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

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

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

I. INTRODUCTION

Evident from the first sentence of Defendant Health Care Service Corporation's ("HCSC") Opposition (Dkt. 99, "Opp." at 1) is the attempt obscure the fundamental and straightforward claim asserted by Plaintiffs: HCSC coverage policies for CLS violate the ACA's preventive care health service coverage mandate.[1] Plaintiffs challenge HCSC's policies which: define CLS as "covered…if you go to a trained, network provider"; and, define the scope of CLS coverage by a too limited set of procedure codes. In response, HCSC points to irrelevant merits arguments, its administrative barriers, and conjecture about breastfeeding mothers' conduct.

The ACA mandate was directed to insurers and health plans.[2] Yet, in its Opposition, HCSC recasts the ACA mandate and flouts fundamental concepts of health insurance coverage in an ultimately unpersuasive attempt to have its "individualized issues" arguments deemed pertinent to class certification. Ignoring the "coverage" requirement, HCSC instead argues about the availability of lactation services. Each class member *did* receive lactation services, but because of HCSC's failure to establish a proper CLS coverage policy, their claims were not covered by insurance as required by the ACA. Likewise, HCSC recasts Plaintiffs' claims as "whether the member had available to her a network provider" (Opp. at 1). HCSC's arguments, however, ignore that it is the insurer's responsibility to establish and follow effective, sound, legal, and, here, ACA-compliant, coverage policies, procedures and infrastructure, under which insurance claims can be adjudicated consistent with the law. HCSC seeks to dispense with its fundamental coverage responsibilities, such as contracting with and meaningfully identifying its

---

[1] Exhibits referenced herein are attached to the Donaldson-Smith Declaration [Dkt. Nos. 92-93, "Ex."] and the Supplemental Donaldson-Smith Declaration ("Supp. Decl. Ex.") filed concurrently herewith.

[2] The ACA requires that plans "must provide coverage for all of the following items and services, *and* may not impose any cost sharing requirements…" (42 U.S.C. § 300gg-13, emphasis added). Insurers cannot circumvent the ACA's mandate by not having in-network providers for the enumerated preventive services. *See* 29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii).

network CLS providers. In addition to running counter to the ACA mandate, the broader import of HCSC's "individualized issues" argument is to seek an intolerable and unsupported precedent in terms of insureds' challenges that are directed specifically to its coverage policies.

HCSC does not refute the facts that are relevant to class certification: the existence of the CLS policies; the substance and applicability of those policies to all members of the class and their CLS claims; and, that HCSC improperly denied and imposed cost-sharing on both in- and out-of-network CLS claims. HCSC has not rebutted Plaintiffs' argument that the determination of whether HCSC's CLS policies violate the ACA can and must be determined on a classwide basis. Plaintiffs have demonstrated that certification of the classes is proper under Rule 23.

II. HCSC'S CHALLENGED POLICIES AND CONDUCT APPLY CLASSWIDE

A. The Policies and Conduct at Issue

HCSC does not dispute that its CLS coverage policies, throughout the Class Period, have been set forth in its Medical Policy for Preventive Care Services and then as of July 2017 its Enterprise Clinical Payment and Coding Policy for Preventive Services. Ex. 19 at 1-2, and Ex. 20 at 1, 17. HCSC does not dispute that its Policies identified codes for CLS and provided that CLS services were eligible for coverage without cost-sharing ***when provided by a network provider***.[3] Pl. Br. at 6-9. Even in its Opposition at 6, HCSC admits that "HCSC provides coverage without cost-shares for lactation services *when rendered by an in-network provider*" (emphasis added).[4] HCSC's customer service representative (CSR) call notes similarly reveal that members were told that [redacted]. Pl. Br. at 13. These challenged policies are applicable to all class members' CLS claims.

[3] HCSC stated that it "defined the scope of the CLS benefit" by "identifying [procedure] codes associated with the ACA-mandated service that pay at no cost-share ***when billed by a network provider***..." Ex. 17, HCSC Rog. 1 at 6 (emphasis added).

[4] Both HCSC's and Plaintiffs' analyses of the CLS claims data revealed that [redacted] HCSC Ex. C, Bourgeois Decl. ¶7.c; and Pl. Br. at 9-10.

