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.	Case No. 1:16-cv-10294 Judge John Robert Blakey **REDACTED PUBLIC COPY**

HEALTH CARE SERVICE CORPORATION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

Martin J. Bishop
Rebecca R. Hanson
Reed Smith LLP
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: 312.207.1000
Fax: 312.207.6400
E-Mail: mbishop@reedsmith.com
rhanson@reedsmith.com

Raymond A. Cardozo (admitted *pro hac vice*)
Reed Smith LLP
101 S. Second Street, Suite 1800
San Francisco, CA 94105
Tel: 415.543.8700
Fax: 415.391.8269
E-Mail: rcardozo@reedsmith.com

Attorneys for Defendant
Health Care Service Corporation

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 4

A. Lactation and Related Care Present a Range of Individualized Issues. 4

B. ACA Gives Health Plans Discretion to Implement the Benefit. 4

C. HCSC Has Established a Network of Providers and Billing Guidance. 5

D. HCSC's Members Have Regularly Accessed and Obtained Coverage Without Cost-Shares for Lactation Services Across Markets and Over Time. 8

E. The Named Plaintiffs' Individual Experiences Varied Substantially. 9

F. Plaintiffs Sue for Damages Based on Out-Of-Network Lactation Services. 11

G. Two Other Courts Conduct Individualized Analyses at Summary Judgment. 11

H. The *Condry* Court Twice Denies Class Certification. 11

I. This Court Denies Plaintiffs' Original Motion for Class Certification 13

J. Plaintiffs Seek Certification of New Classes Under (b)(1) and (2). 13

III. ARGUMENT 13

A. Plaintiffs Face a Significant Burden Under Rule 23 13

B. Plaintiffs Cannot Satisfy the Prerequisites of Rule 23(a). 14

1. Plaintiffs' Classes Lack Commonality 14

a. Plaintiffs' Claim Regarding Out-Of-Network Claims Does Not Establish Common Policies or Injuries. 15

b. Plaintiffs' Claim Based on Purportedly Narrow Coding Similarly Requires Individualized Inquiries. 19

c. Plaintiffs' Cases Do Not Support Commonality. 20

2. Plaintiffs Are Not Typical or Adequate Class Representatives. 22

C. Plaintiffs Cannot Satisfy the Prerequisites of Rule 23(b)(1) or (2). 22

1. Plaintiffs Lack Article III Standing to Seek Prospective Relief. 22

2. Plaintiffs' Classes do not Meet the Requirements of Rule 23(b)(1)(A) 23

3. Plaintiffs' Classes Do Not Meet the Requirements of Rule 23(b)(2). 23

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

A.F. v Providence Health Plan,
300 F.R.D. 474 (D. Or. 2013) 21

Am. Express Co. v. Italian Colors Rest.,
570 U.S. 228 (2013) 14

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 22

Banks v. N.C.A.A.,
977 F.2d 1081 (7th Cir. 1992) 22

Bolden v. Walsh Constr. Co.,
688 F.3d 893 (7th Cir. 2012) 14, 15, 21

Butler v. Ill. Bell Tel. Co.,
No. 06 C 5400, 2008 WL 474367 (N.D. Ill. Feb. 14, 2008) 14, 23

Cates v. Whirlpool Corp.,
No. 15-cv-5980, 2017 WL 1862640 (N.D. Ill. May 9, 2017) 24

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 13

Condry v. UnitedHealth Group Inc.,
No. 17-cv-00183, 2018 WL 3203046 (N.D. Cal. June 27, 2018) ..... *passim*

Condry v. UnitedHealth Group Inc.,
No. 17-cv-00183, 2019 WL 2552776 (N.D. Cal. May 23, 2019) ..... *passim*

Condry v. UnitedHealth Group Inc.,
No. 17-cv-00183, 2019 WL 7050114 (N.D. Cal. Dec. 23, 2019) ..... *passim*

Condry v. UnitedHealth Group Inc.,
No. 17-cv-00183, 2019 WL 7489864 (N.D. Cal. Dec. 19, 2019) 12, 22

Davis v. AT&T Corp.,
No. 15-cv-2342, 2017 WL 1155350 (S.D. Cal. Mar. 28, 2017) 19

Dennis F. v. Aetna Life Ins.,
No. 12-cv-02819, 2013 WL 5377144 (N.D. Cal. Sept. 25, 2013) 21

Doiron v. Conseco Health,
279 Fed. App'x 313 (5th Cir. 2008) 18

DWFII Corp. v. State Farm Mut. Auto. Ins. Co.,
469 F. App'x 762 (11th Cir. 2012) 21

Ferrer v. CareFirst, Inc.,
Case No. 1:16-cv-02162, Dkt. 30-1 24

Flanagan v. Allstate Ins. Co.,
242 F.R.D. 421 (N.D. Ill. 2007).....21

Graddy v. BlueCross BlueShield of Tenn., Inc.,
No. 4:09-cv-84, 2010 WL 670081 (E.D. Tenn. Feb. 19, 2010).....21

Holmes v. Godinez,
311 F.R.D. 177 (N.D. Ill. 2015).....21

Jamie S. v. Milwaukee Pub. Schs.,
668 F.3d 481 (7th Cir. 2012) 23

Kartman v. State Farm Mut. Auto. Ins. Co.,
634 F.3d 883 (7th Cir. 2011) 14, 23, 24

Lindemann v. Mobil Oil Corp.,
79 F.3d 647 (7th Cir. 1996) 22

McCaster v. Darden Rests., Inc.,
845 F.3d 794 (7th Cir. 2017) 14

McDaniel v. Qwest Commc'ns Corp.,
No. 05 C 1008, 2006 WL 1476110 (N.D. Ill. May 23, 2006) 23

Mullins v. Direct Digital, LLC,
795 F.3d 654 (7th Cir. 2015) 20

Oshana v. Coca-Cola Co.,
472 F.3d 506 (7th Cir. 2006) 18, 22

Pella Corp. v. Saltzman,
606 F.3d 391 (7th Cir. 2010) 21

Phillips v. Sheriff of Cook County,
828 F.3d 541 (7th Cir. 2016) 14, 15, 17, 21

Portis v. City of Chicago,
347 F. Supp. 2d 573 (N.D. Ill. 2004) 22

Sierakowski v. Ryan,
223 F.3d 440 (7th Cir. 2000) 22

Simic v. City of Chicago,
851 F.3d 734 (7th Cir. 2017) 22

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).....14, 15

Wit v. United Behavioral Health,
317 F.R.D. 106 (N.D. Cal. Sept. 19, 2016).....20

York v. Wellmark, Inc.,
No. 4:16-cv-00627, 2019 WL 1493715 (S.D. Iowa Feb. 28, 2019) ..... *passim*

