THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants.

No. 2:17-cv-01609-RAJ

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:
January 29, 2021

Oral Argument Requested

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

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I. MOTION

2 Defendants Regence BlueShield ("Regence") and Cambia Health Solutions, Inc. f/k/a
3 The Regence Group ("Cambia") (collectively "Defendants") respectfully move the Court for an
4 order dismissing Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the
5 grounds that it fails to state a claim for relief.

6
II. INTRODUCTION

7 Plaintiffs E.S. and Jodi Sternoff (collectively, "Plaintiffs") are insureds under a Regence
8 BlueShield health plan who allege that they have been diagnosed with hearing loss that qualifies
9 them as disabled. Plaintiffs claim that the plan discriminates against them on the basis of
10 disability because it contains a provision that excludes coverage for all treatment for hearing loss
11 except cochlear implants (the "Exclusion"). This Court dismissed their initial Complaint for
12 failure to state a claim after finding that the Exclusion was not discriminatory because it applied
13 equally to disabled and non-disabled insureds and therefore did not violate Section 1557 of the
14 Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116. On appeal, Plaintiffs
15 changed course and, for the first time, argued that the Exclusion constituted discrimination by
16 proxy because it contained a facially-neutral classification that, in practice, applied solely to
17 disabled insureds. The Ninth Circuit affirmed this Court's dismissal, finding that the Complaint
18 failed to allege facts from which discriminatory intent could be inferred, but it granted Plaintiffs
19 leave to amend their Complaint.

20 Plaintiffs have now filed an Amended Complaint that focuses solely on the proxy
21 discrimination theory, but it fares no better than the first and should also be dismissed. Under a
22 proxy discrimination theory, a facially-neutral category is so closely aligned with a protected
23 class that the categorizing organization must have had a discriminatory intent. Typically, a
24 proxy discrimination claim includes allegations suggesting that facial neutrality was used as a
25 thinly veiled attempt to evade scrutiny for discrimination or targeting a protected class.

26

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1 Here, the Amended Complaint does not meet those exacting standards. As an initial
2 matter, the Amended Complaint contains no allegations of discriminatory intent or animus. To
3 the contrary, the Exclusion follows state guidelines regarding the provision of essential health
4 benefits consistent with the requirements of the ACA.
5 More importantly, the Exclusion is far from the close "fit" required to advance a proxy
6 discrimination claim. It is significantly overinclusive because it applies to numerous non-
7 disabled insureds who have minimal hearing loss or no hearing loss at all. In fact, supporting
8 documents filed by Plaintiffs show that people with non-disabling forms of hearing loss
9 outnumber the disabled two-to-one, and the Exclusion applies to both groups equally. The
10 Exclusion is also underinclusive because it ***does*** provide coverage for many severely disabled
11 insureds who require cochlear implants.
12 Plaintiffs have no answer for this basic and fatal flaw in their claim. For example, they
13 attempt to narrow the scope of the Exclusion to "match" only disabled persons, but that argument
14 is contrary to the Exclusion's plain terms. Plaintiffs also allege that only disabled persons would
15 seek or would have sought treatment or coverage for hearing loss. But the statistical data on
16 which they rely undermines, rather than supports, that already implausible allegation. In sum,
17 because the Exclusion is not a close enough fit to be a proxy for disability, it cannot form the
18 basis of a discrimination claim.
19 Plaintiff's state law claim under Wash Rev. Code § ("RCW") 48.43.0128 must be
20 dismissed for the same reasons as the federal claim—the Exclusion is not a proxy for disability
21 because it applies to far more insureds who have little or no hearing loss than it does to the
22 disabled. Furthermore, the Exclusion cannot be discriminatory under state law because
23 regulations implementing the statute expressly provide that insurers may limit hearing treatment
24 to cochlear implants. And, in any event, the statute contains no express or implied private right
25 of action. Instead, the legislature appropriately tasked the state Insurance Commissioner with
26 enforcing the anti-discrimination mandate in the complex area of health insurance.

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As in their first Complaint, Plaintiffs allege no facts, other than the terms of the Exclusion itself, that would support an inference that Defendants intended to discriminate against the disabled when they adopted the Exclusion. Plaintiffs' Amended Complaint should be dismissed.

III. BACKGROUND

A. The ACA

Congress enacted the ACA in 2010, in an effort to comprehensively reform the nation's health care system. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 590, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012) (Ginsburg, J., dissenting in part). As relevant here, the ACA generally barred insurers from imposing annual or lifetime limits on anything that is an "essential health benefit." "Essential health benefit" is a term of art under the ACA that Congress left to the Secretary of the Department of Health and Human Services ("HHS") to define. 42 U.S.C. § 18022(b). Congress, however, did direct the Secretary to ensure that essential health benefits include "[r]ehabilitative and habilitative services and devices." 42 U.S.C. § 18022(b)(1)(G). Congress further stated that "[t]he Secretary shall ensure that the scope of the essential health benefits . . . is equal to the scope of benefits provided under a typical employer plan, as determined by the Secretary." 42 U.S.C. § 18022(b)(2)(A). To enable the Secretary to assess what sorts of benefits were typical in employer plans, Congress required the Secretary of Labor to conduct a survey of employer plans. *Id*. After an extensive process, the Secretary left it to each state to articulate the scope of essential health benefits in that state. States did so through the adoption of a "benchmark plan."

