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

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

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**

Plaintiffs Laura Briscoe, Kristin Magierski and Emily Adams (collectively "Plaintiffs"), by and through their attorneys, respectfully file this Reply in Support of their Motion for Reconsideration of the Court's Order Granting Defendant's Motions to Exclude the Expert Opinions of Nicole Peluso and Dr. Lauren Hanley (Dkt. 150, "Motion"), and in Response to Defendant Health Care Service Corporation's ("HCSC") Memorandum of Law in Opposition to Plaintiffs' Motion (Dkt. 166, "Opposition").

## I. INTRODUCTION

Plaintiffs' Motion is not reflective of a mere disagreement with this Court's Order excluding Plaintiffs' experts (Dkt. 138, "Order"). Beyond that bare characterization, HCSC's Opposition to Plaintiffs' Motion does not substantively refute Plaintiffs' assertions that the Court's Order failed to properly consider evidence and law in making the significant determination to exclude Plaintiffs' experts, Dr. Lauren Hanley and Ms. Nicole Peluso.

HCSC's Opposition simply parrots the Court's Order. In doing so, HCSC does not address the manifest errors in the Court's Order that are identified by Plaintiffs, including the substantial record evidence and well-established case law cited by Plaintiffs that dictate that Dr. Hanley's and Ms. Peluso's opinions are not "anecdotal" and, in the context of the opinions they are rendering, their methodology, analyses and opinions are demonstrably sound and reliable. HCSC's continued manufacturing of "methodological flaws" where none exist, as it did in its motions seeking to exclude Plaintiffs' experts, is misleading and unfounded, and contributed to the resulting errors reflected in the Court's Order. The methodology employed by each of Plaintiffs' experts was based on her experience and qualifications, and tied to her respective conclusions, which is sufficient to render the opinions reliable and admissible. Further, any arguments as to the bases for the opinions rendered goes to the weight afforded such opinions by the Court, but not to admissibility.

For the reasons set forth herein and in Plaintiffs' opening Motion and Memorandum, Plaintiffs' Motion for Reconsideration (Dkt. 150) should be granted.

## II. REPLY ARGUMENT

### A. Plaintiffs' Motion is Supported by Applicable Law

Plaintiffs have met their burden of establishing that reconsideration is warranted here. Indeed, "motions for reconsideration can serve a valuable function by helping, under appropriate circumstances, to ensure judicial accuracy." *In re Sulfuric Acid Antitrust Litig.*, 446 F. Supp. 2d 910, 913 (N.D. Ill. 2006).

"Judges are not omniscient, and 'in any given opinion, [a court] can misapprehend the facts. . . or even overlook important facts or controlling law.'" *Id.* (citing *Olympia Equip. Leasing Co. v. Western Union Tel. Co.,* 802 F.2d 217, 219 (7th Cir.1986)). Such circumstances are present

in this case.[1]

Plaintiffs are not, as HCSC contends, merely "disappointed" with the Court's Order, nor are they trying to "cure deficiencies in [their] own arguments and in the testimony of [their] expert witness[es]" in an attempt to overturn the Court's decision. HCSC Opp., at 5, 8. Rather, Plaintiffs have identified fundamental flaws in this Court's analysis in excluding Dr. Hanley and Ms. Peluso's opinions in their entirety that justify reconsideration.

The cases that HCSC relies upon are inapposite and do not support a denial of Plaintiffs' Motion. *See* HCSC Opp., at 8-9; *Buchanan v. Chicago Transit Auth.*, No. 16-cv-4577, 2016 U.S. Dist. LEXIS 168983, at *4-6 (N.D. Cal. Dec. 7, 2016) (recognizing that the plaintiff "admits that his motion for reconsideration is redundant of his original motion to compel" yet the court nonetheless "look[ed] past these procedural obstacles" pursuant to its broad authority to control discovery and granted in part plaintiff's motion to reconsider); *Learning Curve Toys, L.P. v. PlayWood Toys, Inc.*, No. 94 C 6884, 2000 U.S. Dist. LEXIS 5135 (N.D. Cal. Mar. 31, 2000) (the plaintiff had used the motion to reconsider to attempt to correct its failure to provide *any* basis and/or literature in support of the technique employed by its expert by submitting a journal article and new report which instead served "to buttress rather than challenge [the] court's finding that [the expert's] techniques were unreliable and likely to confuse a jury"); *In re Abbott Depakote S'holder Derivative Litig.*, No. 11 C 8114, 2013 U.S. Dist. LEXIS 130363, at *14-15 (N.D. Ill.

