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

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

JOINT STATUS REPORT

Plaintiffs Laura Briscoe, Kristin Magierski and Emily Adams ("Plaintiffs") and Defendant Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, a division of which is Blue Cross and Blue Shield of Illinois ("Defendant"), by and through their undersigned counsel, conducted several telephonic meet and confers and jointly submit this Joint Status Report pursuant to the Court's Order dated September 24, 2020 [Dkt. No. 192]. The Parties have worked together cooperatively to try to find common ground where possible with respect to proposing a reasonable discovery schedule and case management dates, and where agreement was not possible the Parties have set forth their respective positions. The Parties hereby state as follows:

SUMMARY JUDGMENT SCHEDULE

1. The Parties will be filing Cross-Motions for Summary Judgment. The Parties suggest and request that, due to the interrelated issues to be raised by the Parties' Summary Judgment motions, the Parties file a total of four briefs sequentially, rather than three pairs of

simultaneous briefs. The opening brief will be filed by the Plaintiffs, the opening/opposition brief will be filed by Defendant, the Opposition/Reply is filed by the Plaintiffs, and the Reply is filed by the Defendant.

2. The Parties agree that promptly upon the Court's issuance of its rulings on the Parties' Cross Motions for Summary Judgment, the Parties will promptly confer and submit a proposed case schedule and deadlines for Pre-Trial proceedings and Trial.

3. The Parties disagree about the need for additional expert discovery prior to summary judgment briefing and, therefore, also disagree about the schedule for that briefing, as well as the page limits for the various briefs. The Parties have set out their positions below:

4. PLAINTIFFS' POSITION ON DISCOVERY AND SUMMARY JUDGMENT SCHEDULE

Plaintiffs seek to include as part of the proposed discovery schedule and case management dates, deadlines for the submission of an expert report(s) opining with respect to the Plaintiffs' individual lactation claims. The intended expert testimony will be addressed to the lactation services rendered to each Plaintiff that are the subject of the claims for which Defendant did not provide coverage as required under the Affordable Care Act and Plaintiffs' health plans.

The Defendant has not stipulated that the services received by each Plaintiff constituted breastfeeding / lactation support and counseling services under the Affordable Care Act and the Health Resources & Services Administration's Women's Preventive Services Guidelines. There is no question about that fact. However, absent that stipulation, Plaintiffs believe that the Court would be assisted by the expert testimony.

Plaintiffs submit that, because of the current procedural posture of the Action, including that deadlines for summary judgment filings, pre-trial deadlines, or bench and jury trial dates are not currently pending or set, the request is justified and within the Court's discretion to permit as

part of setting the current Case Management Schedule. In addition, the inclusion of expert discovery deadlines is necessary to prevent the prejudice to Plaintiffs that would occur by not permitting them the opportunity to submit expert disclosures now. Such circumstances outweigh any asserted prejudice by Defendant (if any). In sum, Plaintiffs would be unduly prejudiced if required to proceed to summary judgment and trial without the benefit of an expert, whereas no comparable prejudice would befall Defendant.

Under these circumstances, and specifically because the Parties and the Court are setting, now, the Case Management Schedule, Defendant cannot now claim that it is being unfairly ambushed or that it does not have sufficient time to formulate a response. *See, e.g., Rowe Int'l Corp. v. Ecast, Inc.*, 586 F. Supp. 2d 924, 934 (N.D. Ill. 2008); *see also Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000). Defendant's reliance on Fed. R. Civ. P. 6(b)(1)(B) is misplaced; the Court requested that parties propose a reasonable discovery and case management schedule, and Plaintiffs are not seeking to disrupt or interfere with existing deadlines for summary judgment and trial. Likewise, the Defendant's citation to and characterization of *Condry v. Unitedhealth Group, Inc.*, (the "*Condry*" matter), Case No. 3:17-cv-00183-VC (N.D. Ca.), are misplaced and misleading. In the *Condry* matter, summary judgment proceedings directed to the named plaintiffs were conducted *prior to* the filing of class certification motions, which is a very different case management structure. Moreover, the expert opinions in *Condry* referenced by Defendant were proffered *solely in rebuttal* to opinions offered affirmatively by defendants' experts (which Defendant did not proffer here); that is an important distinction Defendant glosses over. Defendant's comments about Plaintiffs' Counsel are inapposite.