Washington's benchmark plan covers cochlear implants but not hearing aids. Wash. Admin. Code § ("WAC") 284-43-5640(7)(b)(i) & (c)(iv). Regulations enacted by Washington's Office of Insurance Commissioner ("OIC") provide that a health benefit plan must include cochlear implants as rehabilitative services, and may, but is not required to, include hearing aids other than cochlear implants. *Id*.

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The ACA did not include hearing aids or services as an essential health benefit, and most states' approved benchmark plans exclude or limit coverage for hearing aids. The benchmark plan offers no coverage for non-cochlear hearing aids in the following states: Alabama, Alaska, California, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Mississippi, Montana, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington State, Washington D.C., West Virginia, and Wyoming. The benchmark plan covers hearing aids only for children, while denying coverage for adults in the following states: Colorado, Connecticut, Delaware, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, and Wisconsin. Cigna, Essential Health Benefits: Benchmark Plan Comparison 2017 and Later (2017), https://www.cigna.com/assets/docs/about-cigna/informed-on-reform/top-11-ehb-by-state-2017.pdf.

B. The Amended Complaint

1. Parties

Plaintiff E.S. is the nine-year-old daughter and dependent of R.S. and J.S. She is insured under a Regence BlueShield insured health plan. (Am. Compl. ¶ 6.) Plaintiff Jodi Sternoff is an adult who is also insured under a Regence BlueShield insured health plan. (*Id.* ¶ 7.) Plaintiffs allege that they and other members of the class "have been diagnosed with Hearing Loss," that "limits a major life activity so substantially as to require medical treatment." (*Id.* ¶ 95.) Plaintiffs allege that they require and/or will require medical treatment for their hearing loss, excluding treatment with cochlear implants. (*Id.* ¶ 96.) Plaintiffs also allege that they have paid out-of-pocket for medically necessary treatment for their hearing loss, including audiology examinations and hearing aids. (*Id.* ¶ 111.[1])

[1] Plaintiffs' counsel has filed a Third Amended Complaint raising similar claims on behalf of different plaintiffs against several entities affiliated with Kaiser Permanente. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-01611 (W.D. Wash. Oct. 20, 2020), ECF No. 58.

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Defendant Regence is an authorized health carrier based in King County and is engaged in the business of insurance in the State of Washington, including King County. *Id.* ¶ 8. Cambia is the nonprofit sole member and corporate owner of Regence. (*Id.* ¶ 9.)

2. The Exclusion

At the time the lawsuit was filed, Regence's insured health plans in Washington contained the following benefit exclusion:

> We do not cover routine hearing examinations, programs or treatment for hearing loss, including but not limited to noncochlear hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them.

(*Id.* ¶ 14 (quoting Plaintiffs' Regence Policy, Group No. 10018298).) Regence's 2020 health plan purchased by Plaintiffs contains a similar provision, which provides: "Hearing aids (externally worn or surgically implanted) and other hearing devices are excluded. This exclusion does not apply to cochlear implants." (Am. Compl., App. A (Dkt. 32-1) at 50-51.) The provision further excludes "Routine Hearing Examination." (*Id.* at 52.)[2]

Referred to in the Amended Complaint as a "blanket" Hearing Loss Exclusion (Am. Compl. ¶¶ 19, 24), on its face this policy provision applies to all insureds under the plans at issue. Thus, a non-disabled person will not have coverage for a routine hearing examination, just as a disabled person would not have coverage for the same examination. Plaintiffs do not allege otherwise.

3. New Allegations

As noted, Plaintiffs fundamentally changed their position on appeal. Neither the original Complaint nor the briefing on the first Motion to Dismiss included a theory of "proxy discrimination." Plaintiffs first advanced that theory as a section of their opening brief in the Ninth Circuit, and then only as a mis-labeled theory of disparate impact.

[2] Defendants herein refer to the quoted provisions of Plaintiffs' prior and current policies, collectively, as the "Exclusion."

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1 Plaintiffs acknowledge (as they must) that a number of non-disabled persons ***are*** affected
2 by the Exclusion and, correspondingly, some number of disabled persons ***are not*** affected by the
3 Exclusion and receive treatment related to cochlear implants. Thus, to adequately allege a
4 plausible proxy discrimination claim, Plaintiffs must allege facts—not assumptions—showing
5 that both groups are so small that the Exclusion can fairly be described as intentionally targeting
6 disabled persons.

7 The Amended Complaint attempts to do so by outlining the manner in which all hearing
8 loss is measured and determined, as well as nationwide hearing loss statistics and studies about
9 hearing aids and their consumption. (Am. Compl. ¶¶ 41-52.) From that information, Plaintiffs
10 make a number of implausible leaps. In an attempt to rebut the overinclusivity of the Exclusion,
11 for example, they allege that "virtually all people who seek or obtain hearing aids" would qualify
12 as disabled. (*Id*. ¶ 53.) They claim that people with hearing impairment that is not disabling "do
13 not generally seek formal treatment from medical professionals." (*Id*. ¶ 55.) And they assert that
14 "[e]xcluding coverage for hearing aids and hearing treatment almost exclusively affects people
15 with disabling hearing loss." (*Id*. ¶ 59.) As to cochlear implants, which are covered and which
16 Plaintiffs acknowledge to be available to "people with severe to profound hearing loss,"
17 Plaintiffs simply claim that not enough persons—5.6% by their estimation—are eligible for
18 cochlear implants to make a difference. (*Id*. ¶¶ 69, 72.)

