The Honorable Robert S. Lasnik
ORAL ARGUMENT REQUESTED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHUNDRO; and O.L. by and through her parents, J.L. and K.L., each on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN OF WASHINGTON; KAISER FOUNDATION HEALTH PLAN OF WASHINGTON OPTIONS, INC.; KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST; and KAISER FOUNDATION HEALTH PLAN, INC.,

Defendants.

CASE NO. 2:17-cv-1611-RSL

DEFENDANTS' REPLY IN SUPPORT OF 12(b)(6) MOTION TO DISMISS FOURTH AMENDED COMPLAINT

NOTED ON MOTION CALENDAR: FRIDAY, APRIL 16, 2021

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I. INTRODUCTION

In their Opposition to Kaiser's Motion to Dismiss their Fourth Amended Complaint ("FAC"), Plaintiffs argue they have plausibly alleged facts allowing a reasonable inference that Kaiser designed its exclusion of coverage for hearing aids solely because it intended to discriminate against the hearing disabled. Their arguments are based on three faulty premises, which contradict the law and their own allegations in the Fourth Amended Complaint.

First, while claiming "most, if not all" insureds who seek or use hearing aids are, by definition, disabled, Plaintiffs ignore their own statistics, which show that 75% of Americans who use hearing aids do not report having serious hearing loss. Instead, they ask the Court to adopt a "subjective" standard for determining whether a hearing impairment "substantially limits" a major life activity, which they then precisely key to the specific type of hearing aid Plaintiffs require.[1] Under Plaintiffs' formulation, insureds with serious hearing loss are not substantially limited in hearing if they do not desire an air conduction hearing aid, while those with minimal hearing loss are disabled if they do. That is not the law and is not reasonably plausible. As the Ninth Circuit expressly held, the Affordable Care Act "does not guarantee individually tailored health care plans," which is what Plaintiffs seek. *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 955 (9th Cir. 2020).

Second, Plaintiffs fail to show how the coverage exclusion for one type of hearing aid (but not others) plausibly allows an inference of intentional discrimination "solely" on the basis of disability, as is required. Out of whole cloth, Plaintiffs construct a standard that directly contradicts Ninth Circuit law, contending the only viable non-discriminatory motives for not covering the type of hearing aid Plaintiffs seek is "medical and scientific" reasons. Plaintiffs' intentional, proxy discrimination claim under ACA § 1557 fails the plausibility test and should be dismissed.

Third, Plaintiffs try to save the claim they actually pled (intentional discrimination by proxy), by arguing they meet the standards for a "meaningful access" and disparate impact claim.

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[1] Plaintiffs proposed class consists of insureds who could benefit from air conduction hearing aids, as opposed to cochlear implants and bone anchored hearing aids, which are covered under Kaiser's Plan.

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Neither of these claims are pled; nor could they be under recent Ninth Circuit precedent because the type of hearing aids Plaintiffs desire are not Essential Health Benefits. *See Doe v. CVS Pharm. Inc.*, 982 F.3d 1204, 1211 (9th Cir. 2020) ("meaningful access" claim under ACA 1557 requires the denied benefit to be a mandatory Essential Health Benefit).

Plaintiffs also fail to state a plausible claim under state law for breach of contract or discrimination under Washington's Insurance Reform Act. RCW § 48.43.0128 does not create a private right of action, and cannot be enforced merely by re-casting a claim for violation as a breach of contract. The only reason Plaintiffs allege breach of contract is to run an end around the lack of any private cause of action in the state statute. The court should reject their state law theories.

Kaiser respectfully requests that Plaintiffs' Fourth Amended Complaint be dismissed with prejudice.

II. ARGUMENT

A. Plaintiffs Fail to State a Claim Under ACA § 1557 Because Disability is Neither Subjective Nor the Sole Reason for Kaiser's Exclusion.

The only ACA § 1557 cause of action asserted in the FAC is a single claim for disparate treatment, or intentional discrimination, by proxy. Plaintiffs do not dispute that they must allege facts to show that on its face, the alleged proxy's "fit" is "sufficiently close" to make a discriminatory inference plausible. Nor do Plaintiffs disagree that the causation standard for a claim of disability discrimination under ACA § 1557 is the same as that under Section 504 of the Rehabilitation Act, *i.e.* discrimination "solely by reason of" a disability and not just a "motivating factor." They fail to allege facts to make a reasonable inference on either of these essential elements possible.

1. Plaintiffs' Proxy Discrimination Claim, Based on an Improper Subjective Disability Standard, is Not Plausible.

Plaintiffs do not dispute that under the relevant caselaw, as cited in Kaiser's motion, their ultimate burden is to prove that there is "near unanimity" between the alleged proxy and the disability, but assert that this burden is not applicable at the pleading stage. Opposition, p. 13, n.4.