Rather, under these circumstances, the court has broad discretion with respect to expert testimony, and may take into consideration the following factors: (1) the prejudice or surprise to

the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date. *See, e.g., David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003). Here, none of those factors are present, thus, weighing in favor of the Court approving a schedule that provides for the limited expert discovery requested by Plaintiffs.

Considering the Plaintiffs' positions outlined above, Plaintiffs propose the following schedule and request additional pages for the briefs as noted:

EVENT	**PROPOSED DEADLINE**
Plaintiffs' Affirmative Expert Disclosures	**October 30, 2020**
Defendant's Affirmative and Rebuttal Expert Disclosures	**November 30, 2020**
Plaintiffs' Rebuttal Expert Disclosures	**December 18, 2020**
Plaintiffs' Opening Brief I/S/O Summary Judgment, which Brief will not exceed 20 pages	**January 8, 2021**
Defendant's Opening/Opposition Brief I/S/O Summary Judgment, which Brief will not exceed 25 pages	**February 5, 2021**
Plaintiffs' Opposition/Reply Brief I/S/O Summary Judgment, which Brief will not exceed 20 pages	**February 26, 2021**
Defendant's Reply Brief I/S/O Summary Judgment, which Brief will not exceed 15 pages	**March 19, 2021**

5. DEFENDANT'S OPPOSITION TO PLAINTIFFS' PROPOSAL TO REOPEN DISCOVERY

Discovery – fact and expert – has long been closed and Defendant opposes Plaintiffs' untimely request to reopen it to allow the Plaintiffs to disclose entirely new expert reports on Plaintiffs' "individual lactation claims." Plaintiffs have not and cannot demonstrate "excusable neglect," in making their request, which is the applicable standard this Court should apply. Fed.

R. Civ. P. 6(b)(1)(B) (noting that deadlines can be extended if the party seeking the extension can demonstrate "excusable neglect"); *Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 464 (7th Cir. 2005) (applying "excusable neglect" standard where a party sought to extend a discovery deadline that had already passed). Because Plaintiffs are seeking to reopen discovery that has been long closed, Defendants reliance on Rule 6 is not "misplaced." *Id.*; *G.M. Sign*, No. 09 C 7692, 2011 U.S. Dist. LEXIS 174425, at *4 (noting that the moving party must show "excusable neglect" under Rule 6 in seeking to reopen discovery).

This Court should deny Plaintiffs' request for three reasons:

First, Plaintiffs' request comes **17 months** since the deadline expired for them to disclose experts and over a year since all of discovery closed. *See* Dkt. 84 (scheduling order extending the expert discovery deadline to August 8, 2019, with Plaintiffs' expert disclosures extended to May 3, 2019). Up until now, despite this Court previously setting deadlines for summary judgment – and even setting a date for trial (dates that were only disrupted by the pandemic) – Plaintiffs have not once raised the need for any new discovery. *See e.g., id.* (scheduling order setting summary judgment and trial dates, anticipating that the parties would not be allowed further discovery after class was resolved). Further, Plaintiffs point to no new developments in the case that warrant discovery at this time. Thus, their request fails to demonstrate "excusable neglect." *See, e.g., Brosted.*, 421 F.3d at 464 (7th Cir. 2005) (affirming district court's denial of motion for extension of discovery deadline filed one month after the deadline had passed because moving party could not demonstrate "excusable neglect"). In short, Plaintiffs' request is too late and should be denied by this Court, as a result.