19 **C. Procedural History**

20 Defendants moved to dismiss Plaintiffs' original Complaint pursuant to Federal Rule of
21 Civil Procedure 12(b)(6) on the grounds that Section 1557 incorporated the existing legal
22 standards for review of claims under Section 504 of the Rehabilitation Act and, under those
23 standards, the Exclusion does not discriminate because it applies equally to the disabled and non-
24 disabled. (Dkt. 11.) This Court granted Defendants' motion and dismissed Plaintiffs' Complaint
25 with prejudice, ruling that because "the hearing loss coverage exclusion is applied to all insureds,
26 whether disabled or not[,] . . . [it] does not then deny Plaintiffs meaningful access to services that

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are easily accessible by others." (Dkt. 22 at 5 (citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).)

On appeal, the Ninth Circuit cited its concurrent opinion in *Schmitt* in affirming the dismissal of the Complaint but reversing the dismissal with prejudice and granting Plaintiffs leave to amend. (Ninth Cir. Case. No. 18-35892, Dkt. 49-1.) In *Schmitt*, the Court first assumed without deciding that the standards for claims under Section 504 of the Rehabilitation Act were applicable to claims under Section 1557 of the ACA. *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 954 (9th Cir. 2020). The Court, however, rejected the applicability of the Supreme Court's decision in *Alexander v. Choate*, 469 U.S. 287, 301, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985), to claims for discriminatory benefit design under the ACA. *Schmitt*, 965 F.3d at 955. It found that, even though the Exclusion applies to disabled and non-disabled insureds, it could nonetheless discriminate on the basis of disability if the excluded group were a proxy for insureds with a hearing disability. *Id.* at 958-59. The Court, however, dismissed the Complaint because it failed to allege that the "fit" between the Exclusion and the disabled was sufficiently close to warrant an inference of intentional discrimination. *Id.* at 959-60.

IV. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *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)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[D]ismissal for failure to state a claim under [Rule] 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).

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Telephone 206.624.0900

V. ARGUMENT

A. Plaintiffs Fail to State a Claim Under the ACA Because the Exclusion Is Not a Proxy for Disability.

Plaintiff's proxy discrimination theory fails because the Exclusion is not aimed at a group of insureds that is a proxy for the disabled. Instead, the Exclusion is significantly overinclusive because it applies to many insureds who have non-disabling hearing loss or who have no hearing loss at all. Furthermore, it is also underinclusive because it covers treatment for insureds with the most severe hearing disabilities. With such substantial discrepancies between the scope of the Exclusion's application and the pool of disabled insureds, the Exclusion cannot provide a basis for inferring intentional discrimination.

1. Proxy Discrimination Requires a Fit Between Classification and a Protected Trait That Is Sufficiently Close to Allow Inference of Discriminatory Intent.

Proxy discrimination "arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160, n.23 (9th Cir. 2013). The doctrine prevents the use of "a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992). As the Ninth Circuit noted in *Schmitt*, the issue for the Court is whether the alleged proxy classification matches the protected class closely enough that the Court can infer intentional discrimination. 965 F.3d at 959 ("[T]he crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible." (citing *Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019)).

Case law in the Ninth Circuit and elsewhere shows that correlation between classification and class is not enough, and there must instead be near unanimity between the two groups for a

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1 court to be able to infer that the classification is because of disability. In *Hazen Paper Co. v.*
2 *Biggins*, a case under the Age Discrimination in Employment Act, the Supreme Court rejected
3 the plaintiff's theory that the vesting of pension benefits was a proxy for age. 507 U.S. 604, 611,
4 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). The Court noted that classifications based on factors
5 other than age do not violate the statute, "even if the motivating factor is correlated with age."
6 *Id.* While acknowledging that there is likely to be a significant correlation between the two
7 groups, vesting of a pension plan cannot be a proxy for age because "an employee's age is
8 analytically distinct from his years of service." *Id.*

9 The Ninth Circuit has similarly found that a proxy group must be so closely aligned with
10 the protected class that intentional discrimination can be inferred from the classification alone.
11 In *Pacific Shores Properties*, the Court noted that the neutral criteria must be "*almost exclusively*
12 indicators of membership in the disfavored group." 730 F.3d at 1160, n.23 (emphasis added). In
13 that case, the City of Newport Beach wanted to eliminate all "group homes"—homes in which
14 recovering alcoholics and drug users mutually support each other's recovery. *Id*. at 1147-48.
15 Those persons qualified as disabled under the FHA. *Id*. at 1156-57. In an attempt to insulate its
16 actions from a discrimination claim, the city purposefully made its law facially neutral, thereby
17 affecting some housing other than group homes, but very few. *Id*. at 1163-64. Furthermore,
18 there were numerous actions and public statements showing that the city's intent was to
19 eliminate housing for recovering alcoholics and drug addicts. *Id*. at 1151-52. That evidence,
20 combined with the "almost exclusive[]" correspondence between the classification and the
21 protected class, supported a proxy discrimination claim. *See also Guam*, 932 F.3d at 838
22 ("Although proxy discrimination does not involve express racial classifications, the fit between
23 the classification at issue and the racial group it covers is so close that a classification on the
24 basis of race can be inferred without more.").

