention after Court denied class certification on adequacy grounds).

B. Defendants Will Not be Prejudiced by Intervention

Contrary to Defendants' argument, intervention does not require them to "conduct significant additional discovery to flush out the factual underpinnings" of Proposed Intervenor's claims.[4] Opp.

[4] Given the facts alleged in the TAC it is unsurprising that Defendants give wide berth to challenging the "factual underpinnings" of Proposed Intervenor's claims, yet absent from Defendants' Opposition is an assertion that in-network lactation services were available to Proposed Intervenor.

at 7:18-19. First, as noted, information in Defendants' possession concerning Proposed Intervenor has already been produced. Second, Plaintiffs' class certification motion addresses UHC's uniform policy and conduct to not afford preventive care coverage as mandated by the ACA for any out-of-network claims for breastfeeding support and counseling services; that conduct applies equally to Proposed Intervenor.

Third, Defendants' reliance on the Court's summary judgment is misplaced.[5] *See* Opp. at 7:22-26. Defendants ignore the similarities of Proposed Intervenor and Plaintiff Hoy, to whom the Court granted summary judgment in favor of Plaintiffs finding that "[b]ecause United Healthcare Services has presented no evidence that Hoy had in-network providers available to her, it was obligated to cover services provided by out-of-network providers without cost. *See* 29 C.F.R. § 2590.715–2713(a)(3)(ii)." SJ Order at 4. Both Plaintiff Hoy and Proposed Intervenor are residents of Montgomery County, Pennsylvania. *See* SAC at ¶21; TAC at ¶149. Plaintiff Hoy's pediatrician requested that she see a lactation consultant, as did the Proposed Intervenor's pediatrician. *See* SJ Order at 4; TAC at ¶151. Before receiving CLS, Plaintiff Hoy contacted UHC customer service and was told that UHC "would not reimburse her" for CLS. SJ Order at 4. Likewise, UHC customer service told Proposed Intervenor she was not eligible for coverage after in-network providers of CLS were able to be identified. TAC at ¶152. Plaintiff Hoy received CLS from an out-of-network provider, the Breastfeeding Resource Center, on September 28 and October 5, 2015, as did Proposed Intervenor on January 5 and 10, 2017. SAC at ¶100; TAC at ¶¶154-155. Both Plaintiff Hoy and Proposed Intervenor submitted claims for out-of-network CLS to Defendants. SJ Order at 4; TAC at ¶156. Plaintiff Hoy's claims were denied as not a reimbursable service, whereas portions of the charges were applied to Proposed Intervenor's deductible, resulting in no reimbursement. SJ Order at 4; TAC at ¶156; *see also* Smith Decl., Ex. A, UHC_189934-39. Proposed Intervenor filed an appeal, but Defendants ultimately upheld the initial coverage determination. *See* Ex. A at UHC_189926-33.

[5] Summary judgment is not a prerequisite to a ruling on Plaintiffs' renewed motion for class certification. The Court did not grant summary judgment to either party as to Plaintiffs Endicott and Carroll under Counts II and V (Dkt. 146 ("SJ Order") at 5).