B. HCSC Raises Merits Arguments

HCSC raises merits arguments in defense of its challenged policies and conduct. *See* Opp. at Sections II.A-D.[5] HCSC seeks to have the Court at the class certification stage legitimize the very policies and conduct that are at issue. HCSC's arguments flow from the untenable and wrong condition HCSC created for its insureds. Whether an insured hunted down a provider among the thousands of general providers, or on happenstance stumbled upon a CLS provider, does not drive the determination of whether HCSC has ACA compliant policies and practices. As Plaintiffs' Brief detailed, the circularity and futility of HCSC's stance was not lost on HCSC members, clients, and employees. Ex. 25 at HCSC_0097086 [redacted]

i. What Constitutes CLS

HCSC contends (Opp. at 5) that the ACA and HRSA do not elaborate on what constitutes CLS, and it therefore has discretion on how to implement the CLS benefit (citing to 29 C.F.R. § 2590.715-2713(a)(4)). That is a merits argument. Even if relevant, its resolution applies classwide; it would go to the illegality of HCSC's CLS coverage policies applicable to all members of the Classes and the treatment of their CLS claims. Substantively, though, the assertion is misleading. The ACA and HRSA require "coverage" and state the frequency, method, treatment (*i.e.* comprehensive) and setting for CLS. *See* Pl. Br. at Section II.B. The application of any "reasonable medical management techniques" is only permitted to the extent that the treatment is "not specified in the relevant recommendation or guideline," and, even if the ACA and HRSA guidelines did not specify the CLS treatment (which they do), Section

[5] In conducting the Rule 23 analysis, "the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *see* Pl. Br. at fn. 26. As the Court held,"[a]t summary judgment, the parties can address the precise legal contours of the ACA's coverage requirements." (12/4/17 Order, Dkt. 50, at 13).

2713(a)(4) requires any applied medical management to be reasonable, and based on "***relevant clinical evidence" and on "established …techniques"***. HCSC's after-the-fact attempt to argue that its CLS was appropriately limited in its scope is a merits argument.[6]

ii. Network of CLS Providers

HCSC argues (Opp. at 6-7) that it has "established a network of providers." HCSC's Opposition asserts (as HCSC did in its motion to dismiss filings) that it has thousands of in-network providers of lactation services. (Opp. at 6; *see also* Pl. Br. at 11). HCSC does not have thousands of trained CLS providers. HCSC's argument is driven by its limited view of CLS coverage. CLS is not just an OB/GYN recommending breastfeeding or a weight check of a breastfed baby by a pediatrician. Plaintiffs' expert Dr. Lauren Hanley[7] points out the impossibility of HCSC's position from a clinical and practice standpoint.[8] HCSC's argument is unsupported.[9] HCSC cites to the declarations and deposition testimony it propounded from hospitals and their designees. As an initial point, HCSC does not demonstrate that these facilities and providers were identified by HCSC to insureds by name (provider or facility name) as network CLS providers. HCSC is simply relying on hospitals and the in-hospital breastfeeding

---

[6] HCSC's litigation arguments, like its conduct during the Class Period, directly contravene the ACA's mandate to address "access and utilization of these services", and "underutilization of preventive services" due to "market failures" identified as "***plans' lack of incentive to invest in these services***". Ex. 1, 75 FR 41726 at 41730, Table 1, and at 41731 (emphasis added).

[7] In contrast to its holding with respect to the relevancy and admissibility of Dr. Hanley, the *Condry* court deemed HCSC's experts Ms. D'Apuzzo and Dr. Lee as providing "*little or no opinion relevant to this [class] certification decision*." *Condry, et al. v. UnitedHealth Grp., Inc., et al.*, No. 17-cv-00183, 2019 U.S. Dist. LEXIS 106254, at *12 n.2 (N.D. Cal. May 23, 2019). Consistent with, or possibly heeding, that accurate characterization, absent from HCSC's Opposition is any material reliance on the Reports and Opinions of Ms. D'Apuzzo and Dr. Lee, or its other expert Mr. Hoyt. HCSC experts are not proffering opinions with respect or relevant to the class certification decision. Plaintiffs will seek to exclude and/or limit the expert testimony of HCSC's experts at the appropriate time, at summary judgment and/or trial.

[8] *See* Ex. 21, Dr. Hanley Rpt. at 1-3. Absent specific CLS training plus the ability and willingness to provide office visits of sufficient duration, physicians and their staff cannot be assumed, as HCSC assumes, to be providing CLS. *Id.* at 10.