25 Other courts take a similar approach. The Third Circuit has noted the degree of overlap
26 required before a neutral classification will be inferred to be because of disability. In *Community*

Services, Inc. v. Wind Gap Municipal Authority, the plaintiff claimed that the defendant had discriminated on the basis of handicap under the Fair Housing Amendments Act when it classified a home used for the care of the mentally handicapped as a "commercial facility" for purposes of water and sewer rates. 421 F.3d 171 (3d Cir. 2005). The Court held that the defendant's inclusion of "personal care homes" in this category was not a proxy for handicap, and it distinguished cases in which such a proxy had been found: "[I]n the above-cited cases the challenged classification was used to 'single out' *only* facilities for the disabled for different treatment with the only possible explanation being that it was 'because of' the disabled status of their residents." *Id.* at 181 (emphasis in original). In the case before it, by contrast, the Court found that "[t]he term 'personal care home'—the alleged proxy for disabled status—was not used to 'single out' facilities for assessment of increased fees." *Id.* Instead, those homes were part of a larger group that was deemed to be comprised of commercial facilities. *Id.*

Erie County Retirees Association v. County of Erie, Pennsylvania, 220 F.3d 193 (3d Cir. 2000), provides a useful contrast. In that case, the county provided Medicare-eligible retirees (i.e., those aged 65 and older) a different and inferior health plan than the one available to retirees who had not reached the age of Medicare eligibility. *Id*. at 196. The court explained that the plaintiffs had a viable claim for age discrimination because "Medicare status is a direct proxy for age." *Id*. at 211. Given the inextricable link between Medicare eligibility and age, the court could infer that the classification intentionally targeted persons in a protected group for differential treatment.

Those cases show that, although proxy discrimination does not require an exact match between the proxy category and the classification for which it is allegedly a proxy, the "fit" between the affected group and the protected class must be so tight that the court can infer an attempt to evade the prohibition of intentional discrimination. In one case on which Plaintiffs rely, for example, the court commented that a policy excluding a service dog from a school or banning wheelchairs could be considered facially discriminatory, even though the policy itself

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1 does not mention a protected class. *McWright*, 982 F.2d at 228. In those circumstances, the
2 neutral classification is merely a technicality, and the close fit between the protected class and
3 the policy category indicates an intent to discriminate.
4 Here, despite the Amended Complaint's efforts to demonstrate such a fit, the allegations
5 make clear that the Exclusion does not meet that test.

6 **2. The "Fit" Between the Exclusion and Disability Is Not "Sufficiently Close" to**
7 **Infer Discriminatory Intent.**

8 Plaintiffs cannot show that the Exclusion applies "almost exclusively" to the disabled,
9 that it "single[s] out *only*" disabled insureds, or any other "fit" with a class of disabled insureds
10 such that the Court would be able to infer discriminatory intent. Instead, the Amended
11 Complaint makes clear that the Exclusion both *denies* coverage of hearing treatment for non-
12 disabled insureds and *allows* coverage of hearing treatment for the severely disabled. As a
13 result, the Exclusion does not single out disabled insureds, and it cannot be a proxy for disability.

14 **a. Plaintiffs Allege No Facts Supporting Intentional Discrimination**
15 **Other Than the Exclusion Itself.**

16 In *Schmitt*, the Ninth Circuit noted that the plaintiffs "allege no facts giving rise to an
17 inference of intentional discrimination besides the exclusion itself. Thus, the crucial question is
18 whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible."
19 965 F.3d at 959. The Amended Complaint presents the same issue because Plaintiffs' fail to
20 allege any facts that would support an inference of intentional discrimination. The Amended
21 Complaint adds several new allegations suggesting that Regence added the Exclusion to its
22 policy specifically for the *purpose* of discriminating against the disabled. (*See* Dkt. 32 ¶¶ 61-
23 63.) Unlike the public statements and other facts alleged in *Pacific Shores*, however, Plaintiffs
24 provide no facts in support of these conclusory allegations. Indeed, the facts they do provide
25 directly contradict this theory.
26

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

1 It is well established that, "[t]o survive a motion to dismiss, a complaint must contain
2 sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"
3 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when
4 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
5 defendant is liable for the misconduct alleged." *Id.* Plaintiffs' bare assertion that "Regence
6 designed the Exclusion intentionally to deny services to insureds with disabling hearing loss"
7 (Dkt. 32 ¶ 61), lacks any factual basis and cannot plausibly support a claim for relief.

8 The Amended Complaint and its supporting documents also contain facts fundamentally
9 inconsistent with this conclusory allegation. As discussed in Section A.2.c, *infra*, Defendants'
10 policy was designed consistent with OIC's state benchmark plan, which expressly states that
11 coverage is not required for "[h]earing care, routine hearing examinations, programs or treatment
12 for hearing loss including, but not limited to, externally worn or surgically implanted hearing
13 aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii).
14 Furthermore, statistics relied upon by Plaintiffs demonstrate that the Exclusion applies to more
15 non-disabled than disabled insureds. (*See* Section A.2.b, *infra* (citing Dkt. 32-2 at 2).) Although
16 adherence to state law does not guarantee compliance with Section 1557, *see Schmitt*, 965 F.3d
17 at 955-58, an insurer's decision to follow state insurance regulations that exclude coverage
18 predominantly for non-disabled insureds cannot plausibly create an inference of intentional
19 discrimination.