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While Plaintiffs' need not "prove" their claim at the pleading stage, they still need to allege plausible facts, which if accepted as true would satisfy their burden of proof. The point is that a plaintiff can overcome a motion to dismiss and proceed to discovery only if the allegations supporting the essential elements of the claim are plausible. While the Ninth Circuit recognized it may be difficult at the pleading stage to allege the requisite "fit" with "statistical accuracy[,]" it held that Plaintiffs must support their proxy claim with something more than the conclusory assertion that Kaiser's exclusion predominantly affects the disabled. *Schmitt*, 965 F.3d at 959; *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)). "Sufficient factual matter" necessary to avoid dismissal of a complaint does not include allegations that are conclusory or speculative or that require the Court to draw unreasonable or unwarranted factual inferences. *See Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005). The complaint must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

The Ninth Circuit expressly ruled that in order to state a claim, Plaintiffs must plead that the alleged proxy is "so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Schmitt*, 965 F.3d at 958, *citing Davis v. Guam*, 932 F.3d 822, 837 (9th Cir. 2019). Noting that "since not all hearing loss is substantial, at least some – and potentially most – individuals with that condition are not deemed disabled[,]" the court ruled that Plaintiffs' claim that "few, if any, non-disabled insureds had claims denied under the Hearing Loss Exclusion . . . requires further explanation to be plausible." *Schmitt*, 965 F.3d at 958-59 (emphasis added).

Plaintiffs gloss over the Ninth Circuit's opinion, and claim all they need to do is allege that the exclusion for certain types of hearing aids predominantly affects only disabled insureds. This conclusory allegation is based on the unreasonable premise that only the disabled ever seek treatments and services for hearing loss. This defies common sense and their own statistical allegations. Nor does it address the "close fit" required for proxy discrimination where Plaintiffs

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must allege facts sufficient to show intentional (proxy) discrimination where the allegedly discriminatory exclusion is both over inclusive and under inclusive.

There are a number of reasons why people with non-disabling or temporary hearing impairments might seek hearing-related medical services. Hearing can be affected by ear infections, wax buildup, exposure to load noises, tinnitus or ringing in the ears, congestion, colds and flus, and numerous other conditions that could affect anybody's hearing regardless of any disability. There is no reason to assume that people with mild or moderate hearing loss, or even substantial hearing loss in one ear, would not seek treatments or services to determine whether hearing-related medical services could improve their hearing.

Importantly, as detailed in Kaiser's motion, the new statistics Plaintiffs added to the FAC actually contradict Plaintiffs' faulty premise. Plaintiffs now attempt to downplay and distance themselves from their own alleged statistics, accusing Kaiser of mixing apples and oranges and claiming the Court need not address the data upon which Plaintiff's FAC relies. But Plaintiffs do not dispute that their data shows that about 75% of Americans who use hearing aids do not report having serious hearing loss. *See* Kaiser's Motion to Dismiss, pp. 6-7. The Court cannot simply ignore this data when evaluating the plausibility of Plaintiffs' essential allegations, when it directly contradicts the lynchpin of their entire claim. *See In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (court need not accept as true allegations that are merely conclusory, unwarranted deductions of fact, unreasonable inferences, or contradicted by exhibit).

The crux of Plaintiffs' argument is that everyone who seeks coverage for hearing aid treatments considers themselves "substantially limited" in hearing and are therefore necessarily disabled. They argue that while the existence of an impairment is based on objective criteria, the question whether it "substantially limits" a major life activity is subjectively determined by the individual. There is no authority for this novel proposition, and if adopted it would set a dangerous precedent for a slippery slope. In fact, Plaintiffs' theory is directly contrary to caselaw.

The determination whether an impairment "substantially limits" a major life activity is objective. *See, e.g., Walton v. United States Marshals Serv.*, 492 F.3d 998, 1006-08 (9th Cir. 2007)

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(plaintiff's actual disability requires evidence that a condition is "objectively, a substantially limiting impairment"); *Smith v. Masterson*, 353 F. App'x 505, 507 (2d Cir. 2009) (prisoner's subjective complaints of hearing loss failed to establish disability without corroboration by objective test). Even apart from the assertion that a plaintiff's subjective belief is determinative of disability under Section 504, Plaintiffs purport to measure such subjective belief based only on whether a particular type of hearing aid is desired. Under Plaintiffs' formulation, those with serious hearing loss who don't want the type of hearing aid excluded in the policy are NOT substantially limited in a major life activity (*i.e.* not disabled), while those with minimal hearing loss are disabled, if they do. If Plaintiffs' arguments prevail, every policy exclusion would be "discriminatory" by a mere showing that the excluded service was desired by some individuals who could benefit from it. This is no different than Plaintiffs' original premise, rejected by this court and the Ninth Circuit, that the ACA §1557 is a benefit mandate. Just because a person decides he or she would like to get a hearing aid examination does not mean he or she is disabled. The Court should reject Plaintiffs' argument that only insureds who subjectively believe they are disabled are impacted by the exclusion.