Second, Plaintiffs had a full opportunity to develop experts, which they did, although the Court did exclude those experts at the class certification phase of this case. Those are the only

experts that Plaintiffs disclosed during the extensive discovery period in this case, and the strategic aspect of that decision is underscored by the implausibility that Plaintiffs could not develop expert discovery **about their own "individual lactation claims"** on a timely basis.[1] There is no plausible reason for their failure to develop such evidence during the discovery period except that they expressly chose not to do so. Further, at the outset of this case, Plaintiffs rejected Defendant's proposal to bifurcate discovery between class and merits, and therefore made the strategic decision to develop or abandon such evidence within the set discovery period that preceded class certification briefing. *See* Dkt. 26 (where the Plaintiffs opposed Defendant's proposal to bifurcate discovery noting that there was not a "good reason" to do so). Plaintiffs should not be now allowed to develop this testimony as their time to do so has passed. *Taylor v. Cook Cty. Sheriff's Office*, No. 13 C 1856, 2019 U.S. Dist. LEXIS 159134, at *31-32 (N.D. Ill. Sep. 16, 2019) (denying additional discovery because the moving party had made a "calculated decision" not to pursue the

[1] Indeed, in a case involving similar issues, Plaintiffs' counsel did develop such expert testimony on behalf of their clients, but for whatever reason did not do so here. *See Condry v. Unitedhealth Group, Inc.*, (the "*Condry*" matter), Case No. 3:17-cv-00183-VC (N.D. Ca.) at Dkt. 161-2, Ex. 43 (1/25/19 Rebuttal Expert Report of Dr. Jane Morton (discussing some of the plaintiffs' individual lactation claims). Notably, this *Condry* expert report was completed before the close of expert discovery in this case, which occurred in August 2019. Because Plaintiffs' counsel could have easily anticipated during the extensive discovery period that discovery about their clients' "individual lactation claims" could be useful to prosecuting their case, they should not be allowed additional time to develop new expert testimony at this juncture. Plaintiffs' claim that their counsel's actions in the *Condry* matter are not on point here because summary judgment occurred before class certification in that case. *See supra*. That argument is misplaced because the point is that Plaintiffs' counsel developed an expert on the individual plaintiffs' claims in that case well before expert discovery closed in this case – in other words, counsel knew how to do it, but they chose not to do it here. Plaintiffs further claim that the fact that their counsel developed this same expert testimony in *Condry* that they now seek here is irrelevant because their counsel developed it in rebuttal to the defendants' experts in that case. That argument is also misplaced. There was no requirement or limitation in this case that Plaintiffs could only develop such testimony in rebuttal. The evidence they seek relates to **their own individual lactation claims** – something Plaintiffs easily could have developed affirmatively. And indeed, Plaintiffs had every opportunity to do so before their deadline expired 17 months ago. The fact remains that Plaintiffs knew what the expert discovery cut off was in this case, even agreed to have it extended, and did not develop experts on their individual claims here – and now they are out of time to do so. Tellingly, Plaintiffs have failed to point to anything that has changed in this case since discovery closed over a year ago that would warrant such discovery now.

discovery during the discovery period; the court noted that it understood why moving party wanted the information at that juncture, but found that the moving party could have discovered the facts prior to the close of discovery if Plaintiff had made different decisions).

Third, Plaintiffs' assertion that Defendant will not be prejudiced is baseless. The significant expense of developing a rebuttal expert and the significant delay that such discovery will cause in this four-year-old case will prejudice Defendant.[2] Just because summary judgment and trial dates are currently not set is no reason to allow additional discovery here, where the additional discovery Plaintiffs seek was completely within their control to obtain during the discovery period. *G.M. Sign v. Groupe Cirque Du Soleil*, No. 09 C 7692, 2011 U.S. Dist. LEXIS 174425, at *4-7 (N.D. Ill. Dec. 5, 2011) (denying request for additional fact discovery where plaintiffs knew of the information they needed during the pendency of the discovery period).

The cases Plaintiffs cite do not support their request. *Rowe Int'l Corp. v. Ecast, Inc.*, 586 F. Supp. 2d 924, 935 (N.D. Ill. 2008) (new material in the declaration at issue was stricken because it was not disclosed during the discovery period; also, finding that the purpose of discovery deadlines is to have the evidence exchanged "**well in advance** of both the summary judgment deadline and the trial date, so that the parties would know where they stood on the issues" and that the "risk of 'ambush' is not lessened . . . simply because [the case was] not yet on the eve of trial."); *Sherrod v. Lingle*, 223 F.3d 605, (7th Cir. 2000) (court allowed late expert reports to stand where counsel had disclosed the names of the experts and their initial reports and where the opposing