20 Because Plaintiffs have not alleged facts supporting a plausible inference of
21 discriminatory intent, they must show that the "fit" between the Exclusion and the disabled is
22 close enough that the Court can make this inference in the absence of such facts, i.e., by looking
23 at the Exclusion alone.

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

1 **b. The Exclusion Is Overinclusive Because It Applies to Insureds with Little to No Hearing Loss.**
2
3 The express terms of the Exclusion demonstrate that it is not limited to insureds with
4 disabling hearing loss. By excluding coverage for "Routine Hearing Examinations," the
5 Exclusion prevents coverage for certain hearing-related services for ***everyone***: people with
6 minimal, non-disabling hearing loss as well as those with no hearing loss at all. In *Schmitt*, the
7 Ninth Circuit recognized as much:

8 > All individuals with hearing disability have hearing loss because
9 > "disability" is defined in part as "a physical or mental impairment
> that substantially limits one or more major life activities,"
10 > including "hearing." But since not all hearing loss is substantial, at
> least some—and potentially most—individuals with that condition
11 > are not deemed disabled.

12 965 F.3d at 958 (quoting 42 U.S.C. § 12102(1)(A), (2)(A)); *see also Mack v. CGI Fed., Inc.*,
13 No. 1:17CV297, 2018 WL 7138861, at *1 n.1 (E.D. Va. Sept. 26, 2018) (plaintiff pled
14 insufficient facts to show tinnitus was disabling hearing condition under ADA).
15 The Amended Complaint acknowledges that "[t]here are varying degrees of hearing loss,
16 ranging from mild to profound." (Dkt. 32 ¶ 46.) It asserts that this fact does not render the
17 Exclusion overinclusive because (1) only insureds with hearing loss that substantially limits their
18 major life activities would seek treatment that is barred by the Exclusion, and (2) hearing
19 treatment for non-disabled insureds would be barred by the policy's requirement of medical
20 necessity. (*Id.* ¶¶ 53-58.) The Exclusion's prohibition of coverage for all hearing treatment and
21 routine hearing examinations, however, refutes both of these contentions for several reasons.
22 First, the relevant inquiry when analyzing the applicability of the Exclusion is not which
23 insureds actually seek out treatment for hearing loss, but instead which insureds would be
24 otherwise *entitled* to a service that is barred by the Exclusion. Insureds with no hearing loss at
25 all are denied coverage for routine hearing examinations that may be part of their regular check-
26 ups, particularly as they age, and insureds with mild forms of hearing loss are automatically

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1 denied coverage for treatment whether they ever actually seek it. Plaintiffs assert that an
2 individual's subjective belief regarding the level of his or her impairment is the deciding factor
3 in whether he or she is disabled, and therefore, those who do not seek treatment are *per se* not
4 disabled. (*Id.* ¶ 53.) To the contrary, disability is determined by objective standards, not by
5 subjective complaints. *See, e.g.*, *Smith v. Masterson*, 353 F. App'x 505, 507 (2d Cir. 2009)
6 (prisoner's subjective complaints of hearing loss failed to establish disability without
7 corroboration by objective test). The Exclusion therefore applies equally to insureds with
8 disabling hearing loss, mild hearing loss, or no hearing loss.

9 Second, Regence's medical necessity requirement does not limit the applicability of the
10 Exclusion to disabled insureds. Plaintiffs allege that if "any non-disabled individuals seek
11 coverage for hearing treatment and hearing instruments, most if not all would not be able to
12 demonstrate that their need for the treatment meets Regence's standard for medical necessity."
13 (Dkt. 32 ¶ 56.) The definition of "medical necessity," however, does not support that
14 assumption:

15–17
> Medically Necessary or Medical Necessity means health care services or supplies that a Physician or other health care Provider, exercising prudent clinical judgment, would provide to a patient to prevent, evaluate, diagnose or treat an Illness, Injury, disease or its symptoms, and that are:

18–26
> - in accordance with generally accepted standards of medical practice;
> - clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the patient's Illness, Injury or disease; and
> - not primarily for the convenience of the patient, Physician or other health care Provider, and not more costly than an alternative service or sequence of services or supply at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's Illness, Injury or disease.

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Telephone 206.624.0900

1 (Dkt. 32-1 at 85.)

2 Nothing in this definition suggests that, if the Exclusion did not exist, ***only*** persons with
3 disabling hearing loss would meet the medical necessity requirement. Indeed, it indicates
4 exactly the opposite. As an initial matter, the definition expressly applies to preventive care such
5 as routine examinations. Furthermore, it would cover all treatment for an illness and its
6 symptoms. Plaintiffs do not explain why a person with non-disabling hearing loss who is
7 prescribed hearing treatment or hearing aids would not receive coverage under this definition.
8 They just implausibly assume that result without any factual basis.

9 To suggest that every single claim for hearing treatment by a non-disabled person would
10 be considered a matter of "convenience" or clinically inappropriate defies common sense and
11 should not be accepted by the Court. Plaintiffs offer no allegation, fact, or cogent argument
12 supporting an inference that any person suffering hearing loss—but not so severe that they are
13 disabled—would not otherwise receive treatment considered medically necessary under this
14 definition, particularly given the vast numbers of people that, by Plaintiffs' own admission, have
15 some degree of hearing loss.

