

initial motion for class certification also addressed all four of the *Condry* decisions prior to the Court's issuance of its January 21, 2020 Class Certification Order (Dkt. 138, "CC Order"), including in HCSC's supplemental authority filing (*see* Dkt. 131), to which Plaintiffs promptly responded (*see* Dkt. 132). Likewise, in its Opposition, HCSC affirmatively argued what it contended should be the import of the claims data and HCSC's payment of lactation claims in the context of the existence of a common policy or injury on class certification. *See* Opp. at 15-16. Plaintiffs' opening Brief also referenced the claims data (Dkt. 145 at 9, n.14-15). Without dispute, Plaintiffs' Reply Memorandum in Further Support of Plaintiffs' Motion for Class Certification (Dkt. 170, 171, "Reply", at 10, 12-14) directly responds to the arguments about *Condry* and the claims data made by HCSC in its Opposition.

Mendaciously, HCSC's Motion never references the foregoing. Rather, to try to justify its improper attempt to make further, belated arguments and get the last word through an improperly filed Sur-Reply, HCSC puts forth a pretext that "Plaintiffs misrepresent *Condry*" by "omitting key information that is directly relevant", that "Plaintiffs also make new arguments about HCSC's claims data that were not raised in Plaintiffs' opening brief..." and that "Plaintiffs' omissions regarding the *Condry* case and their new arguments could not have been addressed in HCSC's opposition brief..." Motion at 1-2. Those assertions are blatantly false and have been frivolously cast by HCSC.

First, HCSC's conduct should be admonished by the Court. To use such false pretexts to get additional argument before the Court through a "sur-reply" is unacceptable. Second, HCSC's Motion should be denied. HCSC has not demonstrated that it is entitled to file a sur-reply. Moreover, upon examination, the proposed Sur-Reply is based on a transparent contrivance since it falsely characterizes the record.

II. **HCSC IS NOT ENTITLED TO A SUR-REPLY**

HCSC's Motion and Sur-Reply are without legal or factual support and must be denied.

A. HCSC's Motion is Not Supported by Applicable Law

The Court should deny a motion to file a sur-reply "when the movant has had the opportunity to thoroughly brief the issues." *University Healthsystem Consortium v. UnitedHealth Group, Inc.*, 68 F. Supp. 3d 917, 922 (N.D. Ill. 2014). A sur-reply is not proper when "[e]ach brief in the sequence on the motion fairly responded to the arguments in the brief that preceded it." *Franek v. Walmart Stores, Inc.*, 2009 U.S. Dist. LEXIS 20361, at *60 n.14 (N.D. Ill. Mar. 13, 2009). Further, Courts flatly reject sur-replies that are improper attempts at getting the last-word. *See C&F Packing Co. v. IBP, Inc.*, 916 F. Supp. 735, 741 (N.D. Ill. 1995) (rejecting a sur-reply as the non-movant's "attempt to get in the 'last word'" on the motion, as the reply did not raise any new issues, but rather addressed the opposing party's arguments -- "an action for which [the moving party had] every right.")

The foregoing authority dictates that HCSC's Motion be denied.

B. HCSC Affirmatively Raised and Fully Briefed Condry

HCSC has had and has taken many opportunities to present its arguments about *Condry*. It appears that, notwithstanding the numerous pages of briefing it has already dedicated to *Condry*, HCSC's counsel (who is also counsel to all defendants in the *Condry* matter) believes that it forgot to mention something else about *Condry*. HCSC tries to mask its attempt to improperly and belatedly add to its Opposition by mischaracterizing the record and Plaintiffs' briefing.

HCSC's Opposition to Plaintiffs' Renewed Motion for Class Certification references the four opinions from the *Condry* case. *See Opp.* at 1, 11-13, 15-19, 22-23. The references are not incidental – they are the centerpiece of HCSC's Opposition. Out of a barely 25-page brief, HCSC

cites, often numerous times on each page, the *Condry* case and at least one of the four opinions. Out of the barely 10 pages of “Argument” (*see* pages 14-25 of HCSC’s Opposition), 7 of those pages reference *Condry*. Plainly, if HCSC wanted to tell the Court even more details about the *Condry* plaintiffs or the facts of *Condry*, HCSC had every opportunity to do so. *See* Sur-Reply at 3.¹

Moreover, ostensibly, HCSC would prefer that the Court not be advised of the erroneous holdings in *Condry* because HCSC apparently desires for the Court to indiscriminately follow *Condry*. However, Plaintiffs were entitled to respond to HCSC’s Opposition arguments about *Condry*, including the lactation coverage policy at issue in *Condry*, *see* Reply Br., Dkt. 171, at 2, 12-14. Plaintiffs’ Reply, responding to HCSC’s numerous assertions about *Condry*, in no way opened the door to a “sur-reply,” *see* Reply Br., Dkt. 171, at 2, 12-14. *See Franek*, 2009 U.S. Dist. LEXIS 20361, at *60 n.14 (A sur-reply is not proper when “[e]ach brief in the sequence on the motion fairly responded to the arguments in the brief that preceded it.”)