[9] Plaintiffs requested that HCSC identify every provider in its network since August 1, 2012 who it contends offered(s) network CLS. Ex. 17, HCSC Rog. 5 at 12. HCSC did not identify any providers.

services offered primarily at the time of delivery. Also, the testimony of the hospital designees undermine HCSC's characterizations about its CLS coverage, its claimed "established" "network", and insureds' ability to know about and access all CLS at no-cost from providers.[10] HCSC also ignores the import of its "survey". Opp. at fn. 12; *compare* Pl. Br. at 13-14. HCSC's belated undertaking reinforces the wrong-headedness (as recognized even internally at HCSC) of HCSC's assumption that network providers are CLS providers and that they are willing and able to provide CLS to HCSC's insureds.

iii. Waiver or After-the-Fact Appeals Processes

HCSC makes passing reference to a purported "waiver" and processes (appeals and claims adjustment processes) insureds are supposed to use *after* HCSC improperly denies or applies cost-sharing to a CLS claim. Opp. at 7. Aside from such arguments being irrelevant to class certification, HCSC is asking the Court to ignore facts and reality. *First*, such position flies in the face of the ACA preventive care mandate; among other things, it discourages insureds from seeking out the preventive service by imposing the financial barrier that was to be removed. This further evidences HCSC's persistence that it will require insureds to jump through

---

[10] ***See,* HCSC Ex. G: Delay Tr.** at 38:12-39:13, Of the four St. John's locations, only one provides breastfeeding support services; *Id.* at 127:19-128:14, 164:8-12, Pamphlets and materials advertising St. John's breastfeeding support services are not publicly available; not accessible by mothers who don't deliver at St. John's. ***See,* HCSC Ex. K: McConville Tr.** at 29:25-30:8, Benefis only has 1 IBCLC on staff per day; *Id.* at 93:16-94:7, Benefis' informational brochures about the breastfeeding support services it offers are not available on its website. ***See,* HCSC Ex. H: Deschamps Tr**. at 74:17-76:9, Community Medical Center (CMS) only has 2 IBCLC's on staff to meet all of the hospital's breastfeeding counseling needs; *Id.* at 100:1-13, CMS's IBCLC's have an enormous workload, seeing 40 patients per week; ***See* HCSC Ex. E: Chamblin Tr.** at 57:16-18, DuPage does not offer in-home consultations; *Id.* at 60:3-5, DuPage does not offer post-discharge breastfeeding classes; *Id.* at 59:13-16, HCSC's Provider Finder does not list DuPage's IBCLCs; *Id.* at 68:19-69:2, Chamblin does not know how BCBSIL insureds can identify that she provides breastfeeding support services on provider finder. ***See,* HCSC Ex. J: Meadows Tr.** at 116:14-16, Methodist does not offer in-home consultations; *Id.* at 111:13-22, Methodist's pamphlets informing mothers about services are only distributed within the hospital; and, *Id.* at 112:5-8, Methodist's designee testified that the only way for mothers to access its informational pamphlets is by visiting one of its facilities. ***See* HCSC Ex. I: Houchins Tr.** at 93:15-20, Northwest's support group started in 2017; *Id.* at 96:7-10, Northwest does not offer in-home consultations.

administrative hoops in violation of the ACA mandate. HCSC's stance exemplifies why its policies must be addressed for all insureds, retrospectively and prospectively, classwide. *Second*, in connection with making its argument about the availability of a waiver process, HCSC included a declaration of its employee Ms. Cress (HCSC Ex. L) where Ms. Cress identified [redacted][11] *Third*, HCSC's position is that care is available from network providers. Therefore, its suggestion that insureds can secure a waiver, or even a successful appeal or adjustment is pointless. HCSC is thwarting coverage, improperly shifting burdens onto the Plaintiffs and members of the Classes, and erecting administrative barriers to CLS coverage.

Fourth, HCSC's Opposition at 7 references the information its CSRs provide to insureds (*i.e.* to go back to their primary care providers) and to the Hoyt Report's unremarkable and irrelevant proposition that people seek recommendations about providers from friends and family. HCSC ignores that insureds are looking to identify and obtain services from *in-network* providers, as HCSC directs. And, it ignores that the fundamental role of an insurer is to identify its in-network providers from whom insureds can secure services, which is particularly critical to the purpose and implementation of the ACA preventive care mandate. As Plaintiffs' Brief detailed in Sections II.C-D, HCSC did not have information to provide about CLS providers.[12]

iv. The Plaintiffs' Experiences

HCSC does not, and cannot, contend that the Plaintiffs' and their CLS claims were subject to differing policies. The Plaintiffs' experiences reaffirm that HCSC has illusory, non-

---

[11] Ms. Cress [redacted] HCSC Ex. L at ¶7.