16 Furthermore, the research paper attached to the Amended Complaint as Appendix B—
17 and upon which Plaintiffs rely for statistics regarding the demand for cochlear implants—shows
18 that cases of mild hearing loss outnumber moderate, severe, and profound cases *combined* by a
19 factor of almost two-to one: "An estimated 25.4 million, 10.7 million, 1.8 million, and 0.4
20 million US residents aged 12 years or older, respectively, have mild, moderate, severe, and
21 profound better-ear hearing loss." (Dkt. 32-2 at 2 ("Appendix B") (Adele M. Goman, Ph.D. &
22 Frank R. Lin, M.D., Ph.D., "Prevalence of Hearing Loss by Severity in the United States," Am.
23 J. Pub. Health, October 2016, at 1820).) If this ratio is generally applicable to Defendants'
24 policyholders, as Plaintiffs allege that it is, *twice as many* non-disabled insureds are denied
25 coverage under the Exclusion as compared to disabled insureds. This is without even
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1 considering the much larger pool of insureds with no hearing loss who are denied coverage for
2 routine examinations.

3 This point is even more significant given Plaintiffs' failure to distinguish between
4 bilateral and unilateral hearing loss. When both unilateral and bilateral hearing loss are taken
5 into account, the total number of persons with mild to moderate hearing loss swells from 25.39
6 million to 37.1 million and from 10.66 to 16.99 million respectively. And the number of persons
7 with severe hearing loss jumps from 1.77 million to 4.61 million, and profound hearing loss from
8 .35 million to 2.03 million, indicating that many more people have unilateral hearing loss than
9 bilateral hearing loss. (Appendix B at 3.)

10 Certainly some persons with unilateral hearing loss could meet the definition of disabled.
11 *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566, 119 S. Ct. 2162, 144 L. Ed. 2d 518
12 (1999) (fact that plaintiff suffered monocular vision was, without more, insufficient to establish
13 disability); *Santiago Clemente v. Exec. Airlines, Inc.*, 213 F3d 25, 31 (1st Cir. 2000) (plaintiff
14 suffering from unilateral hearing loss not disabled); *cf. Bosket v. Long Island R.R.*, No. CV 00-
15 7352-RJDJMA, 2004 WL 1305746, at *3–5 (E.D.N.Y. June 4, 2004) (denying both parties'
16 motions for summary judgment regarding disability status of plaintiff with unilateral hearing loss
17 because "[f]act-intensive inquiries such as this often require resolution at trial"). But the
18 statistics cited above belie Plaintiffs' allegation that only persons who have severe hearing loss
19 ***and*** would be deemed disabled would be motivated to seek treatment for their condition.
20 Plaintiffs offer no rationale or explanation for why (1) a person with non-disabling but noticeable
21 hearing loss in one ear would not seek any type of treatment, even a routine examination; or
22 (2) why such treatment would otherwise be denied if the Exclusion did not exist.

23 In sum, on its face and based on Plaintiffs' own allegations, the Exclusion prevents non-
24 disabled insureds from receiving coverage for routine examinations or treatment of hearing loss.
25 The Amended Complaint's contrary allegations—suggesting that the Exclusion only applies to
26 disabled insureds—do not hold up to scrutiny. Because the Exclusion is substantially

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overinclusive, its exclusion of hearing treatment other than cochlear implants is not a proxy for disability.

c. The Exclusion Is Underinclusive Because It Covers Treatment for Insureds with the Most Severe Hearing Loss.

The Exclusion's bar of coverage for routine hearing examinations and mild hearing loss treatment is alone enough to render it an insufficient proxy for disability. But the Exclusion is also underinclusive of disabled policyholders because it expressly authorizes coverage for cochlear implants, which are needed by the most severely disabled insureds. (*See* Dkt. 32 ¶ 66 (cochlear implants are "available to people with severe to profound hearing loss").) Plaintiffs attempt to minimize this lack of fit between the alleged proxy and the class of disabled insureds by alleging that (1) only a small percentage of people with hearing loss need cochlear implants, and (2) Regence only included coverage for cochlear implants because it was required by state law. (Dkt. 32 ¶¶ 69, 72-73.) Neither of these allegations aids Plaintiffs' claims.

First, Plaintiffs allege that only 5.6% of people under 65 with self-reported hearing loss would be potentially eligible for a cochlear implant. (*Id.* ¶ 69.) However, as discussed in Section A.2.b, *supra*, Plaintiffs' statistics show that half of those people have only mild, non-disabling hearing loss. (Dkt. 32-1 at 1.) This means that, assuming people with severe to profound hearing loss qualify as disabled, approximately 18% of the hearing disabled population is eligible for cochlear implants that are covered by Regence's policy. Furthermore, those are the insureds with the most severe hearing loss who are most likely to need treatment.[3]

Second, Plaintiffs' allegation that Regence covered cochlear implants only because coverage was required under state law and not out of "any desire to provide benefits to persons

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[3] Plaintiffs' allegation that many people who are eligible for cochlear implants never receive them (Dkt. 32 ¶ 70) is irrelevant because (1) there is no indication as to how many of these people have health insurance, and (2) as previously stated, the relevant inquiry is the fit between the Exclusion and those who are *eligible* for treatment—not those who actually sought it. (*See* Section A.2.b, *supra*.)