[1] As HCSC recognizes, regardless of which rule the Court applies—Rule 59(e), 60(b) or 54(b)—the standard and analysis for reconsideration are the same. *See Fox v. Admiral Ins. Co.*, No. 12 CV 8740, 2016 U.S. Dist. LEXIS 83542, at *2 n.2 (N.D. Ill. June 28, 2016) ("The analysis for a motion to reconsider is the same under either [54(b) or 59(e)]"); *Apex Colors, Inc. v. Chemworld Int'l Ltd., Inc.*, No. 2:14-CV-273-PRC, 2018 U.S. Dist. LEXIS 186046, at *15 (N.D. Ind. Oct. 31, 2018) ("Courts apply the same standard for a motion to amend or alter judgment under Rule 59(e) and a motion to reconsider a non-final order."). Plaintiffs do not contend that there has been any change in the law or newly discovered evidence since the Court's opinion, and thus HCSC's arguments in that regard are irrelevant.

Sept. 12, 2013) (the court found the defendant's motion for reconsideration of an order denying a motion to dismiss inappropriate where it misconstrued the court's order and simply "attack[ed] the Court's reasoning in reaching its decision"); *Helferich Patent Licensing, LLC v. New York Times Co.*, No. 10-cv-4287, 2013 U.S. Dist. LEXIS 171293, at *8-9 (N.D. Ill. Dec. 4, 2013) (the court found the reconsideration motion to be "better characterized as a motion for clarification, because, instead of identifying manifest errors of fact or law" the plaintiff requested "if only for sake of clarity of the appellate record" to amend the opinion and provide additional information and analysis regarding evidence it had submitted which the plaintiff believed was not adequately addressed by the court); *Neumann v. Borg-Warner Morse TEC, LLC*, No. 15 C 10507, 2016 U.S. Dist. LEXIS 70458, at (N.D. Ill. May 31, 2016) (on a motion for reconsideration, plaintiff raised new public policy issues that she neglected to address when opposing the motion to dismiss).

Where, as here, a judge disregards or issues a decision contrary to established rule of law, reconsideration of such opinion is proper. *See, e.g. Beller v. Health & Hosp. Corp.*, No. 1:03-cv-00889-TWP-TAB, 2011 U.S. Dist. LEXIS 127952, at *16 (S.D. Ind. Nov. 4, 2011) ("Upon reconsideration, the Court concludes that it committed an error of law when it denied Defendant's summary judgment motion without regard to the Seventh Circuit's rulings with respect to retroactive application of administrative regulations."); *Am. Hardware Mfrs. Ass'n v. Reed Elsevier, Inc.*, No. 03 C 9421, 2010 U.S. Dist. LEXIS 74866, at *12 (N.D. Ill. July 26, 2010) ("It is appropriate to correct this patent error of law on reconsideration.").

As discussed below, this Court erred in failing to consider the full scope of record evidence and testimony supporting the reliability of Dr. Hanley's and Ms. Peluso's opinions, and applying such evidence to established case law, and thus reconsideration and reversal of the Court's decision is appropriate.

**B. The Court Misapplied the Law to Record Evidence Concerning the Reliability of Ms. Peluso's and Dr. Hanley's Methodologies**

The Court committed a manifest error when it misapplied the law to record evidence demonstrating that Ms. Peluso's and Dr. Hanley's methodologies were sound. In particular, the Court ignored well-settled case law and Federal Rule of Evidence 702 which provide that a methodology based on experience in the field may sufficiently establish the requisite nexus between an expert's qualifications and his or her conclusions.