[12] [redacted] *See* Ex. 26 at HCSC_0097043; Pl. Br. at Sections II.C and II.D.

ACA compliant policies for CLS. HCSC's assertion that it was Plaintiffs' choice to receive CLS from out-of-network providers is a red-herring. HCSC aims to avoid scrutiny of its non-compliance by suggesting, unpersuasively, that HCSC's liability in this Action pivots on the individualized knowledge or conduct of each Plaintiff. However, HCSC's liability is not measured based on the Plaintiffs' knowledge, but on the lawfulness of HCSC's CLS policies.

Further, HCSC's assertions about what the Plaintiffs could have done are irrelevant and wrong. (Opp. at 10-11). None of Plaintiffs' prenatal and postpartum providers, including a midwife; two hospitals; a primary care provider; and an IBCLC who led a prenatal breastfeeding class (Opp. at 10-11), offered or rendered CLS to Plaintiffs (*see* Pl. Br. at 3). Yet, HCSC asks the Court to believe that they did or could have. It is an exercise in futility. HCSC did not have the infrastructure, and while Plaintiffs sought information from HCSC about network CLS providers, HCSC did not identify any of the Plaintiffs' providers or facilities, or any other network provider of CLS. Prior to obtaining out-of-network CLS,[13] all three Plaintiffs conducted extensive searches using either HCSC's Blue Access for Members ("BAM") or Provider Finder in an effort to find network providers of CLS (Pl. Br. at fn. 4). As any other class member would have encountered, no network CLS providers were located because [redacted] (Ex. 16, Benner at 2; Pl. Br. at fn. 4). Further, as Ms. Benner testified, BAM is the platform that both HCSC members and CSRs use to identify in-network providers, and the information available to both is identical. (Supp. Decl. Ex. 37, Benner Tr. at 133:9-24). As a result, just like online searches, calls to HCSC's CSRs to locate in-network providers were futile for Plaintiffs and class members because the CSRs had no different information or search

[13] Plaintiffs received CLS from out-of-network providers on the following dates: Briscoe, 12/1/14; Magierski, 4/13/16; and Adams, 5/26/16.

capabilities than members. *Id.*; Pl. Br. at fn. 5.

III. CLASSWIDE PROCEEDINGS WILL GENERATE COMMON ANSWERS AND TYPICALITY IS SATISFIED[14]

HCSC is incorrect that its liability cannot be determined with common proof. Opp. at 15-22. *See A.F. v. Providence Health Plan*, 300 F.R.D. 474, 477, 481 (D. Or. 2013) (certifying a class of persons who were denied treatment based on a plan exclusion of a particular treatment for autism because, among other reasons, "all class members have in common the issue of whether the [exclusion] violates state or federal law"). *See* Pl. Br. at fn. 29.

A. HCSC's "Available to Her" Theme

Throughout its Opposition, HCSC's theme is that a liability determination depends on whether lactation services are "available to her", and what information an insured may have had in her possession (*see* Opp. at 1, 16). Those arguments are red-herrings. HCSC did not adjudicate CLS claims based on whether in-network services were unavailable to claimants. HCSC did not inform insureds that claims were denied or had cost-sharing applied because HCSC identified available in-network providers. HCSC did not ask the insureds to demonstrate that they did not have an in-network CLS provider available before denying a claim or imposing cost-sharing. HCSC could not point to specific in-network CLS providers as the reason for denying claims. HCSC's CLS policies, discussed in Section III, were not based on member specific circumstances; rather they applied the foregoing uniform policies to all class members.

B. Billing Codes

HCSC asserts that its billing codes for CLS are adequate (Opp. at 8, 19-20) in response to Plaintiffs' arguments that HCSC's CLS billing policy violated the ACA (Pl. Br. at 6-10). The adequacy or inadequacy of HCSC's billing codes – a merits argument – requires resolution on a

[14] HCSC does not challenge numerosity or the adequacy of the representative parties' counsel.