Nevertheless, HCSC’s Sur-Reply at page 1, cites selective excerpts from the *Condry* Class Certification transcript and order to try to bolster its argument. However, as HCSC is fully aware, the District Court in *Condry* plainly stated: “I don’t read [the policy] as a statement that’s contradictory to the requirements of the ACA.” (Dkt. 162-11 at 7). The District Court in *Condry* improperly made such merits determination about defendants’ lactation policy and that then

¹ The lack of foundation for HCSC’s Motion is also demonstrated by the fact that the *Condry* decisions pre-dated this Court’s January 21, 2020 Order on Plaintiffs’ initial Class Certification motion, and were extensively addressed previously. In particular, the parties’ briefing on Plaintiffs’ initial Class Certification Motion in late 2019 and early 2020 addressed the four *Condry* decisions in: Plaintiffs’ initial Motion for Class Certification (Dkt. 95, at 15, n.23), HCSC’s Opposition to Plaintiffs’ Motion, (Dkt. 99 at 1-2, 13-15, 18, 21, 23), Plaintiffs’ reply (Dkt. 123 at 4, n.7, 10-11), HCSC’s supplemental authority re: *Condry*, *see* Dkt. 131, and Plaintiffs’ response to HCSC’s supplemental authority, Dkt 132.

formed the basis for holding that the “evidence does not demonstrate a uniform standard” in the *Condry* class certification holding on which HCSC so heavily relies. That approach by the *Condry* court is a fallacy, the proverbial rabbit in the hat approach that drove the class certification ruling.

Moreover, HCSC’s Sur-Reply is comprised of argument that HCSC already made in its Opposition, thereby further demonstrating the lack of merit in HCSC’s Motion. For example, HCSC’s Opposition already advised the Court about “the default rule under the [ACA]”—*see* Opposition at page 12, citing to *Condry*. Another example is HCSC’s lengthy footnote 3 in its Sur-Reply; the footnote references the 12% metric from *Condry*, the “over 30%” metric from its claims data, and arguments about individualized inquiries, all of which are arguments already made by HCSC in several places throughout its Opposition including pages 12 and 15, which notably, cite *Condry*.

Viewed through any prism, contrary to HCSC’s Motion and Sur-Reply at page 1, Plaintiffs’ Reply is not a “mischaracterization” that justifies a sur-reply. *See C&F Packing Co.*, 916 F. Supp. at 741 (rejecting a sur-reply, as the reply did not raise any new issues, but rather addressed the opposing party’s arguments -- “an action for which [the moving party had] every right.”). Rather, what HCSC has done is attempt to mischaracterize Plaintiffs’ arguments to try to justify their sur-reply. That is a meritless, frivolous, and a repugnant tactic that should be swiftly rejected.

C. HCSC Affirmatively Raised and Relied On Its Claims Data

HCSC’s Opposition made several legally unsupported assertions and conclusions about its claims data relying on the *Condry* decisions in response to Plaintiffs’ commonality demonstration. (*See* Opp., Dkt. 163, at 8, 15-16, 19, 20). Plaintiffs were entitled in their Reply Brief to respond to HCSC’s arguments and law, and such response did not constitute “new” argument or cases as HCSC now postures.

Plaintiffs specifically explained why and how HCSC's numerous references to a self-serving employee declaration (*see id.*, citing two Bourgeois Declarations) and reliance on *Condry*, was an attempt to improperly misdirect the Court away from the pertinent issue -- the challenged uniform policy established by HCSC that governed all lactation claims -- to the legally irrelevant consequences of HCSC's policy. *See* Plaintiffs' Reply at 13-14.

In this regard, as with respect to its revisiting *Condry*, Plaintiffs' Reply responds specifically to law and argument raised in HCSC's Opposition. Accordingly, HCSC is not entitled to try to rehabilitate, augment, or re-argue *that which it raised* in their Opposition through a bogus "sur-reply."

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny HCSC's Motion and strike its proposed Sur-Reply.

DATED: March 31, 2020

**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 March 31, 2020, 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