Moreover, the relevant inquiry here is not who is actually impacted by the exclusion – *i.e.* what proportion of denied claims are from disabled insureds – but whether the language of the exclusion, on its face, allows an inference of discriminatory intent. Discrimination by proxy, as opposed to disparate impact (which is not pled in the FAC) focuses on the face of the policy and the language used, to determine whether the policy was designed solely with discriminatory intent. Plaintiffs' argument that the hearing aid exclusion is a proxy for discrimination because it only affects those that seek hearing aid treatment is not supported by law and should be rejected.

2. Plaintiffs' Failure to Allege Discrimination "Solely" By Reason of Disability Requires Dismissal.

Nowhere in their FAC or Opposition do Plaintiffs allege that Kaiser intentionally discriminated "solely" because of disability, as they acknowledge is required under *Doe*, 982 F.3d 1209-10. Nor would any such claim be plausible. The failure to make that essential allegation, in

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1 and of itself, warrants dismissal of Plaintiffs' ACA § 1557 disability discrimination claim.
2 Plaintiffs apparently recognize Kaiser's interest in offering an affordable basic healthcare
3 plan, and that coverage for hearing aids and other non-EHBs would increase premiums. They
4 argue, however, that cost savings cannot be considered when determining whether the motivation
5 for the exclusion is "solely" based on discrimination against the disabled. The law does not require
6 that only "scientific" or "medical" reasons are sufficient to preclude a claim that discrimination is
7 the sole reason for a challenged policy. Plaintiffs' claim depends on establishing that the alleged
8 proxy is "unexplainable on grounds other than" discriminatory motive. *Pacific Shores Props., LLC*
9 *v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), *quoting Arlington Heights v.*
10 *Metropolitan Housing Corp.*, 429 U.S. 252, 266-68, 7 S.Ct. 555, 50 L. Ed.2d 450 (1977). A health
11 plan runs afoul of ACA § 1557 only if its allegedly discriminatory provisions are adopted with
12 intent to discriminate against the disabled, and for no other reason, as the cases in Section III.B of
13 Kaiser's motion to dismiss illustrate. Therefore, Plaintiffs cannot plausibly claim that Kaiser's
14 intent in designing it plan was solely to discriminate against the hearing disabled.
15 **3. Plaintiffs' Unpled "Meaningful Access" Claim is Contrary to Law.**
16 Despite pleading only a proxy discrimination claim, which looks to the face of a policy for
17 evidence of discriminatory intent, Plaintiffs now argue unrelated issues of disparate impact and
18 "meaningful access" in their Opposition. This attempt to confuse the issue and distract the Court
19 is misplaced and misleading, because it is irrelevant to the proxy discrimination analysis. But in
20 any event, Plaintiffs' meaningful access theory fails under Ninth Circuit law because the benefit
21 to which Plaintiffs claim they were denied meaningful access is not mandated by the ACA.
22 The meaningful access test was first enunciated in *Alexander v. Choate*, 469 U.S. 287, 298-
23 99 (1985), when it rejected the "boundless notion" that all disparate impact showings give rise to
24 an actionable claim under Section 504 of the Rehabilitation Act, and "assume[d] without deciding"
25 that Section 504 reached "at least some conduct that has an unjustifiable disparate impact upon the
26 [disabled]." In *Doe*, the Ninth Circuit laid out the analysis for disability discrimination claims
27 under ACA § 1557, stating "we first consider the nature of the benefit [plaintiffs] were allegedly

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1 denied." 982 F.3d at 1210. The court accepted the plaintiffs' characterization that the "denied
2 benefit is meaningful access to 'the prescription drug benefit as a whole[.]'" *Doe*, 982 F.3d at
3 1210. This was important, because when turning to the question whether the plaintiffs were denied
4 meaningful access to the defined benefit, the Court noted that "[c]onsistent with *Choate*, the
5 district court in this case should have looked to the ACA to determine whether Does adequately
6 alleged they were denied meaningful access to an <u>ACA-provided benefit</u>." *Id.* at 1211 (emphasis
7 added). Under *Doe*, a viable "meaningful access" claim under ACA § 1557 requires the benefit at
8 issue to be mandated by the ACA. Unlike the benefit of "prescription drugs," at issue in *Doe*,
9 hearing aid examinations and hearing aids are not Essential Health Benefits under the ACA.