classwide basis. Indeed, HCSC's arguments support that very conclusion. HCSC points out: "[i]t is industry standard for an insurer, like HCSC, to provide coding guidance of services" and "[w]ithout such guidance, payors would not be readily able to identify claims that need to be processed according to particular rules, such as network lactation claims under ACA." (Opp. at 8). Exactly. The challenged HCSC guidance as it exists and as altered by any judgment governs coverage for every CLS claim. HCSC asserts that "none of Plaintiffs' suggested additional procedure codes indicate a lactation service on their face" (*id*. at 3, 19). That is misdirection. HCSC's witness, Ms. Benner, refutes this point. Ms. Benner provided the narrative descriptions for HCSC's CLS procedure codes (99401-04, 99411-12, 99347-50) (Ex. 16, Benner at 5-6). Those codes do not mention lactation or CLS. Plaintiffs asserted that absent the additional procedure codes (to recognize the scope, complexity and duration of the CLS visit) coupled with appropriate diagnosis codes, HCSC failed to capture and thus cover CLS.[15] The billing codes for CLS apply classwide. HCSC's coding policy for CLS (like any other covered service) does not and could not hinge on an individual class member's circumstance.[16] In HCSC's words – the "guidance" for it to be "able to identify claims that need to be processed according to particular rules, such as network lactation claims under ACA" applies to all class members. (Opp. at 8).

C. Claims Data

Further, HCSC repeatedly argues that the claims data demonstrates that they had network providers (Opp. at 2, 9, 15-16 "over time and across markets"). *First*, the claims data to which HCSC refers depicts claims HCSC internally identified as ***adjudicated*** or ***processed*** as "in-

[15] Even HCSC's witness, Dr. Chamblin, testified that she uses procedure codes that are not in HCSC's policy. HCSC Ex. E, Chamblin Tr. at 71-72.

[16] Where a plaintiff presents evidence that a defendant has engaged in standardized conduct with respect to putative class members, the legality of which is an "outcome determinative issue," commonality is satisfied. *Healy v. IBEW, Local Union No. 134*, 296 F.R.D. 587, 592 (N.D. Ill. 2013); *see also Stafford v. Carter*, 2018 U.S. Dist. LEXIS 34266, at *13-17 (S.D. Ind. Mar. 2, 2018) cited at Pl. Br. at 18.

network" – that is very different and does not demonstrate that HCSC actually had CLS trained network providers. HCSC Ex. C, Bourgeois Decl. at ¶6.b [redacted]; at ¶7.c [redacted]. *Second*, HCSC focuses (Opp. at 9) on the claims submitted with "HCSC's coding guidance," which Plaintiffs have asserted fails to capture the full scope of CLS. *Third*, as Plaintiffs pointed out and HCSC's Opposition does not dispute: [redacted] Pl. Br. at 9-10. Those statistics do not support the network coverage for CLS that HCSC contends. *Fourth*, HCSC admitted insureds were on their own in locating CLS providers: its CSRs [redacted] Ex. 16, Benner at 1(b). Finally, as discussed *supra*, HCSC's policy was that only in-network CLS claims would be eligible for ACA-preventive care coverage. That policy together with HCSC's inability to provide the names of network CLS providers, steered insureds to not submit out-of-network CLS claims.[17] HCSC's CLS claims database, therefore, does not capture unsubmitted out-of-network claims, and consequently, does not demonstrate the availability of network providers.

D. Other CLS Cases

Throughout its Opposition, including with respect to its Commonality challenge (*id.* at 12-16, 21, 23), HCSC spills much ink relying on decisions from *Condry* and *York, et al, v.*

[17] Contrary to HCSC's Opp. at 20-21, the inclusion of persons who never submitted claims is not an expansion of the classes. Plaintiffs have always asserted that HCSC's policies deterred the submission of out-of-network CLS claims, and inclusion of such persons in the classes is not difficult. *See* Pl. Br. at fn. 27.

Wellmark, Inc., et al. HCSC's propositions are not supported by those decisions, which were addressed in Plaintiffs' Opening Brief at 15, fn. 23. Fundamentally, unlike the defendant insurers in these cases, UnitedHealth and Wellmark, HCSC did not seek pre-class certification summary judgment as to any of the individual plaintiffs. Now, HCSC tries to improperly bootstrap those proceedings (involving different cases, plaintiffs, and insureds) here. Substantively, HCSC is wrong that those decisions support the presence of "individualized issues".