Zinser v. Accufix Research Inst., Inc.,
253 F.3d 1180 (9th Cir. 2001) 23

Statutes

42 U.S.C. § 300gg-13(a)(4) 4

42 U.S.C. § 18022(c)(3)(B) 18

Mont. Admin. Code § 37.108.219 6

Regulations

29 C.F.R. § 2520.102-3.....6

29 C.F.R. § 2590.715-2713(a)(2).....20

29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii).....5, 15

29 C.F.R. § 2590.715-2713(a)(4).....5

45 C.F.R. § 156.230 6

45 C.F.R. § 156.230(b) 6

50 Ill. Admin. Code § 2051.310 6

50 Ill. Admin. Code § 2051.310(a)(5) 6

N. M. Admin. Code § 13.10.22.8(A).....6

N. M. Admin. Code § 13.10.22.8(D).....6

Tex. Admin. Code § 3.3704(f).....6

Other Authorities

https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/aca-implementation-faqs;.....5

https://www.hrsa.gov/womens-guidelines-2016/index.html 4

I. INTRODUCTION

Despite being given a second chance, Plaintiffs fail to cure the deficiencies that underlay this Court's denial of their motion for class certification. Like their previously denied motion, Plaintiffs' renewed motion asks the Court to certify multi-state, multi-year classes of present and former Health Care Service Corporation ("HCSC") members who allegedly were denied access to cost-share-free lactation services under the Affordable Care Act ("ACA"). But the ACA directs health plans to cover in-network preventive lactation support and counseling services without cost-shares (*e.g.*, deductibles) and allows health plans to impose cost-shares on, or deny coverage for, out-of-network services so long as the member had a network provider available. The ACA's requirements dictate individualized analysis and each putative class member's claim turns on whether an in-network lactation service was available to that member. As such, these claims cannot be adjudicated on a class-wide basis, so no classes can be certified under Rule 23.

Two federal courts have analyzed these requirements at summary judgment, conducted the required individualized inquiry, and reached ***different*** outcomes based on the particular facts of each named plaintiff's claim. *Condry v. UnitedHealth Group Inc.*, No. 17-cv-00183, 2018 WL 3203046 (N.D. Cal. June 27, 2018) ("*Condry SJ Order*"); *York v. Wellmark, Inc.*, No. 4:16-cv-00627, 2019 WL 1493715 (S.D. Iowa Feb. 28, 2019). Relying on this individualized analysis, one of these courts ***twice*** denied certification of classes substantially similar to those asserted here. *Condry v. UnitedHealth Group Inc.*, No. 17-cv-00183, 2019 WL 2552776 (N.D. Cal. May 23, 2019) ("*Condry Class Order I*"); *Condry v. UnitedHealth Group Inc.*, No. 17-cv-00183, 2019 WL 7050114 (N.D. Cal. Dec. 23, 2019) ("*Condry Class Order II*").

Consistent with these decisions, this Court denied Plaintiffs' first attempt to certify a putative class. Nevertheless, Plaintiffs once more attempt to homogenize their disparate claims, urging the Court to focus solely on purported uniform policies. But Plaintiffs not only misstate

Defendant's policies, they also fail to show how the Court could conduct on a class-wide basis the required assessment of the ***impact*** of such policies on any particular class member in terms of liability, remedies, and available defenses. A plaintiff cannot meet her Rule 23 burden merely by identifying common questions that a defendant's conduct raises. Rather, a plaintiff must demonstrate a common injury among class members, and how the class action device would facilitate common answers through common proof. Plaintiffs have not satisfied that burden here.

Such is the case with Plaintiffs' theory that HCSC violated ACA by applying a uniform policy of denying coverage for, or imposing cost-shares on, out-of-network lactation claims. In fact, the evidence shows that many members were able to obtain in-network coverage for out-of-network services, including through HCSC's "waiver" or appeals processes. This evidence demonstrates that HCSC did not apply a blanket policy of excluding out-of-network claims from coverage without cost-shares. Critically, the evidence also shows that, over time the vast majority of women had in-network care and did not pay cost shares.

The wide availability of network providers—and the availability of in-network coverage for out-of-network care where appropriate—undermines Plaintiffs' assertion that the Court may simply presume that all women who obtained out-of-network services were forced to do so because no in-network provider was available to them. Rather, the law and facts require this Court to conduct an individualized inquiry into why each putative class member sought services out-of-network, including consideration of whether:

- a network provider was available within a "reasonable" distance;
- the member chose an out-of-network provider for personal reasons;
- the provider collected any amounts due from the member; and
- the member applied for a waiver or submitted an appeal.

These individualized considerations are critical since, under the ACA, the propriety of

denying coverage for, or imposing cost-shares on, out-of-network claims turns on whether each member had an in-network option available, and if not, whether each one followed the procedure to secure coverage for out-of-network care. This is, unavoidably, an individualized inquiry.

Similarly riddled with individualized issues is Plaintiffs' (unpled) assertion that HCSC adopted an unduly narrow set of billing codes for lactation services. ACA does not prescribe the billing codes that a health plan must adopt for services. Members obtained full coverage for claims billed with codes not included in HCSC's coding guidance, eviscerating Plaintiffs' argument that HCSC applied a uniform policy of rejecting claims. Moreover, thousands of claims were submitted for the service using HCSC's billing codes, meaning that each claim billed with other codes would need to be examined to determine whether it could have been billed with one of HCSC's suggested codes. Further, none of Plaintiffs' proposed additional procedure codes indicate a lactation service on their face, and the only way to ensure those claims were actually for lactation services would be to review the underlying medical records for each individual claim (which are typically possessed by the provider or member).

Plaintiffs' classes suffer from other deficiencies as well. Plaintiffs lack Article III standing to obtain prospective relief. Further, Plaintiffs' request for an order requiring HCSC to "reprocess" claims under some unspecified "new standard" fails to identify a cognizable wrong (ACA does not require any of the things Plaintiffs demand), and to comply with Rule 65(d), which requires a request for injunctive relief to "state its terms specifically." Notably, Plaintiffs ask this Court to order HCSC to adopt numerous additional billing codes, but this Court has already barred the expert testimony purporting to support such a theory.

The application of the law to the facts at issue turns on the particular circumstances of each class member's claims and, thus, the Court should deny Plaintiffs' motion.

II. BACKGROUND[1]

A. Lactation and Related Care Present a Range of Individualized Issues.

Lactation is the process of milk production and secretion by women in connection with childbirth. (Ex. A, Expert Report of Dr. Henry Lee ("Lee Report"), at 3-4.) Socioeconomic, workplace, cultural, and other factors play a role in individual breastfeeding decisions, including whether a woman chooses to breastfeed and the level and type of care sought. (*Id.* at 4.) Some women do not need or want lactation assistance, such as mothers with prior breastfeeding experience. (*Id.*) Others benefit from lactation care, but the services that facilitate successful breastfeeding vary for each individual based on a myriad of issues. (*Id.*) Some women need help for complex issues, while others require only basic advice. (Ex. B, Deposition of Dr. Lauren Hanley ("Hanley Dep."), at 83:1-3, 85:24-86:2.) A woman's choice of provider may be affected by language barriers or personal preference. (Ex. A, Lee Report, at 4.)