Finally, granting this Motion would only necessitate limited fact discovery, and would not require "significant additional discovery" as claimed by Defendants. "In the context of a timeliness analysis, prejudice is evaluated based on the difference between timely and untimely intervention—not based on the work the defendants would need to do regardless of when intervention was sought." *Pep Boys*, 2016 U.S. Dist. LEXIS 9753, at *19 (internal quotation marks and citations omitted). The fact that intervention will not expand the current scope of litigation also distinguishes this case from many of the cases that Defendants relies upon. *Id.* at *20 (denying intervention based on prejudice where the putative intervenor's "pleading raise[d] new issues beyond the scope of the claims and defenses raised by Plaintiff" and there were "issues particular to [the putative intervenor's] claim that likely would have to be litigated if the Court permit[ted] her intervention"); *Lindblom*, 2018 U.S. Dist. LEXIS 109384, at *12-13 (denying intervention based on prejudice because intervention would "require significant and costly discovery" to determine whether the 10 movants are eligible for membership in the putative class which was raised in Defendant's opposition); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997) (acknowledging that intervention has the "inevitable effect of prolonging the litigation to some degree," but denied intervention because "the proposed intervenor waited twenty-seven months before seeking to interject itself into the case, only to move the court for full-party participation at a time when the litigation was, by all accounts, beginning to wind itself down"); *Valley View Health Care, Inc. v. Chapman*, No. 1: 13-cv-0036, 2013 U.S. Dist. LEXIS 122112, at *11-12 (E.D. Cal. Aug. 27, 2013) (denying intervention because "the purely legal issues in this case make the [public policy] discovery proposed by Intervenors irrelevant"); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 410-15 (N.D. Cal. 2004) (denying intervention because it would prejudice plaintiff's rights in the action as plaintiff and proposed intervenor were "themselves at loggerheads over a number of issues"); *Harris v. Vector Mktg. Corp.*, No. C-08-5198-EMC, 2010 U.S. Dist. LEXIS 104996, at *16-17 (N.D. Cal. Sep. 17, 2010 (denying intervention based on a "substantial showing" of prejudice of having to subpoena and depose third parties).

Here, any additional factual inquiries would be directed to the Proposed Intervenor, and readily addressed through discovery requests and her deposition. Defendants make a contrived attempt to now expand the scope of discovery, by asserting that they would be entitled to depose purported "in-network providers available" to Proposed Intervenor (Opp. at 7:26-28). That position is inexplicable since Defendants did not depose any of the Plaintiffs' providers.

Similarly unavailing is Defendants' argument that expert discovery "need to reopen…" Opp. at 8:1-4. Specifically, Defendants cite to the expert report of Dr. Henry Lee in which opinions were offered "on the network services obtained by Plaintiffs Carroll and Endicott" (*id.*). However, the Court has already held that Defendants' experts D'Apuzzo, Dos Santos, Miller and Lee "provided little or no opinion relevant to this certification decision". CC Order at fn. 2; *see also* SJ Order (Court did not rely on Defendants' experts). In short, Defendants' Opposition rests on strategy, not prejudice, and does not overcome the Ninth Circuit's liberal policy in favor of intervention.

C. Proposed Intervenor Satisfies the Requirements for Intervention as a Matter of Right, But Also Fulfills the Requirements for Permissive Intervention

Defendants raise two additional arguments with respect to denying intervention as a matter of right – both of which are unavailing. First, Defendants argue that intervention as a matter of right should be denied because Proposed Intervenor has not shown a significant protectable interest. Opp. at 11:23-27. Defendants rely on *Donnelly v. Glickman* as support for this position, but that case is factually distinguishable. In *Donnelly*, the court held that intervenor–male employees had no "significant protectable interest" in an employment discrimination suit brought by female employees because the female plaintiffs expressly waived their right to seek remedies sought by the male employees. *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998). Here, as set forth in the TAC, Proposed Intervenor is a current beneficiary of an ERISA-governed UHC health benefit plan that is subject to the ACA's preventive services requirements, and UHC applied cost-sharing to her two out-of-network CLS claims. As such, Proposed Intervenor is a putative member of the ERISA Plan Class and her claims continue to be at issue in the Action. The disposition of this action may, as a practical

matter, impair or impede Proposed Intervenor's ability to protect her interests.[6]

Second, Defendants argue that Proposed Intervenor's interests are not impaired because she has the ability to file a separate suit to seek injunctive relief. Opp. at 9:25-10:3; 11:23-12:2. If intervention is denied, Proposed Intervenor may file her own action and it will proceed on a separate track to this action, leading to a real risk of subsequent conflicting decisions between courts. In the interest of promoting judicial economy and fairness, the Proposed Intervenor's and Plaintiffs' claims should be litigated together in this Court, thereby preventing undue burden of duplicative discovery, resolving common legal issues together, and decreasing the risk of inconsistent results.