First, the *Condry* summary judgment order affirmed that, with respect to the ACA's "requirement that health insurers provide coverage" for CLS, it requires providing meaningful access by insurers, "[i]llusory or de minimus access is not sufficient…." *Condry*, No. 17-cv-00183, 2018 U.S. Dist. LEXIS 111233, at *4 (N.D. Cal. June 27, 2018). *Second*, in *Condry*, United's provider directory actually identified an in-network provider by name and specifically as a "lactation specialist" who was proximate to two plaintiffs, both of whom resided in the San Francisco-area; that circumstance (not present here) was relied on by the *Condry* court in issuing the summary judgment opinion as to those two plaintiffs. *Id.* at *8-9. Likewise contrary to HCSC's arguments, the *Condry* court acknowledged that even if there were "differing results" they "do not automatically defeat class certification – "the Court could award classwide relief by requiring the company to reprocess all claims previously denied pursuant to that noncompliant policy, even if some claims were granted pursuant to that non-compliant policy (and even if some claims would still be denied pursuant to a compliant policy). *Condry*, 2019 U.S. Dist. LEXIS 106254, at *7.[18] HCSC's assertions are unpersuasive.

[18] HCSC's Opp. at fn. 18, also cites to the settlement in *Ferrer v. CareFirst, Inc.*, Case No. 1:16-cv-02162 (D.DC) for the proposition that HCSC's "current" list of CLS codes is similar to CareFirst's CLS codes. HCSC is incorrect. First, it was only beginning in July 2017, over six months after this Action was filed, that HCSC added some of the referenced codes. *See* Pl. Br. at 7. Second, in any event, unlike CareFirst's policy which provides that "non-physician providers may bill the [codes]" (HCSC Ex. T, Dkt. 30-1, at 90-

E. Other Purported Individualized Issues

HCSC argues that members seek CLS services based on their personal preference. First, there are two wholly separate, basic events: the selection of a provider and the identification of providers that are in-network whose services will be covered by insurance.[19] In the context of the ACA preventive care mandate, an insurer's identification of in-network providers is critical to insureds being able to either (i) access the no-cost benefit from such in-network providers, or, (ii) be informed that their out-of-network CLS claims should be submitted to the insurer and covered without cost-sharing. The repeated pleas from HCSC's group plans, [redacted], for the identity of CLS network providers further belies HCSC's contention. Ex. 26 at HCSC_0097040-41. Likewise, HCSC's arguments about any "need" for individual medical record review or varying payment amounts incurred by class members do not preclude certification. The resolution of liability is directed at HCSC's, not the insureds', conduct.[20]

---

104), HCSC's policy is that [redacted] (Ex. 14, Janulis at 6). Thus, [redacted] *See* HCSC Ex. B (Rebuttal Rpt. at ¶43). This alone is a material difference between the two lists.

[19] Contrary to HCSC's argument, its call center notes reveal that [redacted] *See* Ex. 31 at HCSC 0062002; Ex. 32 at HCSC 0062286; Ex. 33 at HCSC 0065428; Ex. 15, Ludaka at 1 [redacted]

First, contrary to HCSC Opp. at 23, Plaintiffs Briscoe and Magierski both exhausted administrative remedies. Briscoe testified that she appealed the EOB dated 1/9/15 denying her $200 lactation claim as "not covered", which resulted in HCSC issuing a revised EOB dated 2/6/15 in which the $200 charge was now reflected as "covered," but reduced by improperly applying $40 to coinsurance. HCSC Ex. P at 136:9-139:8; Ex. 7, Briscoe Rog. 8 at 14-15. Similarly, Magierski testified that she appealed the EOB dated 5/11/16 that applied $137.59 of the $235 billed amount to her deductible, but in a letter dated 6/6/16, HCSC upheld its initial determination. HCSC Ex. P at 96:18-100:15; Ex. 8, Magierski Rog. 8 at 14-15. Second, exhaustion of remedies is futile when claim denials are based on an established policy. *See Stanek v. AT&T*, 96 C 4096, 1997 U.S. Dist. LEXIS 3716, at *17-18 (N.D. Ill. Mar. 27, 1997).