B. ACA Gives Health Plans Discretion to Implement the Benefit.

ACA requires health plans to cover certain preventive services for women without cost-sharing as specified in guidelines supported by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. § 300gg-13(a)(4). HRSA's Guidelines require coverage for "comprehensive lactation support services," including "counseling" and "education" during the "antenatal, perinatal, and the postpartum period."[2]

ACA and HRSA do not elaborate on what constitutes "[c]omprehensive lactation support services," beyond "counseling" and "education" and do not delineate coding for those services. Lactation services can be rendered by any "provider type acting within the scope of [her] license

[1] Exhibits are listed in HCSC's Appendix, filed contemporaneously herewith. Plaintiffs have filed a twenty-five page brief, apparently relying on this Court's August 16, 2019 order granting the parties' joint motion to exceed page limitations in connection with Plaintiffs' original certification motion. (Dkt. 87.) Consistent with that order and Plaintiffs' opening brief, HCSC submits a twenty-five-page brief as well.
[2] *See* https://www.hrsa.gov/womens-guidelines-2016/index.html.

or certification (for example, a registered nurse)."[3] Health plans have discretion to adopt billing codes that pay at no cost-share and to use "reasonable medical management techniques to determine the frequency, method, treatment, or setting for coverage." 29 C.F.R. § 2590.715-2713(a)(4); Ex. C, June 6, 2019 Expert Report of Palma D'Apuzzo in Rebuttal to Report of Nicole Peluso ("Peluso Rebuttal"), ¶¶ 25-27.) ACA's supporting regulations allow health plans to deny coverage for, or impose cost-shares on, lactation services rendered by out-of-network providers, so long as those health plans have providers in their networks who offer the services. 29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii). Only when a health plan does not have in its network providers who offer lactation services must the health plan cover out-of-network services without cost-shares. *Id.*

C. HCSC Has Established a Network of Providers and Billing Guidance.

HCSC provides coverage without cost-shares for lactation services when rendered by an in-network provider. (Pls.' Ex. 19, Preventive Care Services Medical Policy ("Medical Policy"), at HCSC_0177107-8; Pls.' Ex. 20, Clinical Payment and Coding Policy ("CPCP"), at HCSC_0177651, 656-7.) HCSC has thousands of in-network providers of lactation services, including OB/GYNs, pediatricians, and lactation consultants.[4] (Ex. D, 9/27/2019 Declaration of

[3] FAQs About ACA Implementation (Part XXIX) at Q.3, https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/aca-implementation-faqs; *see also* Pls.' Ex. 13, WPSI Report, at 39 (listing examples of lactation providers).

[4] *See also* Ex. E-1, Declaration of Lisy Peters, ¶¶ 4-6 (Healthy Babies Healthy Families); Ex. E-2, Declaration of Jo Ann Dominick Meigs, ¶¶ 4-7 (Presence Resurrection Medical Center); Ex. E-3, Declaration of Vicky Harter ("Harter Decl."), ¶¶ 4-7 (INTEGRIS Baptist Medical Center); Ex. E-4, Declaration of Cynthia Hartwig, ¶¶ 4-6 (Advocate Lutheran General Hospital); Ex. E-5, Declaration of Lori Guinane ("Guinane Decl."), ¶¶ 4-7 (Swedish Covenant Health); Ex. F, Deposition of Natalee Deschamps ("Deschamps Dep."), at 29:17-61:25 (Community Medical Center); Ex. G, Deposition of Cindy Delay, at 41:8-86:15 (St. John Medical Center); Ex. H, Deposition of Don Houchins ("Houchins Dep."), at 27:8-73:22 (Northwest Community Hospital); Ex. I, Deposition of Carol Chamblin ("Chamblin Dep."), at 26:8-52:9 (Dr. Chamblin); Ex. J, Deposition of Caroline McConville ("McConville Dep."), at 28:10-75:25 (Benefis Health System); Ex. K, Deposition of Kassandra Meadows ("Meadows Dep."), at 40:14-75:12 (Methodist Healthcare System of San Antonio, Ltd., LLP); Ex. L, Deposition of Kathy Chaney ("Chaney Dep."), at 42:9-54:12, 58:14-111:23 (Baylor University Medical Center); Ex. M, Cress

Andrew Bourgeois ("2019 Bourgeois Decl."), ¶ 7; Ex. A, Lee Report, at 11.) The number and location of network providers vis-à-vis HCSC's members varies by region and depends, in part, on federal and state-specific laws, which identify the number of providers with whom health plans must contract to maintain sufficient networks.[5] Similarly, federal and state-law rules differ with respect to member notification requirements, such as provider directories, and the particular requirements may vary by plan type.[6]

Women are exposed to and receive lactation services from various provider types throughout pregnancy, during the hospitalization associated with delivery, and during postpartum visits. (Ex. A, Lee Report, at 4-11; Ex. D, 2019 Bourgeois Decl., ¶ 7.) HCSC directs members to network providers, including through HCSC's provider directory, which is available online. (Pls.' Ex. 14 at 3; Pls.' Ex. 15 at 3; Ex. M, Declaration of K. Cress ("Cress Decl."), ¶ 41.) Further, HCSC customer service representatives encourage members to work with their primary care providers to obtain the services they need. (Pls.' Ex. 16 at 1, part (b).) Even so, studies indicate that most people seeking a provider (including lactation providers) do not turn to their insurance company; they are more likely to seek referrals from their primary care physicians or others. (Ex. N, Expert Report of Brian Hoyt ("Hoyt Report"), at 11-15; Ex. A, Lee Report, at 4-11.) Regardless, if in-network providers are unavailable, HCSC plan members may be eligible to receive the in-network level of benefits for out-of-network services through HCSC's "waiver" or appeals processes. (Ex. M, Cress Decl., ¶¶ 3-8.) Members may also contact HCSC to obtain a

---

Decl., ¶¶ 22-38 (noting the providers identified above are in-network). HCSC has not filed the referenced deposition exhibits but will promptly do so at the Court's request.

[5] *See, e.g.*, 50 Ill. Admin. Code § 2051.310; Mont. Admin. Code § 37.108.219; 45 C.F.R. § 156.230. Many of these requirements distinguish between urban and rural areas and/or areas with certain populations. *See, e.g.*, Tex. Admin. Code § 3.3704(f); N. M. Admin. Code § 13.10.22.8(A).

[6] *See, e.g.*, 50 Ill. Admin. Code § 2051.310(a)(5) (website requirements); N. M. Admin. Code § 13.10.22.8(D) (requirements for "provider lists"); 45 C.F.R. § 156.230(b) (requirements for Qualified Health Plans); 29 C.F.R. § 2520.102-3 (requirements for ERISA plans).

claim adjustment. (Ex. O, Deposition of Karla Cress, at 247:6-248:19; Ex. P, 8/16/2017 Note, at HCSC_0051451-53, 10/15/14 Note, at HCSC_0072429-30.)

Medical codes are the language used between providers and insurers to communicate the services rendered for reimbursement purposes. (Ex. C, Peluso Rebuttal, ¶¶ 15-21.) It is industry standard for an insurer to provide coding guidance for services, such as lactation services, where neither industry standard, nor the law, mandates the use of particular codes, and there is thus no reasonable way to determine whether a lactation encounter occurred. (*Id.* ¶¶ 25-29; Ex. B, Hanley Dep., at 197:2-7.) Without such guidance, payors would be unable to identify claims that need to be processed according to particular rules, such as network lactation claims under ACA. HCSC identifies the procedure codes providers should select to obtain reimbursement for lactation services. (*See* Pls.' Ex. 19, Medical Policy; Pls.' Ex. 20, CPCP; *see also* Ex. C, Peluso Rebuttal, ¶ 28.) In light of the preventive benefit at issue, HCSC's procedure-level codes correspond to lactation classes and preventive counseling. (Ex. B, Hanley Dep., at 180:4-11, 187:5-16.)