Rule 702 explicitly contemplates that experts may draw upon their personal experiences in rendering expert opinions, as the experts have done here. Fed. R. Evid. 702 Advisory Committee's Notes ("[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."). Similarly, in some cases, such as this one, "the relevant reliability analysis focuses upon personal knowledge or experience." *United States v. Brumley*, 217 F.3d 905, 911 (7th Cir. 2000). Courts within the Seventh Circuit repeatedly recognize that practical experience and training may serve as proper bases of expertise. *See, e.g. Haager v. Chi. Rail Link, L.L.C.*, 232 F.R.D. 289, 293 (N.D. Ill. 2005); *Ty Inc. v. Publ'ns Int'l, Ltd.*, No. 99 C 5565, 2004 U.S. Dist. LEXIS 12037, at *7 (N.D. Ill. 2004); *Spearman Indus. v. St. Paul Fire & Marine Ins. Co.*, 138 F. Supp. 2d 1088, 1097 (N.D. Ill. 2001).

Here, the experts' methodology is intertwined with, and thus directly extrapolated from, the experts' experiences in their relevant fields. HCSC improperly asserts that Plaintiffs' experts "did not explain their methodology or how their experience relates to it and, thus their opinions are not reliable." HCSC Opp., at 6. However, Plaintiffs clearly articulated how Dr. Hanley's clinical credentials and experience "are directly foundational, pertinent and supportive of the opinions given by her" regarding her conclusions on ICD codes and the level of training in

comprehensive breastfeeding support received by health care professionals and the integration of comprehensive breastfeeding support and counseling into a primary care provider practice. Dkt. 126, at 10-11. The Court itself even identified portions of Dr. Hanley's report that identify diagnosis codes indicating the rendering of CLS, thereby acknowledging that Dr. Hanley's opinions are informed by her practical experience. Order, at 11. Similarly, Ms. Peluso's actual, practical real-world experience in owning and managing two medical billing entities—one for lactation consultants and one for midwives—provide the bases for her opinions in this case on the designated subject matter of the deficiencies in HCSC's Policy. *See* Dkt. 124, at 5-6.

HCSC (Opp. at 7) chides Plaintiffs for not "connecting the dots" between their experts' experiences and the conclusions they draw in their reports. But what HCSC—and this Court—fail to recognize is that the standard under Federal Rule of Evidence 702 is a liberal and "flexible" one, and that personal experience can be a reliable and valid basis for expert testimony. *Groobert v. President & Dirs. of Georgetown Coll.*, 219 F. Supp. 2d 1, 7 (D.D.C. 2002). Dr. Hanley's and Ms. Peluso's testimony are grounded in experience in their fields and they have adequately explained how those conclusions are so grounded.

For example, Ms. Peluso expressly stated during her deposition that her opinions concerning HCSC's billing practices for CLS arise out of and are informed by the billing practices she employs in her personal business as both an IBCLC and a billing practice professional. *See* Dkt. 101, HCSC Exhibit S, Transcript of Ms. Peluso's Deposition, Tr. at 22:23-23:8; 199:10-200:7; 68:19-71:4. She drew upon this experience when reviewing HCSC's policy concerning procedure codes for breastfeeding support and counseling, and rendered her expert opinions with the benefit of her personal knowledge and practice in the field.

Similarly, Dr. Hanley compiled the table of diagnoses codes in her Report based on her

practical personal experience with ICD codes that she personally, actually uses as an IBCLC, her experience providing CLS and counseling, including her understanding of lactation issues termed as complex and not complex, and her work as a Fellow of the American College of Obstetricians and Gynecologists, a Fellow of the Academy of Breastfeeding Medicine, the American College of Obstetricians and Gynecologists representative to the Project Advisory Committee of the Physician Engagement and Training Focused on Breastfeeding Project, and her experience lecturing students and residents at Harvard Medical School on the topics of lactation, benign breast disease and substance use disorders in pregnancy. *See* Dkt. 100, HCSC, Ex. A, Transcript of Dr. Hanley's Deposition, at 40:19-43:11; 47:22-48:18; 48:19-23; 49:4-15; 55:22-56:14; 78:22-81:12; 83:23-85:22; and Decl. Ex. 21, at 1-3. These principles and methods are reliable and applied reliably to the facts of the case. Plaintiffs did indeed provide the precise "analytical link" between the experts' experience and methodology that HCSC contends is lacking. HCSC Opp., at 7. The proffered expert testimony is thus properly grounded, well-reasoned, and not speculative.