IV. PLAINTIFFS SATISFY RULE 23(b)(1) AND (b)(2)

HCSC's response regarding (b)(1) and (b)(2) certification is limited (Opp. at 23-24). HCSC relies on *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F. 3d 883 (7th Cir. 2011) (Opp. at 14, 24-25). *Kartman*, however, is distinguishable in several material respects. In *Kartman*, the Seventh Circuit, addressing the merits of the plaintiffs' claim rather than Rule 23 issues, determined that Indiana law did create a duty for insurers to examine all hail-damaged roofs pursuant to an identified uniform standard, and that State Farm had an ad hoc method for determining coverage for hail-damaged roofs. 634 F.3d at 889-91.[21] In contrast, the ACA creates an actual, specific duty and statutory requirement directly governing CLS coverage. And, HCSC has, of course, policies specific to CLS preventive care coverage. Also, contrary to HCSC's claim, Plaintiffs are seeking the usual remedy sought in analogous cases.[22] "Several cases hold that certification of an ERISA claim is proper under Rule 23(b)(2) where monetary relief, in conjunction with injunctive relief, is sought." *Breedlove v. Tele-Trip Co.*, No. 91 C 5702, 1993 U.S. Dist. LEXIS 10278, at *25-26 (N.D. Ill. July 26, 1993); *Wit v. United Behavioral Health*, 317 F.R.D. 106, 138 (N.D. Cal. 2016) ("The situation here differs from *Kartman* in that Plaintiffs are asserting claims to obtain injunctive relief based on an injury that is distinct from the actual denial of benefits and that is cognizable under ERISA…").

Finally, Plaintiffs, including Ms. Briscoe, have standing to represent the Classes. (Opp. at 23). Plaintiffs have standing to seek an order remedying HCSC's past violations, including an

---

[21] *N.B. v. Hamos*, 26 F. Supp. 3d 756, 774 (N.D. Ill. 2014) (where plaintiffs' claims would require policy modifications and such policy changes were generally applicable, and therefore would benefit all class members, certification under 23(b)(2) was appropriate), *see* Pl. Br. at fn. 38.

[22] *Morgan v. Laborers Pension Trust Fund*, 81 F.R.D. 669, 681 (N.D. Cal. 1979)("Courts are not precluded from certifying a class under [] 23(b) merely because plaintiffs have included a request for monetary damages in their complaint."); *Des Roches v. Cal. Physicians' Serv.*, 320 F.R.D. 486, 509-10 (N.D. Cal. 2017)(Plaintiffs' requested reprocessing injunction meets the requirements of Rule 23(b)(2). Such injunction would apply to the class as a whole and would not require the court to engage in individual determinations of class members' claims.).

order requiring HCSC to process CLS claims under a corrected standard, as each Plaintiff incurred harm in having cost-sharing imposed by HCSC on their CLS claims (Pl. Br. at 4). Plaintiffs have standing to pursue the retrospective injunctions because (1) they have alleged an injury in fact, in the form of a deprivation of the health insurance benefits to which they were entitled; (2) there is a causal connection between their injury and the conduct complained of, namely, HCSC's CLS policy, and (3) it is likely, as opposed to merely speculative, that this injury will be redressed by the order Plaintiffs seek. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). In order to have a personal stake in retrospective relief, a plaintiff need not have likelihood of future harm because the relief sought seeks to remedy past wrong to the Plaintiffs and class members.[23] Moreover, that any Plaintiff (even if she is not a current plan member) lacks standing to seek prospective declaratory and injunctive relief "create[s] a difficult situation for insureds" and undermines the purpose of insurance. *Johnson v. Hartford Cas. Ins. Co.*, No. 15-cv-04138, 2017 U.S. Dist. LEXIS 77482, at *31-32 (N.D. Cal. May 22, 2017) (holding that plaintiff had standing for injunctive relief because if again insured by Hartford, plaintiff "should be able to have confidence that Hartford will obey the law in the future if he shows that it is violating it now").

V. PLAINTIFFS SATISFY RULE 23(c)(4)

In the alternative, Plaintiffs sought certification under subsection (c)(4). Contrary to

---

[23] In certifying a class Rule 23(b)(1) and (b)(2) class, the court in *Wit*, 317 F.R.D. at 132, rejected defendant's argument that because some of the named plaintiffs were no longer members of its insurance plans, they do not have standing to seek injunctive or declaratory relief. *See also Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 C 5755, 2000 U.S. Dist. LEXIS 17832, at *19 (N.D. Ill. Nov. 30, 2000) (holding that former employee had standing to seek injunctive relief because he possessed the "same interest and suffered the same injury as the other class proposed class members, whether former or current"); *Walker v. Bankers Life & Cas. Co.*, Civil Action No. 06 C 6906, 2007 U.S. Dist. LEXIS 73502, at *17-18 (N.D. Ill. Oct. 1, 2007)(same).