With respect to diagnosis codes, it is industry standard that a provider will bill using the most-specific coding possible, which here means selecting diagnosis codes that contain the word "lactation" in their descriptions. (Ex. C, Peluso Rebuttal, ¶ 34; *see also* Pls.' Ex. 23, Expert Report of Palma D'Apuzzo in Rebuttal to Expert Report of Dr. Lauren Hanley ("Hanley Rebuttal"), ¶ 23 & n.1.) However, HCSC processes its suggested procedure-level codes for network claims without cost-shares regardless of the diagnosis code used. (Ex. C, Peluso Rebuttal, ¶ 34.) Because all but one of the procedure codes (S9443) could apply to a number of preventive services, and numerous diagnosis codes say nothing on their face about lactation, determining whether claims billed actually involved lactation services would require an

individualized examination of medical records. (*Id.* ¶¶ 32-33, 41; Pls.' Ex. 23, Hanley Rebuttal, ¶ 23 & n.2; *see also* Ex. B, Hanley Dep., at 222:4-14, 215:10-216:8.)

If a provider deviates from HCSC's coding guidance, it becomes even more difficult to determine whether the claim related to lactation, because it is assumed, based on industry standards, that a provider who does not comply with HCSC's coding guidance intends to seek reimbursement for some other, non-lactation service. (Ex. C, Peluso Rebuttal, ¶ 41; *see also* Pls.' Ex. 18, Expert Report of Nicole Peluso, at 10-12.) Diagnosis codes do not help; while some diagnosis codes use the word "lactation" in their descriptions, many others do not. (Pls.' Ex. 23, Hanley Rebuttal, ¶ 23 & n.2.) "[T]he only way to determine whether visits documented with these … not overtly lactation-related … codes involved breastfeeding issues would be to perform a patient-by-patient review of medical records." (*Id.*) [redacted] (Ex. M, Cress Decl., ¶ 11)

D. HCSC's Members Have Regularly Accessed and Obtained Coverage Without Cost-Shares for Lactation Services Across Markets and Over Time.

HCSC's claims data confirms that thousands of members regularly found, received and obtained cost-share free coverage for lactation services in-network for a variety of diagnoses, both across markets and over time. (Ex. D, 2019 Bourgeois Decl., ¶ 7.) [redacted] (*Id.*) [redacted] (Ex. Q, 3/9/2020 Declaration of Andrew Bourgeois ("2020 Bourgeois Decl."), ¶ 7(c).) [redacted]

[redacted] (*Id.* at ¶ 10(b).) [redacted] (Ex. D, 2019 Bourgeois Decl. ¶ 7.) Other members likely received lactation care through global billing, free services, or bundled postpartum wellness visits, which do not appear in HCSC's claims data in a manner that can be identified as lactation services.[7]

E. The Named Plaintiffs' Individual Experiences Varied Substantially.

Plaintiffs [redacted] (Ex. M, Cress Decl., ¶¶ 16-19.) [redacted] (*Id.*) Their experiences with lactation services varied substantially.

Briscoe attended a prenatal breastfeeding class offered by a network provider (Carol Chamblin) and obtained lactation assistance from an in-network midwife (Hillary Kieser). (Ex. R, Deposition of Laura Briscoe ("Briscoe Dep."), at 51:17-53:25, 107:14-108:2; Ex. M, Cress Decl., ¶¶ 33-34.) Aware that in-network services were available, Briscoe nevertheless received services in her home from an out-of-network lactation consultant referred to her by a friend. (Ex. R, Briscoe Dep., at 55:9-15; Pls.' Ex. 7 at 8.) Prior to receiving these services, Briscoe did not contact her providers to ask for a recommendation as to other providers of the service.[8] (Ex. R,

[7] *See, e.g.*, Ex. L, Chaney Dep., at 114:17-23 (Baylor does not separately bill for inpatient lactation services); Ex. J, McConville Dep., at 33:16-34:1 (consultations are free at Benefis for first two weeks after birth); Ex. F, Deschamps Dep., at 55:4-56:8 (Community Medical Center has had a free breastfeeding class at least since 2012); Ex. K, Meadows Dep., at 58:3-10 (Methodist has not charged for one-on-one appointments since at least 2012); Ex. E-5, Guinane Decl., ¶ 7 ([redacted]); Ex. E-3, Harter Decl., ¶ 7 ([redacted]).

[8] Briscoe claims that Chamblin, who taught Briscoe's breastfeeding class, did not offer one-on-one consultations. (Ex. R, Briscoe Dep., at 54:1-13.) Not so; Chamblin testified that she did. (Ex. I, Chamblin Dep., at 52:19-53:3.)

Briscoe Dep., at 54:23-55:15.) Instead, Briscoe claims that she contacted HCSC by phone (there is no record of such a call) and consulted HCSC's online provider directory. (Pls. Ex. 7 at 7-8; Ex. R, Briscoe Dep., at 58:2-15.) HCSC covered Briscoe's out-of-network claim but allocated a portion to coinsurance. (Ex. R, Briscoe Dep., at 101:2-11.) Briscoe claims she filed a written appeal, but there is no record of it. (*Id.* at 139:9-22; Ex. M, Cress Decl., ¶ 21 [?].)

Magierski received lactation services at her in-network hospital, and hospital staff informed her that she could receive additional lactation services after discharge. (Ex. S, Deposition of Kristin Magierski ("Magierski Dep."), at 50:20-54:15; Ex. M, Cress Decl., ¶ 35.) Magierski also received lactation assistance from her in-network primary care provider. (Ex. S, Magierski Dep., at 56:3-57:4.) Nevertheless, Magierski received services from an out-of-network lactation consultant she located on "Google and Yelp."[9] (*Id.* at 59:3-16.) Magierski claims she contacted HCSC twice by phone (there is no record of such calls) and consulted HCSC's online provider directory prior to seeking out-of-network services. (*Id.* at 71:24-73:6, 77:4-12; Pls.' Ex. 8 at 7-8.) HCSC partially covered Magierski's claim, but Magierski was responsible for the billed charges because she had not satisfied her annual deductible. (Ex. S, Magierski Dep., at 101:3-21.) Magierski claims she filed a written appeal, but there is no record of such an appeal. (*Id.* at 100:8-22, 190:17-19, 192:21-193:19; Ex. M, Cress Decl., ¶ 21.)

Adams received lactation services from an in-network hospital. (Ex. T, Deposition of Emily Adams ("Adams Dep."), at 78:8-79:23, 81:2-24, 83:1-84:9, 86:4-88:19; Ex. M, Cress Decl., ¶ 37.) Rather than seek additional services in-network, Adams received services in her home from an out-of-network lactation consultant. (Ex. T, Adams Dep., at 92:15-93:20.) Adams claims that she contacted HCSC by phone and consulted HCSC's online provider directory prior

[9] Magierski claims that the hospital could not resolve her issues because it did not have a breast shield. (Ex. S, Magierski Dep., at 153:14-154:2.) Not so; the hospital testified that breast shields, among other supplies, were available and provided to patients. (Ex. H, Houchins Dep., at 42:16-24.)

to seeking out-of-network services,. (*Id.* at 55:17-57:13; Pls.' Ex. 9 at 7-8.) HCSC partially covered Adams' out-of-network claim and allocated a portion of the billed charges to coinsurance. (Ex. T, Adams Dep., at 148:24-149:2.) Adams appealed, and HCSC upheld its decision. (Pls.' Ex. 9 at 15.)

F. Plaintiffs Sue for Damages Based on Out-Of-Network Lactation Services.

Plaintiffs allege that HCSC violated ACA when it failed to provide "in-network … providers within a reasonable distance of … plan participants." (Dkt. 56 ("Second Am. Compl.") ¶ 146.) The Second Amended Complaint seeks certification of classes under Rule 23(b)(2) and (3), with no mention of (b)(1) or any alleged deficiencies in HCSC's billing codes. (*Id.* ¶ 127.)