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with disabling hearing loss" is immaterial and misleading. (Dkt. 32 ¶ 73.) Regence makes no secret of the fact that its plan adheres to Washington's benchmark plan, which was designed by OIC to provide the essential health benefits mandated by the ACA. If the Court assumes that Regence covered cochlear implants because they are required under the benchmark plan, then it should likewise assume that Regence excluded coverage for other hearing treatment not out of any discriminatory intent but because such exclusion is expressly allowed by the benchmark plan. *See* WAC 284-43-5642(1)(b)(vii) ("A health benefit plan . . . is not required to[] include . . . [h]earing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids, and the surgery and services necessary to implant them.").

Plaintiffs' allegations show that at least half of all Regence insureds to whom the Exclusion applies are not disabled, and of those who are, the 18% who have the most severe conditions do receive coverage for cochlear implants. Because the Exclusion denies coverage to more non-disabled than disabled insureds, it cannot be a proxy for disability, and Plaintiffs' claim for violation of Section 1557 must be dismissed.

B. Plaintiffs Fail to State a Claim Under RCW 48.43.0128.

Plaintiffs' Amended Complaint adds a new claim for "breach of contract and violation of RCW 48.43.0128." (Dkt. 32 ¶¶ 125-29.) That statute took effect in June 2020, and has not yet been interpreted by any court. It provides, in relevant part, as follows:

> A health carrier offering a nongrandfathered health plan . . . may not . . . [i]n its benefit design or implementation of its benefit design, discriminate against individuals because of their age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.

RCW 48.43.0128(1)(a).

Plaintiffs claim that the Exclusion discriminates against them on the basis of disability in violation of the statute. (Dkt. 32 ¶¶ 128-29.) They further claim that, because the statute voids the Exclusion, Defendants breached their contract with Plaintiffs by relying on a void provision

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600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

in denying coverage for Plaintiffs' hearing treatment. (*Id.* ¶ 129.) This claim should be dismissed for three independently sufficient reasons.

First, the Exclusion is not discriminatory under state law for the same reasons discussed in Section A, *supra*. Its application is not limited to the disabled because it also excludes coverage for insureds with non-disabling hearing loss. Even if the definition of disability under state law is broader than under the ADA, as Plaintiffs allege, the Exclusion is still not a proxy for disability because it bars coverage of routine hearing examinations for insureds with no hearing loss at all, as well as all other forms of treatment for all degrees of hearing loss severity.

Second, the regulations implementing RCW 48.43.0128 explicitly state that insurers "must provide coverage that is substantially equal to the EHB-benchmark plan, as described in WAC 284-43-5642." WAC 284-43-5622(1). The plan described in WAC 284-43-5642 provides that "[a] health benefit plan . . . is not required to, include the following services as part of the EHB-benchmark package: . . . Hearing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii).

This regulation amounts to a determination by OIC that exclusion of treatment for hearing loss is not discriminatory, and courts "give substantial weight and deference to an agency's interpretation of the statutes and regulations it administers." *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wash. App. 513, 523, 119 P.3d 896, 902 (2005). Defendants cannot have violated a state statute by explicitly following the directives of its implementing regulations, and because the Exclusion is not void, Defendants' reliance upon it is not a breach of contract.

Third, Plaintiffs have not demonstrated that RCW 48.43.0128 is enforceable via a private right of action, and they cannot evade that requirement by dressing a statutory claim in a breach-of-contract disguise. In order to determine whether a statute supports an implied right of action,

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1 the court must determine "(1) whether the plaintiff is within the class for whose benefit the
2 statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or
3 denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose
4 of the legislation." *Keodalah v. Allstate Ins. Co*., 194 Wash. 2d 339, 449 P.3d 1040, 1045 (2019)
5 (citing *Bennett v. Hardy*, 113 Wash. 2d 912, 784 P.2d 1258 (1990)).

6 In *Keodalah*, the court examined each one of those factors with respect to a separate
7 provision of the Insurance Code, RCW 48.01.030, and concluded that no factor supported
8 implying a private right of action. 449 P.3d at 1045-47. First, the statute benefited the general
9 public and served the general public welfare rather than an "identifiable class of persons." *Id*.
10 at 1045. Next, in the absence of an express cause of action and with the presence of several
11 specific enforcement mechanisms in the insurance code, the court concluded that the overall
12 statutory context suggested that the legislature did not intend to imply a cause of action. *Id*.
13 at 1046. With respect to the third factor, the implication of creating broad liability throughout
14 the insurance regime ran counter to the legislature's apparent purpose. *Id*. *See also Cameron v.*
15 *Physicians Ins.*, No. 03-cv-879-HA, 2004 WL 1661989, at *3-4 (D. Or. July 26, 2004) (holding
16 that Oregon anti-discrimination provision for health insurance contains no private right of
17 action).