HCSC's argument (Opp. at 25), Rule 23(c)(4) certification is appropriate to address whether HCSC's coverage policies for CLS violated the ACA. HCSC cites to *Kartman* asserting that, even under (c)(4), individualized issues would "come to the fore." (Opp. at 25). HCSC is incorrect: In *Kartman*, (c)(4) certification was not sought (*id.* at 886), and as discussed, material factual and legal distinctions exist between *Kartman* and Plaintiffs' claims.[24] Also, HCSC's argument is circular. Rule 23(c)(4) is invoked to carve out common issues for class treatment, for example, if the claim as a whole would not satisfy (b)(3)'s predominance requirement, or, in other words, even if HCSC's purported "individualized issues" were germane, which they are not as Plaintiffs are not seeking (b)(3) certification. *Finally*, and to be clear, the Classes must be certified under Rule 23(a), (b)(1) and (b)(2). In their Brief, Plaintiffs cited to *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 483, 491 (7th Cir. 2012). The (b)(3) certification concerns raised in *McReynolds*, a Title VII racial discrimination case asserted against Merrill Lynch, which are not even present here, did not preclude certification. *Id.* To avoid inconsistent determinations as to whether Merrill Lynch violated the antidiscrimination statutes, the Seventh Circuit reversed a denial of class certification under both Rules 23(b)(2) and (c)(4) on the issue of "whether the defendant has engaged and is engaging in practices that have a disparate impact." *Id.* at 492.

VI. CONCLUSION

Based on the foregoing and Plaintiffs' Opening Brief, Plaintiffs respectfully request that the Court certify the proposed Classes under Rules 23(b)(1) and (b)(2) (or (c)(4), in the alternative).

DATED: October 18, 2019

---

[24] Also, unlike here, in *Kartman* the "particular standard State Farm used to evaluate policyholders' hail damage ***is not an element of any case presented by these plaintiffs*** for final injunctive relief", which fact would not favor (c)(4) certification. *Id.* (Emphasis added). Notably, the *Kartman* court did state that "[i]n some circumstances, the applicable standard of care might be a proper separable issue." *Id.*

CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP

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

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Kimberly M. Donaldson Smith, an attorney, hereby certify that on October 18, 2019, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kimberly M. Donaldson- Smith
Kimberly M. Donaldson-Smith

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

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

SUPPLEMENTAL DECLARATION OF KIMBERLY DONALDSON-SMITH IN CONNECTION WITH PLAINTIFFS' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Kimberly Donaldson-Smith, hereby declare and state as follows:

1. I am a Partner of the firm of Chimicles Schwartz Kriner & Donaldson-Smith LLP, counsel for Plaintiffs Laura Briscoe, Kristin Magierski, and Emily Adams (collectively, "Plaintiffs") in this action. I make this declaration in connection with Plaintiffs' Reply in Further Support of Plaintiffs' Motion for Class Certification ("Plaintiffs' Memorandum"). I have personal knowledge of the following facts, and if called as a witness, I could and would competently testify to them.

2. True and correct copies of the following Exhibits are submitted in support of Plaintiffs' Memorandum and attached hereto:

Exhibit No.	**Description**	**Designation**
37	Deposition Transcript of HCSC's Witness, Teresa Benner (excerpts)	Filed Publicly

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 18, 2019

By: */s/ Kimberly Donaldson-Smith*
Kimberly Donaldson Smith
CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH LLP
361 W. Lancaster Avenue
Haverford, PA 19041
(610) 642-8500
KMD@Chimicles.com

EXHIBIT 37

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

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

The videotaped deposition of TERESA BENNER, called as a witness for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before Michelle M. Yohler, a Certified Shorthand Reporter of the State of Illinois, CSR No. 84-4531, at 10 South Wacker Drive, 40th Floor, Chicago, Illinois, on the 10th day of April, 2019, at 9:28 a.m.

Q. And by "called out," you mean that there was an additional filter feature --

A. Yes. Mm-hm.

Q. -- under Additional Services?

And it looks like it's BAM --

A. Yes.

Q. -- is the acronym?

A. Yes.

Q. So according to this, BAM was updated in August of 2018 -- or, no, sorry --

A. December.

Q. -- December of 2017 to include the Additional Services feature -- or search option of breastfeeding/lactation support?

A. Yes.

Q. Okay. And Blue Access for Members is the platform that members and the customer advocates used to identify in-network --

A. Correct.

Q. -- providers?

And customer advocates don't see anything different on that platform than the member would, right?

A. No, they use the same portal.