G. Two Other Courts Conduct Individualized Analyses at Summary Judgment.

Two federal courts have examined claims involving ACA-mandated lactation services at summary judgment. In *Condry*, the U.S. District Court for the Northern District of California assessed the circumstances of the six named plaintiffs, analyzing: (i) whether each named plaintiff attempted to locate in-network providers; (ii) whether "nearby" providers were available; and (iii) whether each named plaintiff contacted customer service. *Condry SJ Order*, 2018 WL 3203046, at *2-3. The court granted in part and denied in part the parties' cross-motions for summary judgment. *Id.* at *1-4. In *York*, the U.S. District Court for the Southern District of Iowa also conducted an individualized examination of the plaintiffs' claims, finding the defendants were entitled to summary judgment because the plaintiffs had access to and received in-network services. *York*, 2019 WL 1493715, at *4-6.

H. The *Condry* Court Twice Denies Class Certification.

After its summary judgment ruling, the *Condry* court denied the plaintiffs' motion for class certification. *Condry Class Order I*, 2019 WL 2552776, at *1. Even limiting the classes to out-of-network claimants, there was no "evidence that UHC uniformly applied an unlawful

policy to out-of-network claims." *Id.* The court concluded that the named plaintiffs lacked standing to seek prospective relief "because they [were] no longer … plan participants." *Id.* The court also expressed concerns about the request that the defendants "be ordered to 'reprocess claims under a corrected standard,"' since they did "not describe [that] corrected standard." *Id.*

Following the court's order, the *Condry* plaintiffs sought to add a current United beneficiary as a named plaintiff in an effort to cure their standing deficiency. The court denied that motion, explaining that the proposed intervenor lacked "standing to seek prospective relief," because "she include[d] no allegations about the likelihood that she will need lactation services in the future." *Condry v. UnitedHealth Group Inc.*, No. 17-cv-00183, 2019 WL 7489864, at *1 (N.D. Cal. Dec. 19, 2019) ("*Condry Intervention Order*").

Simultaneous with their motion to intervene, the *Condry* plaintiffs also filed a renewed motion for class certification, alleging (like Plaintiffs here) that United applied a "uniform policy" of denying coverage for, or imposing cost-shares on, out-of-network claims. *Condry Class Order II*, 2019 WL 7050114, at *3. The *Condry* court began by observing that "none of the named plaintiffs … ha[d] standing to seek prospective injunctive relief," leaving Plaintiffs "to seek certification of … a class consisting of all people denied coverage for out-of-network lactation services." *Id.* On this front, however, the plaintiffs had "not met their burden of demonstrating that United … applied a uniform standard or practice." *Id.* at *3. United's rule that in-network services were presumptively covered, but that out-of-network services were not necessarily so, simply stated "the default rule under the Affordable Care Act" and did not eliminate the need for individual inquiry in cases involving out-of-network services. (Ex. U, *Condry* Class Cert Hrg. Tr., at 6:14-17.) Indeed, the evidence showed that United fully paid at least 12% of out-of-network claims. *Condry Class Order II*, 2019 WL 7050114, at *3. The court

questioned how United could have applied a uniform policy to out-of-network claims when it fully paid some of them and observed that the plaintiffs had "not presented evidence that would allow the Court to reach a conclusion, or even to make an estimate." *Id.* at *3-6.

I. This Court Denies Plaintiffs' Original Motion for Class Certification.

On January 21, 2020, this Court denied Plaintiffs' original motion for class certification without prejudice. (Dkt. 138 ("Class Order").) The Court began by barring the testimony and opinions of Plaintiffs' experts, explaining that the experts "fail[ed] to explain how their anecdotal experiences enabled them to reliably reach their expert conclusions."[10] (*Id.* at 7.) The Court then rejected Plaintiffs' class certification theories, explaining that Plaintiffs' classes were overbroad, "present[ed] a host of individualized issues," raised typicality and adequacy concerns, and did not "present a systemwide policy." (*Id.* at 10-11.) The Court also found that "the proposed class members [were] not readily ascertainable," given Plaintiffs' failure "to propose a set of … codes that encompasses all [lactation] care." (*Id.* at 11-13.)

J. Plaintiffs Seek Certification of New Classes Under (b)(1) and (2).

In their renewed motion for class certification. (Dkt. 148 ("Pls.' Mem.").) Plaintiffs allege (i) that HCSC applied a uniform policy of imposing cost-shares on, or denying coverage for, out-of-network claims, and (ii) that HCSC reimbursed an unduly narrow set of billing codes for the ACA-mandated service. (*Id.* at 10.) Plaintiffs seek certification under Rule 23(b)(1) and (2), yet acknowledge that they still seek damages by asserting that they are entitled to have HCSC "reprocess" their claims under "a new standard." (*Id.* at 11.)

III. ARGUMENT

A. Plaintiffs Face a Significant Burden Under Rule 23.

Class treatment is "an exception to the usual rule that litigation is conducted by and on

[10] Plaintiffs have moved for reconsideration of this portion of the Court's order. (Dkts. 150, 152.) HCSC will respond to that untenable motion separately.

behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Consequently, Rule 23 requires a plaintiff to "affirmatively demonstrate [her] compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

These standards are not relaxed when a plaintiff seeks certification under Rule 23(b)(1) or (2). Courts must scrutinize classes in this context to ensure that the plaintiff ***proves*** "that there are ***in fact*** sufficiently numerous parties, common questions of law or fact, etc." *Id.* (bolded emphasis added). Thinly veiled efforts to use (b)(1) or (2) to obtain monetary relief while avoiding the protections of Rule 23(b)(3) should be discouraged. *Id.* at 360, 363; *see also Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 889, 894-95 (7th Cir. 2011); *Butler v. Ill. Bell Tel. Co.*, No. 06 C 5400, 2008 WL 474367, at *6 (N.D. Ill. Feb. 14, 2008).

B. Plaintiffs Cannot Satisfy the Prerequisites of Rule 23(a).

1. Plaintiffs' Classes Lack Commonality.

Rule 23(a)(2) requires a plaintiff to do more than raise common questions, such as whether a defendant's alleged conduct is unlawful. *Dukes*, 564 U.S. at 349; *McCaster v. Darden Rests., Inc.*, 845 F.3d 794, 800 (7th Cir. 2017). "What matters to class certification … is … ***the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation***." *Dukes*, 564 U.S. at 350 (bolded emphasis added); *see also Phillips v. Sheriff of Cook County*, 828 F.3d 541, 550 (7th Cir. 2016); *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896-99 (7th Cir. 2012). Plaintiffs do not satisfy commonality, because HCSC's liability to each class member cannot be determined with common proof. *Dukes*, 564 U.S. at 350.

a. Plaintiffs' Claim Regarding Out-Of-Network Claims Does Not Establish Common Policies or Injuries.

Plaintiffs contend that HCSC violated ACA by applying a uniform policy of imposing cost-shares on, or denying coverage for, out-of-network lactation claims. (Pls.' Mem. at 1, 6-7.) As a threshold matter, there is no "meaningful evidence" that HCSC "uniformly applied an unlawful policy to out-of-network claims." *Condry Class Order I*, 2019 WL 2552776, at *2. To the contrary, the evidence shows that, notwithstanding its broad network of lactation providers, [redacted] (Ex. Q, 2020 Bourgeois Decl. ¶ 7(c).) HCSC therefore did not apply a blanket policy of excluding out-of-network claims from eligibility for coverage without cost-shares.[11] *See Dukes*, 564 U.S. at 355 ("[t]he only corporate policy" was the lack "of a uniform … practice that would provide the commonality needed for a class action"); *Condry Class Order II*, 2019 WL 7050114, at *3-5 (no uniform policy when United covered 12% of out-of-network claims).