The Court and HCSC manufacture "methodological flaws" where none exist: the methodology each expert employed was based on her experience and qualifications, and tied to their conclusions, which is sufficient to render the opinions reliable. *See, e.g. Ty Inc*, 2004 U.S. Dist. LEXIS 12037, at *7 (concluding that "by virtue of [the expert's] fifty-plus years of experience in the publishing field, [he] has obtained expertise in the customs and practices of the publishing industry, and is certainly qualified to render an expert opinion as to those customs and practices"); *Hiller v. Fletcher*, No. 02-1231 LH/RLP, 2004 U.S. Dist. LEXIS 33394, at *24-26 (D.N.M. Aug. 30, 2004) ("Dr. Norcross's reliance upon his substantial experience in the medical profession is an appropriate basis for his opinions"); *Carroll v. Morgan*, 17 F.3d 787, 790 (5th Cir. 1994) (holding that a doctor was qualified under *Daubert* to give an expert opinion on standard of

medical care based on thirty years of experience as a practicing, board-certified cardiologist and his review of the medical records). The "link" in this case between the experts' experience and the conclusions reached does not warrant further description or explanation: it speaks for itself. HCSC Opp., at 7.

Dr. Hanley's and Ms. Peluso's opinions are based on their "specialized knowledge" of CLS, billing practices and ICD codes, and their "extensive practical experience endow[] [them] with the kind of expertise recognized by the Seventh Circuit." *Spearman*, 138 F. Supp. 2d at 1097. Their many years of practical experience qualify them as experts in the field of CLS and areas of diagnosis codes and medical billing practices reasonably used by providers to indicate CLS, and the methodology underlying their opinions—namely, firsthand review of the materials in this case combined with their extensive experience in the field—is sufficiently reliable to admit into evidence at this stage in the litigation. *See id.* (concluding that expert's "many years of practical roofing experience qualify him as an expert in the field of roofing, and the methodology underlying his opinion -- namely, firsthand observation combined with his extensive roofing experience -- is sufficiently reliable to admit at trial").[2]

Accordingly, both Dr. Hanley and Ms. Peluso possess genuine expertise in lactation services—as this Court well recognized—and because their opinions draw on that expertise as well

[2] HCSC attempts—but fails—to distinguish *Ty Inc v. Publ'ns Int'l, Ltd.*, 2004 U.S. Dist. LEXIS 12037, at *18, on the grounds that there, the expert sufficiently explained his methodology by noting that he applied his knowledge of industry standards and understanding of key documentation to the facts at hand in the case. HCSC Opp., at 9. That is exactly what Plaintiffs' experts did here; there is no meaningful distinction between the opinion rendered in *Ty Inc.* and the facts of this case. Equally unpersuasive (and ironic) is HCSC's arguments that this Court should ignore the decision admitting Dr. Hanley's opinions in *Condry v. UnitedHealth Group, Inc.*, No. 17-cv-00183, 2019 U.S. Dist. LEXIS 106254, at *12 n.2 (N.D. Cal. May 23, 2019), because the court there denied a challenge to Dr. Hanley's opinions "in a single, footnoted sentence lacking any analysis whatsoever." HCSC Opp., at 9. The *Condry* court nonetheless admitted Dr. Hanley's testimony based on virtually an identical methodology.

as their personal analysis of the policies and practices in question, they should be permitted to testify. *See id.* Any arguments as to the bases for the opinions rendered goes to the weight afforded such opinions by the Court, and not to admissibility. *See id.*

The Court erred in concluding that (a) the experts' experiences were somehow "anecdotal" and that (b) such experiences did not "enable them to reliably reach their expert conclusions." Order, at 7; HCSC Opp., at 5. The experts and Plaintiffs have adequately explained how their extensive experience in the field informed and allowed them to reach the conclusions they posit here; for the Court to reach a contrary conclusion was plain error in contravention of the law and warrants reversal.

## III. CONCLUSION

For all the foregoing reasons, as well as those set forth in Plaintiffs' Motion for Reconsideration, Plaintiffs' Motion for Reconsideration should be granted.

Dated: March 31, 2020

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**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.

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