[2] Even if this Court were to allow Plaintiffs time to pursue this untimely discovery, Plaintiffs' proposed schedule should be rejected. Plaintiffs' proposed schedule underscores the prejudice of this additional discovery to Defendant. If the Court were to enter Plaintiffs' proposed schedule, Defendant is only afforded 30 days from Plaintiffs' additional expert disclosure to: 1) find a rebuttal expert and have that expert develop a report; and 2) depose Plaintiffs' new experts and (presumably) defend its rebuttal expert at deposition. Even if additional time was afforded to accomplish these tasks, taking into consideration the difficulties of accomplishing these tasks in a pandemic, this case – which is already four years old – will be delayed by several additional months.

party had been part of the delay in scheduling depositions that ended up occurring at the end of the discovery period that resulted in additional information discussed in the late, updated report); *Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (allowing undisclosed testimony by a fact witness because the witness had been disclosed in discovery and because the opposing party had introduced evidence that directly rebutted that witnesses testimony, thus there was no prejudice to that party).

Here, where discovery has been closed for over a year and where the scheduling orders to date have contemplated summary judgment briefing on the heels of class certification with no intervening additional discovery period, Defendant should be able to rest on the fact that it "knows where it stands on the issues" at this point in the litigation. *Rowe*, 586 F. Supp. at 935; *see also, e.g.*, Dkt. 140 (1/28/20 Order setting deadlines for Plaintiffs' renewed class certification motion and further setting deadlines for motions for summary judgment, trial-related deadlines, and a trial date); *see also* Dkt. 139 (Defendant's motion seeking extension of time to file summary judgment until 28 days after the Court ruled on class certification; notably absent is any response by Plaintiffs informing the Court they needed additional discovery before the parties briefed summary judgment).

In an attempt to distract the Court from the fact that discovery has been closed for over a year, Plaintiffs claim above that "Defendant has not stipulated that the services received by each Plaintiff constituted breastfeeding / lactation support and counseling services under the Affordable Care Act and the Health Resources & Services Administration's Women's Preventive Services Guidelines." Notably, Plaintiffs has not submitted to or asked Defendant for a stipulation, but instead made this suggestion for the first time on the day this filing was due via a draft edit to the

status report. While Defendant is willing to review any reasonable stipulation in the ordinary course, such a stipulation is beside the point of whether discovery should reopen (it should not).

In short, Plaintiffs' prejudicial and late request for additional discovery should be denied. *Vakharia v. Swedish Covenant Hosp.*, 1994 U.S. Dist. LEXIS 2712, 1994 WL 75055, at *2 (N.D. Ill. 1994) ("Parties are entitled to a reasonable opportunity to investigate the facts-and no more."). Considering the Defendant's positions outlined above, Defendant proposes the following schedule for summary judgment briefing.

With respect to page limits, Plaintiffs' opening brief and Defendant's final brief should not exceed the number of pages allowed by the Northern District of Illinois' Local Rules (15 pages), but because the two middle briefs cover 1) Defendant's opening brief and its response to Plaintiffs' opening brief and 2) Plaintiffs' Opposition to Defendant's opening, as well as Plaintiffs' reply in support of their opening brief, Defendant respectfully requests that those two briefs be expanded to 25 pages each. *See* N.D. Ill. Local Rule 7.1 (limiting briefs to 15 pages). If Plaintiffs are to be afforded 20 pages for its opening brief as they have requested above, Defendants respectfully request 20 pages for its reply (its final brief) and that the Court allow 25 pages to both parties for their respective middle briefs.

EVENT	**PROPOSED DEADLINE**
Plaintiffs' Opening Brief I/S/O Summary Judgment, which Brief will not exceed 15 pages	**November 16, 2020**
Defendant's Opening/Opposition Brief I/S/O Summary Judgment, which Brief will not exceed 25 pages	**December 21, 2020**
Plaintiffs' Opposition/Reply Brief I/S/O Summary Judgment, which Brief will not exceed 25 pages	**January 19, 2021**
Defendant's Reply Brief I/S/O Summary Judgment, which Brief will not exceed 15 pages	**February 9, 2021**

Dated: October 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kimberly M. Donaldson Smith, hereby certify that on October 7, 2020, I electronically filed a true and correct copy of the foregoing JOINT STATUS REPORT 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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