Even if there were evidence of a uniform policy, Plaintiffs have failed to establish a common injury among class members, as they must. *Phillips*, 828 F.3d at 552 (commonality "obligates a district court to determine whether plaintiffs have suffered the same injury"); *Bolden*, 688 F.3d at 896 (same). Indeed, the presumptive limitation of cost-share-free coverage to in-network claims merely states "the default rule under [ACA]" and does not eliminate the need for individual inquiry in cases involving out-of-network services.[12] (Ex. U, *Condry* Class

[11] This is significant because, as the *Condry* court observed, numerous factors could explain coverage for out-of-network services, and Plaintiffs have not presented any evidence "that would allow the Court to reach a conclusion, or even to make an estimate" with respect to this issue. *Condry Class Order II*, 2019 WL 7050114, at *5.

[12] This "default rule" is sensible, since out-of-network claimants have bypassed available in-network options, and/or the opportunity to obtain in-network coverage for out-of-network care through HCSC's waiver process. *See supra* at 6-7. Plaintiffs' implication that HCSC should have refrained from imposing cost-shares on any claims regardless of network status (Pls.' Mem. at 10-11) is a non-sequitur, given that ACA expressly allows plans to apply cost-shares to out-of-network claims if a network provider is available to the member. 29 C.F.R. § 2590.715-2713(a)(3)(i)-(ii).

Cert. Hrg. Tr., at 6:14-17; *see also id.* at 88:3-6 ("really where the rubber hits the road is what happened with these claims").) This is particularly true here, where, as discussed above, [redacted][13] *See supra* at 8-9. Additional members likely received the service post-delivery and at wellness visits that were not billed individually, or obtained free in-network services through hospital clinics. *See, e.g.*, *supra* at nn.4, 7.

Thus, ***most*** members were aware of and able to obtain in-network lactation services without cost-shares. The Court therefore cannot assume that every denial of, or cost-share imposed on, out-of-network claims resulted from conduct that violated ACA. Rather, the Court must examine each instance in which a claim was denied or a cost-share was imposed to determine, among other things, whether the member had an in-network provider available, and if not, if there were any other reasons why the claim was denied or a cost-share imposed.

First, the Court would need to determine whether each class member had network providers available, and whether HCSC provided that member with sufficient information about those providers. *York*, 2019 WL 1493715, at *4-6; *Condry SJ Order*, 2018 WL 3203046, at *2-3. The named Plaintiffs' circumstances demonstrate the individualized nature of this exercise. All three Plaintiffs received in-network services. *See supra* at 9-11. While the named Plaintiffs claim that customer service representatives informed them that no network providers were available, this assertion requires the Court to examine each customer service call to determine the validity of Plaintiffs' claims. There is no evidence that each and every class member had contact with

[13] [redacted] (Ex. D, 2019 Bourgeois Decl., ¶ 6.) Plaintiffs cite the same claims data to establish numerosity, thus acknowledging the breadth and reliability of this information. (Pls.' Mem. at 14.)

customer service, but this analysis would need to be conducted for each absent class member who did. [redacted] (Pls.' Exs. 27-33.)

The fact-bound and individualized exercise of determining the availability of network providers is rendered more complex by Plaintiffs' legal theories, which contend that HCSC deprived members of access to "in-network lactation service providers within a ***reasonable distance*** of" their homes. (*See, e.g.*, Second Am. Compl. ¶ 140 (emphasis added).) Even assuming ACA incorporates this "reasonable distance" requirement, determining the "reasonable distance" applicable to each class member, and whether a network provider was within that distance, would require an assessment of state and federal network adequacy laws, including laws applicable to different regions within states. *See supra* at 5-6 & n.5. Various rules similarly regulate the manner in which health plans notify members of the providers within their networks. *See supra* at 6 & n.6. Thus, identifying the standard for determining whether HCSC made members sufficiently aware of in-network providers would vary depending on the class member, plan type, and geographic region.[14] *See Condry Class Order II*, 2019 WL 7050114, at *5-6.

Second, the Court would need to decipher the various standards of care applicable to the situations presented by class members to determine whether the network providers who were available lived up to Plaintiffs' subjective standards.[15] How much and what type of training must a provider have? How much time should providers devote to various questions and conditions?

[14] Plaintiffs assert that "HCSC made no distinction with respect to its … policies between and among its Divisions." (Pls.' Mem. at 6.) Even if true, the ***legality*** of those allegedly uniform policies and practices would vary across plans and geographies under Plaintiffs' legal theories, which purport to incorporate into ACA a "reasonable distance" requirement. (Second Am. Compl. ¶ 140.)

[15] (*See* Pls.' Mem. at 3, 5, 9 (vaguely referencing "trained out-of-network providers" and suggesting that lactation services encompass an unspecified array of services).)

What practices, methods, or treatments should be applied? A class action is not a proper forum for resolving these complex and multifaceted questions. *Phillips*, 828 F.3d at 554-55.

Third, the Court would need to analyze what efforts the member made to look for the service, including any communications with HCSC and the extent to which the member previously or subsequently obtained services from network providers. *York*, 2019 WL 1493715, at *4-6; *Condry SJ Order*, 2018 WL 3203046, at *2-3. And the Court would need to assess ***why*** the member sought services out-of-network, including whether she did so for personal or subjective reasons, such as on the recommendation of a friend. *Id.* Furthermore, the Court would need to determine whether any given class member actually paid a cost-share or other amount and thereby suffered a compensable injury.[16] *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) ("[c]ountless" class members "could not show any damage"). This analysis would be member-specific, given that HCSC is unable to [redacted] (Ex. M, Cress Decl., ¶¶ 12-15.)

Moreover, the Court would need to analyze available defenses, including whether HCSC denied a claim for reasons unrelated to the lactation benefit, such as untimely submission or the member's lapse of coverage. (Ex. Q, 2020 Bourgeois Decl., ¶ 8); *Doiron v. Conseco Health*, 279 Fed. App'x 313, 316 (5th Cir. 2008) (class members "had claims denied for reasons other than" those at issue). The Court would also need to assess whether the member attempted to obtain a waiver or claim adjustment or appealed their claim. *See supra* at 6-7.

Plaintiffs cannot establish a common impact across the classes by citing out-of-context quotations from HCSC's emails or by focusing on HCSC's out-of-network claims data—while

[16] Plaintiffs' classes are further overbroad to the extent they purport to encompass all members who did not receive full coverage for lactation care. (*Id.* at 10.) Out-of-network providers can charge patients for the difference between their billed charges and an insurer's allowed amount ("balance billing"). Balance billing is not cost-sharing under ACA. 42 U.S.C. §§ 18022(c)(3)(B).

ignoring that the vast majority of members were aware of and able to obtain in-network lactation services. (*See, e.g.*, Pls.' Mem. at 8-9 & nn.13-15.) Plaintiffs go so far as to argue that individualized issues, such as the availability of network providers, are irrelevant, given their "uniform policy" theory. (*Id.* at 1-2, 15-18.) This is not proof of commonality. The Court cannot derive any common answers from the complex matrix of questions at issue here.

b. Plaintiffs' Claim Based on Purportedly Narrow Coding Similarly Requires Individualized Inquiries.