10 In short, even if Plaintiffs had alleged a cause of action for denial of meaningful access,
11 their claim would fail as a matter of law. Plaintiffs essentially seek coverage for hearing aid
12 examinations and hearing aids because that is "health care precisely tailored to [their] particular
13 needs," something the Supreme Court expressly held is not required. *See Choate*, 469 U.S. at 302;
14 *accord Schmitt*, 965 F.3d at 955 (ACA § 1557 "does not guarantee individually tailored health
15 care plans"). While hearing loss coverage might be specifically tailored to meet the Plaintiffs'
16 unique health care needs, the ACA does not mandate the benefit. Under Ninth Circuit law, as
17 enunciated in *Doe*, Plaintiffs' meaningful access arguments must be rejected.

18 **B. Plaintiffs Fail to State a Claim Under State Law.**

19 Finally, Plaintiffs' second cause of action, for breach of contract as a result of violation of
20 RCW § 48.43.0128, should also be dismissed for failure to state a claim. Plaintiffs' Opposition
21 raises a number of arguments, but none of them support a right to enforce the insurance code
22 through a breach of contract claim, not do Plaintiffs explain how an insurance policy that is
23 consistent with OIC regulatory guidance and Washington's benchmark plan can be said to violate
24 state law.

25 Plaintiffs cite a number of cases, but none of them hold that insurance code statutes may
26 be enforced through a breach of contract claim. For example, in *O.S.T. v. Regence BlueShield*, 181
27 Wash.2d 691, 707, 335 P.3d 416 (2014), plaintiffs pleaded a breach of contract claim based on an

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1 alleged violation of RCW § 48.44.341, but that claim was never adjudicated. The Washington
2 Supreme Court affirmed the dismissal of the plaintiffs' declaratory judgment claim on summary
3 judgment. *Id.*; *O.S.T. v. Regence BlueShield*, No. 112341879, 2012 WL 12137687, *1 (Wash.
4 Super. Dec. 13, 2012).

5 It is true that RCW § 48.15.510 provides that noncomplying forms are to be construed to
6 comply with state law, and RCW § 48.18.200(2) renders certain noncomplying insurance
7 provisions void. Cases hold that noncomplying provisions in insurance contracts will not be
8 enforced. *Brown v. Snohomish County Physicians Corp.*, 120 Wash.2d 747, 753, 845 P.2d 334,
9 337 (1993); *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 376, 119 S. Ct. 1380, 1390,
10 143 L. Ed.2d 462 (1999). But that is a far cry from rewriting the terms of an insurance contract or
11 allowing insureds to sue for breach of contract.

12 Even if Plaintiffs could seek to enforce RCW § 48.43.0128 through a breach of contract
13 action, their claim would still fail as a matter of law because Kaiser's hearing loss exclusion is
14 consistent with state law. OIC regulatory guidance as to the requirements of state law is entitled to
15 deference by this Court. Both WAC § 284-43-5622 and WAC § 284-43-5940, which implement
16 RCW § 48.43.0128, prohibit discrimination in benefit design and mandate coverage "substantially
17 equal to the EHB-Benchmark plan." Because Washington's benchmark plan requires coverage for
18 cochlear implants but not hearing aids, it cannot be said that Kaiser's plan violates state law.

19 Plaintiffs couch their claim for violation of RCW § 48.43.0128 in an attempt to run an end
20 around the fact that the statute does not create a private right of action. This tactic was specifically
21 condemned and foreclosed in *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 114, 118, 131
22 S.Ct. 1342, 179 L. Ed. 2d 457 (2011) (the absence of a private right of action to enforce a statute
23 "would be rendered meaningless" if a plaintiff could simply sue to enforce the contract instead.)
24 Enforcement of the Insurance Reform Act is expressly left to the insurance commissioner, who
25 can issue fines or suspend or revoke an insurer's certificate of authority. *See* RCW
26 § 48.43.0122(2); *see also* RCW § 48.43.047(3). None of the authorities Plaintiffs cite support their
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arguments that the Washington Legislature has incorporated RCW § 48.43.0128 into the Washington Law Against Discrimination (RCW § 49.60) or its private enforcement provisions.

III. CONCLUSION

Plaintiffs have failed to state a plausible claim for intentional disability discrimination by proxy under ACA § 1557, and their breach of contract claim for violation of RCW § 48.43.0128 fails as a matter of law. For all of the foregoing reasons, this Court should dismiss Plaintiffs' Fourth Amended Complaint with prejudice.

Respectfully submitted this 16th day of April 2021.

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2 CERTIFICATE OF SERVICE
3 I, Sherelyn Anderson, affirm and state that I am employed by Karr Tuttle Campbell in King
4 County, in the State of Washington. I am over the age of 18 and not a party to this action. My
5 business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104.
6 On this day, I caused the foregoing Defendants' Reply in Support of 12(b)(6) Motion to
7 Dismiss Fourth Amended Complaint, to be served on the parties listed below in the manner
8 indicated.
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17 I declare under penalty of perjury that the foregoing is true and correct, to the best of my
18 knowledge.
19 Dated this 16th day of April 2021, at Seattle, Washington.
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