Aside from timeliness, Defendants argue against permissive intervention on one ground – that Proposed Intervenor and Plaintiffs do not "share a common question of law or fact." Opp. at 12:7-16. Defendants cite to *Donnelly* and *Cohen v. Trump* in support of this contention; however, both are inapposite. In *Donnelly*, the district court held that the intervenor–male employees' claims in an employment discrimination suit brought by female employees shared "no common factual proof" and that their interests were "in direct opposition resulting in prejudice to existing parties." *Donnelly*, 159 F.3d at 412 (internal quotations omitted). Similarly, in *Cohen*, the court found that intervenor's claims for injunctive relief, shared "no commonality *whatsoever* with the claims and defenses" of the case. *Cohen v. Trump*, No. 3:13-cv-2519-GPC-WVG, 2017 U.S. Dist. LEXIS 44771, at *7 n.6, *9 (S.D. Cal. Mar. 27, 2017) (emphasis added).

Such issues are not present in the instant case. Rule 24(b) provides for permissive intervention on a timely motion by anyone who "has a claim or defense that shares with the main action a common question of law or fact," and when the intervention "will [not] unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). Here, Proposed Intervenor's claims not only share a common question of law or fact, but the claims are nearly identical to Plaintiff Hoy's

[6] The Ninth Circuit has suggested that a class member, "by their very nature, meet[s] the first two requirements for intervention as a matter of right." *Glass v. UBS Fin. Servs.*, No. C-06-4068-MMC, 2007 U.S. Dist. LEXIS 8509, at *8 n.1 (N.D. Cal. Jan. 17, 2007) (citation omitted); *see also Munoz*, 2013 U.S. Dist. LEXIS 106004, at *35-36.

claims asserted under Count II, the Lactation Services Class claims, which the Court granted in favor of Plaintiffs. *See* Section III.B, *supra*. As such, Proposed Intervenor's claims will not necessitate "the resolution of a complex matrix of factual and legal inquiries", as Defendants state. Opp. at 12:9-12.

D. Plaintiffs Meet the Requirements for Amendment

Defendants argue that Plaintiffs' request for leave to file the TAC for the sole purpose of including Proposed Intervenor as a named Plaintiff should have been "presented pursuant to Rule 24, rather than Rule 15." Opp. at 12:18-22. Defendants rely on *Montgomery v. Rumsfeld* and *Barnhart v. Fastax Inc.*, both of which are distinguishable from the present litigation. In *Montgomery*, "intervention was attempted by means of an amendment to the complaint, rather than by a motion to intervene under Rule 24, Fed. R. Civ. P." under which the court held that the 13 proposed intervenors did not satisfy the requirements for intervention. *Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978). In *Barnhart*, the court denied plaintiffs' motion to intervene as of right and, in the alternative, a motion to amend under Rule 15 following the court's denial of class certification on the grounds that plaintiff was *never* qualified to represent the class, thereby rendering "the action an individual suit." *Barnhart v. Fastax Inc.*, No. 6:14-cv-00482-MC, 2016 U.S. Dist. LEXIS 183283, at *3-4, 7-9 (D. Or. May 4, 2016). Here, Plaintiffs filed the Motion to Intervene seeking to add a new Plaintiff pursuant to Rule 24, which has a pleading requirement that is satisfied by virtue of filing the proposed TAC under Rule 15(a)(2). *See* Fed. R. Civ. P. 24 (c) ("The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought"). Furthermore, there is no undue delay or prejudice to Defendants for the same reasons stated in Section III.B, *supra*.

V. CONCLUSION

For the foregoing reasons, Plaintiffs and the Proposed Intervenor respectfully request that this Court grant the motion for intervention and for leave to file the proposed TAC.

Dated: September 30, 2019

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I hereby certify that on September 30, 2019, I served the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO GRANT REQUEST FOR INTERVENTION AND FOR LEAVE TO FILE THIRD AMENDED COMPLAINT** on the following counsel of record via email:

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