Plaintiffs' claim that HCSC adopted an unduly narrow set of billing codes similarly does not provide a viable basis for certifying a putative class. As a threshold matter, and as discussed further in section II (B), above, ACA does not require HCSC to adopt any specific billing codes. As a result, the supposed harm Plaintiffs assert is a concocted effort to avoid denial of class certification. Additionally, this Court's exclusion of Plaintiffs' experts means they have ***no expert support whatsoever*** for their coding theory. (*See* Class Order at 7.) Moreover, the Second Amended Complaint lacks any allegations pertaining to purportedly narrow coding. *See, e.g.*, *Davis v. AT&T Corp.*, No. 15-cv-2342, 2017 WL 1155350, at *2 (S.D. Cal. Mar. 28, 2017) (rejecting "entirely different class" than that alleged in the Complaint).

Setting these issues aside, Plaintiffs' claim cannot be adjudicated on a class-wide basis.

[redacted]

See supra at 8-9; *see also* Ex. P, 8/16/2017 Note, at HCSC_0051451-53, 10/15/14 Note, at HCSC_0072429-30; Ex. Q, 2020 Bourgeois Decl., ¶ 10(b). In other words, HCSC did not apply a uniform policy of rejecting claims submitted with other codes. Additionally, many providers were able to bill for a full range of lactation services using HCSC's codes. (Ex. D, 2019 Bourgeois Decl., ¶ 7; Pls.' Ex. 21, Hanley Report, at 14-19.) Thus, an examination of each claim

billed with ***other*** codes would be required to assess why a provider did not bill in accordance with HCSC's guidance.

Additional individualized assessments would be required. Many of the codes Plaintiffs seek to include do not indicate on their face that an encounter for lactation services occurred—including pediatric codes, which indicate that services have been rendered to ***children*** and thus bear no relationship to the ***women's*** preventive benefit at issue.[17] *See supra* at 7-8. The Court would thus need to examine each class member's treatment, including the underlying medical records (which HCSC does not typically have), to determine whether the class member received lactation services or some other type of service, or whether the "primary purpose" of an office visit was lactation care. *See* 29 C.F.R. § 2590.715-2713(a)(2) (coverage for office visits required ***only if*** the "primary purpose" of the visit is preventive care). And HCSC would be entitled to present the defense that, in accordance with its discretion to identify codes that it would recognize as a particular covered service, it appropriately excluded the billing code(s) at issue from cost-share-free coverage. *See supra* at 8, 15. Moreover, the Court would need to determine whether the cost-share or claim denial resulted from the codes used to seek reimbursement, or some other issue unrelated to the benefit. Ex. D, 2019 Bourgeois Decl., ¶ 8. These individual issues are incompatible with Rule 23.[18]

c. Plaintiffs' Cases Do Not Support Commonality.

The individualized issues discussed above demonstrate that Plaintiffs' claims cannot be

[17] As the Court recognized, this coding ambiguity raises ascertainability issues. (*See* Class Order at 11.) Plaintiffs have the burden to identify an ascertainable class by reference to "objective criteria," even when certification is sought under Rule 23(b)(1) and (2). *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (ascertainability applies "to all class actions, regardless of whether certification [is] sought under Rule 23(b)(1), (2), or (3)").

[18] Plaintiffs did not conduct discovery on many codes identified by their excluded expert, Peluso. (*See* Pls.' Ex. 18, Dkt. 93-6, at Ex. B (CPT codes 99502, 99221-23, 99231-33, 99356-57, 99382, 99384, 99392, 99394, 96150-55, 96161, 96127, 98961-62, 99050-51, 99056, 99058, 99060, 99078, S9444-46 and S9452).) Notably, Plaintiffs advanced the same narrow coding argument in the *Condry* case, but the court still denied class certification. *See* Case No. 3:18-cv-00183 (N.D. Cal.), Dkt. 222 at 12-13.

resolved on a class-wide basis. Plaintiffs' cited cases do not warrant a different outcome. Those cases involved challenges to uniform policies and practices that, under the applicable substantive law, *uniformly impacted* ***all*** class members. *See, e.g.*, *Wit v. United Behavioral Health*, 317 F.R.D. 106, 127 (N.D. Cal. Sept. 19, 2016) (challenge to guidelines that uniformly injured all class members under health plans and state law); *Holmes v. Godinez*, 311 F.R.D. 177, 218 (N.D. Ill. 2015) (challenge to policies in correctional institutions that uniformly injured all class members under the Constitution and federal statutes); *A.F. v Providence Health Plan*, 300 F.R.D. 474, 477, 481 (D. Or. 2013) (challenge to exclusion in health plans that uniformly injured all class members under state and federal law); *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 426, 428 (N.D. Ill. 2007) (challenge to "uniform work rules" that uniformly injured all class members by breaching identical contracts).

By contrast, here, Plaintiffs have not even established any uniform policies or practices. *See supra* at 15. And, even if HCSC's alleged policies or practices could be deemed uniform, determining the ***impact*** of those policies and practices in terms of liability, remedies, and available defenses is fraught with individualized issues.[19] *See, e.g.*, *Dennis F. v. Aetna Life Ins.*, No. 12-cv-02819, 2013 WL 5377144, at *4 (N.D. Cal. Sept. 25, 2013) (liability to class did not turn on the challenged policy); *Graddy v. BlueCross BlueShield of Tenn., Inc.*, No. 4:09-cv-84, 2010 WL 670081, at *9 (E.D. Tenn. Feb. 19, 2010) (policies did "not eliminate the need for an individualized assessment"); *DWFII Corp. v. State Farm Mut. Auto. Ins. Co.*, 469 F. App'x 762, 764-65 (11th Cir. 2012) (even if conduct raised issues in the abstract, each class member would

[19] Plaintiffs repeatedly confuse ***damages*** for ***injury***, arguing that, in the cases they cite, courts certified classes even though all class members did not incur damages or the same amount of damages. (*See, e.g.*, Pls.' Mem. at 17); *see Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (explaining that while the common injury attributable to the class was the existence of a design defect, proximate causation and damages for any individual class member could be determined after certification proceedings). Even if variations in damages do not defeat certification, however, Plaintiffs must still identify a common ***injury***, which they have not done. *Phillips*, 828 F.3d at 552; *Bolden*, 688 F.3d at 896.

"still [need to] demonstrate that it [was] entitled to reimbursement for the disputed charges"). This is so because, unlike the laws at issue in the cases on which Plaintiffs rely, the underlying substantive law here (ACA) requires, by its very terms, an individualized examination of each class member's circumstances to determine liability and, therefore, injury. *York*, 2019 WL 1493715, at *4-6; *Condry SJ Order*, 2018 WL 3203046, at *2-3.

2. Plaintiffs Are Not Typical or Adequate Class Representatives.

The test for typicality and adequacy is whether the named plaintiff's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members." *Oshana*, 472 F.3d at 514; *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). The varying circumstances of the named Plaintiffs' claims render Plaintiffs' typicality and adequacy arguments nonstarters. Beyond that problem, the named Plaintiffs lack Article III standing. *See infra* at 22-23. Briscoe and Magierski failed to exhaust administrative remedies and are subject to this exhaustion defense. *See supra* at 9-10; *see also* Dkts. 34-1 at 99-109, Dkt. 34-3 at 95-103 (appeals procedures); *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 649–50 (7th Cir. 1996) (exhaustion required for ***all*** ERISA claims). Plaintiffs' receipt of in-network care renders them atypical (and inadequate) representatives of those who did not.

