

**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,                 | ) |                          |
|                                     | ) | Case No. 1:16-cv-10294   |
| Plaintiffs,                         | ) |                          |
|                                     | ) | Judge John Robert Blakey |
| v.                                  | ) |                          |
|                                     | ) |                          |
| HEALTH CARE SERVICE                 | ) |                          |
| CORPORATION and BLUE CROSS          | ) |                          |
| AND BLUE SHIELD OF ILLINOIS,        | ) |                          |
|                                     | ) |                          |
| Defendants.                         | ) |                          |

**HEALTH CARE SERVICE CORPORATION’S MOTION TO FILE A SUR-REPLY**

Defendant Health Care Service Corporation (“HCSC”), an Illinois Mutual Legal Reserve Company, a division of which is Blue Cross and Blue Shield of Illinois, by and through its attorneys, respectfully files this motion for leave to file the Sur-Reply in Opposition to Plaintiffs’ Renewed Motion for Class Certification, attached hereto as Exhibit A. In support of this motion, HCSC states the following:

1. On March 17, 2020, Plaintiffs Laura Briscoe, Kristin Magierski, and Emily Adams (“Plaintiffs”) filed their Reply Memorandum in Further Support of Plaintiffs’ Motion for Class Certification (“Reply”) (Dkt. 170).

2. In the Reply, Plaintiffs misrepresent aspects of decisions made in the similar *Condry v. UnitedHealth Group, Inc.*<sup>1</sup> case, omitting key information that is directly relevant to the class certification decision that this Court has been asked to make. Plaintiffs also make new arguments about HCSC’s claims data that were not raised in Plaintiffs’ opening brief.

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<sup>1</sup> *Condry v. UnitedHealth Group, Inc.*, No. 17-cv-00183 (N.D. Cal.) (“*Condry* case”).

3. Plaintiffs' omissions regarding the *Condry* case and their new arguments could not have been addressed in HCSC's opposition brief and HCSC seeks to address them now to clear up the record. HCSC's sur-reply should be allowed because doing so "vouchsafes the aggrieved party's right to be heard and provides the court with the information necessary to make an informed decision." *University Healthsystem Consortium v. UnitedHealthGroup, Inc.*, 68 F. Supp. 3d 917, 922 (N.D. Ill. 2014), citing *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 329 (N.D. Ill. 2005); also citing *Franek v. Walmart Stores, Inc.*, Nos. 08-cv-0058 & 08-cv-1313, 2009 WL 674269, at \*19 n.14 (N.D. Ill. Mar. 13, 2009) ("recognizing that a surreply might be appropriate 'when a moving party "sandbags" an adversary by raising new arguments in a reply brief"). Here, HCSC's sur-reply aims to assist the Court in making an informed ruling on the pending motion for class certification. *Sawyer v. Columbia Coll.*, No. 09-cv-6962, 2010 WL 3081260, at \*1 n.1 (N.D. Ill. Aug. 5, 2010) (allowing a surreply where the substance helped the court's decisionmaking).

WHEREFORE, HCSC respectfully requests that the Court enter an Order granting HCSC's Motion to File a Sur-reply.

Dated: March 26, 2020

Respectfully submitted,

By: /s/ Rebecca R. Hanson

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**CERTIFICATE OF SERVICE**

I, Rebecca R. Hanson, an attorney, hereby certify that on March 26, 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

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
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| LAURA BRISCOE, KRISTIN              | ) |                          |
| MAGIERSKI, and EMILY ADAMS, on      | ) |                          |
| behalf of themselves and all others | ) |                          |
| similarly situated,                 | ) |                          |
|                                     | ) | Case No. 1:16-cv-10294   |
| Plaintiffs,                         | ) |                          |
|                                     | ) | Judge John Robert Blakey |
| v.                                  | ) |                          |
|                                     | ) | REDACTED VERSION         |
| HEALTH CARE SERVICE                 | ) |                          |
| CORPORATION and BLUE CROSS          | ) |                          |
| AND BLUE SHIELD OF ILLINOIS,        | ) |                          |
|                                     | ) |                          |
| Defendants.                         | ) |                          |

**HEALTH CARE SERVICE CORPORATION'S SUR-REPLY IN OPPOSITION  
TO PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION**

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In their Reply Memorandum in Support of Plaintiffs' Motion for Class Certification ("Pls.' Reply") (Dkt. 170), Plaintiffs omit and mischaracterize information from orders in the similar *Condry v. UnitedHealth Group* matter<sup>1</sup> (the "*Condry* matter") in a misguided effort to avoid the same result from that case: the Court's denial of their class certification motion. Plaintiffs also cite new case law to misdirect the Court from the claims data evidence establishing that a class cannot be certified here. Plaintiffs' tactics are not persuasive, but rather reveal their apparent recognition that the logic underlying decisions in the *Condry* matter warrants denial of their own class certification motion.