C. Plaintiffs Cannot Satisfy the Prerequisites of Rule 23(b)(1) or (2).

1. Plaintiffs Lack Article III Standing to Seek Prospective Relief.

A plaintiff must have Article III standing to obtain the relief she seeks on behalf of a class. *Banks v. N.C.A.A.*, 977 F.2d 1081, 1085-86 (7th Cir. 1992); *Portis v. City of Chicago*, 347 F. Supp. 2d 573, 575-76 (N.D. Ill. 2004). A plaintiff seeking an injunction must establish "a significant likelihood and immediacy of sustaining some direct injury." *Sierakowski v. Ryan*, 223 F.3d 440, 443 (7th Cir. 2000); *see also Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017). Here, Briscoe and Adams are [redacted] (Ex. M, Cress Decl., ¶¶ 17, 19),

and therefore cannot establish a likelihood of sustaining any injury in the future. *See Condry Class Order I*, 2019 WL 2552776, at *2; *Condry Class Order II*, 2019 WL 7050114, at *2. [redacted] but she has not offered any evidence that she will seek lactation services in the future, as she must. *See Condry Intervention Order*, 2019 WL 7489864, at *1 (failure to proof regarding "likelihood that [intervenor would] need lactation services").

2. Plaintiffs' Classes do not Meet the Requirements of Rule 23(b)(1)(A).

Plaintiffs fail to satisfy the requirements of Rule 23(b)(1)(A) because "Rule 23(b)(1)(A) … requires more … than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001). At best, Plaintiffs suggest that HCSC may be liable to some class members but not others. (Pls.' Mem. at 17); *see also McDaniel v. Qwest Commc'ns Corp.*, No. 05 C 1008, 2006 WL 1476110, at *11 (N.D. Ill. May 23, 2006). Further, Plaintiffs' belated invocation of Rule 23(b)(1) does not change the fact that they still seek significant monetary recovery in the form of reprocessed claims (*see, e.g.*, Pls.' Mem. at 11) and that Rule 23(b)(1)(A) is not an avenue to class certification in such circumstances. *Butler*, 2008 WL 474367, at *6.

3. Plaintiffs' Classes Do Not Meet the Requirements of Rule 23(b)(2).

Rule 23(b)(2) requires a showing that the relief be both (1) final and (2) appropriate. *Kartman*, 634 F.3d at 892. ***First***, declaratory or injunctive relief is not "final" when it "would merely initiate a process through which highly individualized determinations of liability and remedy are made." *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012). For all of the reasons discussed above, a systemic reform of HCSC's policies or practices would not establish liability or remedies class-wide, and Plaintiffs are seeking individualized damages. *Kartman*, 634 F.3d at 893 ("uniform" standard would require individual inquiries).

Second, Plaintiffs' proposed injunction is not "appropriate." Plaintiffs seek an order

requiring HCSC to "reprocess" claims under a "new standard." (Pls.' Mem. at 23-24; *see also id.* at 10-11.) But neither ACA nor HRSA impose a single, uniform standard, either for provider networks or billing codes. *See supra* at 4-5. As the Seventh Circuit explained in *Kartman*, therefore, "there is no independent cognizable wrong to support a claim for injunctive relief" requiring HCSC to reprocess claims under a "new standard." *Kartman*, 634 F.3d at 886. Plaintiffs' request for an order requiring HCSC to adopt additional billing codes is particularly flawed in that this Court has already barred both of Plaintiffs' experts, and Plaintiffs, therefore, lack any expert testimony supporting their coding theory.[20] Additionally, to the extent Plaintiffs are asking the Court to order HCSC to adopt certain ***diagnosis*** codes, such codes can already be utilized consistent with HCSC's coding guidance. (*See* Pls.' Ex. 19, Medical Policy; Pls.' Ex. 20, CPCP.) Any request that HCSC be ordered to analyze in-network provider availability is moot, as HCSC's waiver and appeal processes already take these issues into account. *See supra* at 6.

Plaintiffs' focus on significant monetary recovery also precludes them from establishing irreparable harm. *Id.* at 892; *Cates v. Whirlpool Corp.*, No. 15-cv-5980, 2017 WL 1862640, at *24 (N.D. Ill. May 9, 2017). And Plaintiffs' request that the Court order HCSC to reprocess lactation claims under a "new standard" runs afoul of Rule 65(d), which requires that every

[20] Even if this Court had not barred Plaintiffs' experts, Plaintiffs do not identify which of their expert's codes the Court should order HCSC to include, nor does their expert. (Ex. V, Peluso Dep., at 188:18-189:15). The Centers for Disease Control ("CDC") and others in the industry do not come close to suggesting most of the codes identified by Plaintiffs. (*See id.* at 223:5-9; Ex. C, Peluso Rebuttal, ¶¶ 36-39; Ex. W, Peluso Dep. Ex. 4.) In identifying codes for lactation services, the CDC warned that not all payors accepted the CDC's codes and that providers should check with the insurer regarding which codes the insurer would accept for the service. (Ex. W, Peluso Dep. Ex. 4.) Further, while arguing to this Court here that HCSC's coding list is too narrow, Plaintiffs' counsel recently settled a case where they agreed that the payor's coding guidance would include substantially the same procedure codes that are included on HCSC's current list for lactation counseling. *Compare* Ex. X (Ex. C to Settlement Agreement in *Ferrer v. CareFirst, Inc.*, Case No. 1:16-cv-02162, Dkt. 30-1, Dec. 10, 2018) (which only allows procedure codes 99401-99404, 98960 and S9443 to be adjudicated as preventive lactation counseling when billed in combination with certain delineated diagnosis codes)) *with* Pls.' Mem. at 1, n.1 (setting out the procedure codes HCSC has suggested for lactation counseling, which, like CareFirst's list, include 99401-99404 and S9443, in addition to various other procedure codes (99411-99412, 99347-99350) – all of which can be billed regardless of the diagnosis code). Thus, Plaintiffs' counsel's assertion that HCSC's codes are too narrow is belied by their agreement to similarly in *CareFirst*.

injunction "state its terms specifically" and "describe in reasonable detail" the "act or acts restrained or required." *Kartman*, 634 F.3d at 893 (injunction imposing "reasonable, uniform, and objective standard" was "far too general"). The Court should deny (b)(2) certification.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for class certification.

Dated: March 10, 2020

Respectfully submitted,

By: */s/ Rebecca R. Hanson*

Martin J. Bishop
Rebecca R. Hanson
Reed Smith LLP
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: 312.207.1000
Fax: 312.207.6400
E-Mail: mbishop@reedsmith.com
rhanson@reedsmith.com

Raymond A. Cardozo (admitted *pro hac vice*)
Reed Smith LLP
101 S. Second Street, Suite 1800
San Francisco, CA 94105
Tel: 415.543.8700
Fax: 415.391.8269
E-Mail: rcardozo@reedsmith.com

Attorneys for Defendant
Health Care Service Corporation

CERTIFICATE OF SERVICE

I, Rebecca R. Hanson, an attorney, hereby certify that on March 10, 2020, I caused a true and correct copy of the foregoing document to be filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

/s/ Rebecca R. Hanson