First, Plaintiffs erroneously claim that the *Condry* court did not "address United Healthcare's express written policy that out-of-network lactation claims were not eligible for the ACA-mandated coverage." (Pls.' Reply at 13.) That is untrue. United Healthcare's policy was that in-network services were presumptively covered and out-of-network services were not necessarily covered. (Nov. 21, 2019 *Condry* Class Certification Hr'g Tr. (Dkt. 162-11), at 6:14-17.) The *Condry* court expressly addressed that written policy at oral argument on Plaintiffs' renewed class certification motion, correctly referring to it as [REDACTED]<sup>2</sup> (*Id.*) In rejecting the *Condry* plaintiffs' argument that such a statement constitutes a "uniform policy" that would warrant class certification, the *Condry* court explained that such language cannot eliminate the need for individual inquiry in cases involving out-of-network services. (*Id.*, at 88:3-6 [REDACTED].) In doing so, the court recognized that although the ACA confers an unqualified right to coverage for lactation services obtained in-network, the right to coverage for out-of-network claims is qualified

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<sup>1</sup> *Condry v. UnitedHealth Group, Inc.*, No. 17-cv-00183 (N.D. Cal.).

<sup>2</sup> The *Condry* hearing transcript will be publicly available on April 1, 2020

by the fact that coverage is only required if in-network services were not available. (*Id.*, at 86:16-89:12.) Therefore, with regard to out-of-network claims, individualized inquiries are required to determine if the individual circumstances justified out-of-network coverage and a class cannot be certified under those circumstances.<sup>3</sup> (*Condry* Order on Class Certification, *Condry v. UnitedHealth Group, Inc.*, Case No. 17-cv-183, 2019 WL 7050114, at \*6-7 (N.D. Cal. Dec. 23, 2019).)

Second, in their Reply, Plaintiffs contend that Defendants raise the issue of the percentage of paid claims “in contravention of fundamental class certification principles,” but the cases they cite do not support their argument. (Pls.’ Reply at 13.) Plaintiffs cite manufacturing defect cases (*id.*) that they did not refer to in their opening brief, and those cases simply do not apply here. *See generally*, Pls.’ Mem. of Law in Support of Pls.’ Mot. for Class Certification (“Pls.’ Mem.”) (Dkt. 148). In those cases, the plaintiffs alleged the existence of a defect in all of the products at issue, which uniformly injured all of the putative class members under the applicable substantive law,

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<sup>3</sup> Like the purported policy in *Condry*, the purported policy here mirrors the ACA in stating explicitly that members are covered so long as they utilize a provider in the plan’s network. (Pls.’ Mem. at 7 (HCSC’s Clinical Payment and Coding Policy for Preventive Services stating that “[t]here is no copay, deductible or coinsurance . . . as long as the member utilizes a provider in the plan’s network.”).) In assessing the policy, *Condry* court found plaintiffs had not proven that there was a “blanket nationwide policy” of refusing to cover out-of-network claims because the claims data demonstrated that United Healthcare fully paid 12% of out-of-network claims, and that this data undermined the plaintiffs’ argument that a purported policy to uniformly deny out-of-network claims had been uniformly applied to the out-of-network class. (*See Condry* Order Denying Class Certification, *Condry*, 2019 WL 7050114, at \*3.) The court questioned how United could have fully paid 12% of out-of-network claims if the “uniform policy was to deny out-of-network claims. . . .”<sup>3</sup> (*Id.*) Similarly, here, as noted in HCSC’s Response in Opposition (Dkt. 160) at 8-9),

[REDACTED], demonstrating that its policy was not uniformly applied to deny coverage to members who obtained out-of-network services, and that individualized inquiries would be required to determine why HCSC denied any given out-of-network claim or imposed a cost-share. (*Id.* at 15-16.) Like the plaintiffs in the *Condry* matter, Plaintiffs here failed to demonstrate that there is a uniform policy that would warrant certification of a class. Plaintiffs’ attempt to sweep this aspect of the *Condry* order under the rug in their reply brief should be rejected and this Court should deny Plaintiffs’ motion for class certification on the same basis.



regardless of whether those defects had manifested in the individual class member's product. (*See* Pls.' Reply at 13-14 (citing *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010), and *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010).) Here, Plaintiffs have not identified any "defect" in HCSC's coverage for lactation support and counseling service that would uniformly injure all class members, particularly given that the underlying substantive law (ACA) requires, by its very terms, an individualized examination of each class member's circumstances.

Finally, Plaintiffs further attempt to distinguish the *Condry* case in their Reply by noting that for two of the plaintiffs who had summary judgment denied and granted in United Healthcare's favor, the plan's provider directory had identified in-network providers as "lactation specialists" that were nearby. (Pls.' Reply at 13.) However, Plaintiffs fail to mention that summary judgment also was denied as to two additional plaintiffs (as well as to United Healthcare) where the court had not identified any "lactation specialist" nearby. Whether a nearby "lactation specialist" was listed in a directory was not a deciding factor for the *Condry* court at summary judgment. And of course, Plaintiffs' mistaken focus on whether a nearby lactation specialist was listed in the plan directory only further highlights how an individual examination of the in-network services available to each class member is required to adjudicate these claims. Again, Plaintiffs' efforts to mischaracterize the *Condry* orders should be rejected.

In sum, Plaintiffs' efforts in their reply to omit information in an attempt to mischaracterize and minimize the *Condry* orders should be rejected and this Court should decline to certify a class in this case.

Dated: \_\_\_\_\_, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Rebecca R. Hanson, an attorney, hereby certify that on \_\_\_\_\_, 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