18 The Court should reach the same result here. RCW 48.43.0128 is not like Section 1557,
19 which incorporates existing anti-discrimination standards related to defined groups. Instead, it
20 applies incredibly broadly, including, inter alia, "expected length of life," "quality of life," or
21 "other health conditions." It also does not contain an express cause of action and, unlike
22 Section 1557, makes no mention of enforcement. *Cf*. 42 U.S.C. § 18116 ("The enforcement
23 mechanisms provided for and available under such title VI, title IX, section 794, or such Age
24 Discrimination Act shall apply for purposes of violations of this subsection."). To the contrary,
25 the legislature made clear that the Insurance Commissioner would be charged with determining
26 any violations of, and enforcing, RCW 48.43.0128's mandate. RCW 48.43.0128(3). And the

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

1 commissioner has done so. Pursuant to the implementing regulations, the commissioner
2 determines whether health benefit plans comply with the statute. WAC 284-43-5622(9); WAC
3 284-43-5940(2). For those reasons, each of the *Bennett* factors support the conclusion that the
4 legislature did not intend RCW 48.43.0128 to be enforceable in a private lawsuit.

5 Plaintiffs cannot evade this conclusion by pursuing a breach-of-contract claim as an end-
6 around. As an initial matter, neither RCW 48.18.200(2) nor *Brown v. Snohomish County*
7 *Physicians Corp*., 120 Wash. 2d 747, 753, 845 P.2d 334, 337 (1993), stand for the proposition
8 that all "relevant requirements" of the Insurance Code are deemed terms of every insurance
9 contract. (*See* Dkt 32 ¶ 126.) Instead, RCW 48.18.200(2) prohibits including certain provisions
10 in an insurance contract (and such banned provisions would be considered void). Similarly,
11 *Brown* indicates that limitations or provisions in insurance contracts that are contrary to statute or
12 public policy will not be enforced. 845 P.2d at 337. Both prohibitions are very different from
13 mandating that every insurance contract affirmatively repeats as a contractual term every
14 statutory requirement, and therefore every statutory violation is enforceable in a contract action.

15 Even if Plaintiffs could show that the contract incorporated the statute, their claims would
16 still fail. In *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 131 S. Ct. 1342, 179 L. Ed. 2d
17 457 (2011), the Supreme Court rejected a plaintiff's attempt to sue for breach of contract when
18 the contract incorporated the requirements of a statute, but the statute itself did not provide a
19 private right of action. The Court stated that "[t]hough labeled differently, suits to enforce [the
20 contract and the statute] are in substance one and the same. Their treatment, therefore, must be
21 the same, no matter the clothing in which [plaintiffs] dress their claims." 563 U.S. at 114
22 (internal quotation marks, brackets, and citation omitted). It stated that the absence of a private
23 right of action to enforce the statute "would be rendered meaningless" if a plaintiff could simply
24 sue to enforce the contract instead. *Id*. at 118. The Court's reasoning is persuasive here and
25 demonstrates that Plaintiff's second claim—whether pleaded as a statutory claim or a contract
26 claim—should be dismissed.

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

VI. CONCLUSION

For the reasons above, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint.

DATED: December 11, 2020.

STOEL RIVES LLP

s/Maren R. Norton
Maren R. Norton, WSBA No. 35435
maren.norton@stoel.com
Brad S. Daniels, WSBA No. 46031
brad.daniels@stoel.com
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: 206.624.0900
Facsimile: 206.386.7500

Attorneys for Defendants

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 11, 2020 I filed the foregoing with the Clerk of the
3 Court using the CM/ECF system which will send notice of such filing to the following counsel of
4 record:

5
- **Brad S Daniels**
6 brad.daniels@stoel.com,darise.holland@stoel.com
- **Eleanor Hamburger**
7 ehamburger@sylaw.com,matt@sylaw.com,theresa@sylaw.com,stacy@sylaw.com
- **Maren Roxanne Norton**
8 maren.norton@stoel.com,sea_ps@stoel.com,docketclerk@stoel.com,heidi.wilder@stoel.
9 com,cindy.castro@stoel.com
- **Richard E Spoonemore**
10 rspoonemore@sylaw.com,matt@sylaw.com,rspoonemore@hotmail.com,theresa@sylaw.
11 com,stacy@sylaw.com
- **John F Waldo**
12 johnfwaldo@hotmail.com

13 Dated: December 11, 2020.

14

15 *s/Cindy Castro*
16 Cindy Castro, Legal Practice Assistant

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STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals, Plaintiffs, v. REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP, Defendants.	No. 2:17-cv-01609-RAJ **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

This matter came before the Court on the Motion to Dismiss Amended Complaint filed by defendants Regence BlueShield and Cambia Health Solutions, Inc. (collectively, "Defendants"). The Court has reviewed the Motion, papers filed in response and in support thereof, and the records and files herein. Being fully informed, the Court hereby ORDERS that:

1. Defendants' Motion to Dismiss Amended Complaint is GRANTED in its entirety for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

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ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

1 2. Plaintiffs' Amended Complaint and all claims therein are DISMISSED with prejudice.

2 IT IS SO ORDERED.

3 Dated this __ day of _________, 2020.

4

5 ______________________________
THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

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8 Presented By:

9 STOEL RIVES LLP

10 *s/Maren R. Norton*

11 Maren R. Norton, WSBA No. 35435
Brad S. Daniels, WSBA No. 46031
12 600 University Street, Suite 3600
Seattle, WA 98101
13 Phone: (206) 624-0900
Facsimile: (206) 386-7500
14 Email: maren.norton@stoel.com
Email: brad.daniels@stoel.com
15
16 Attorneys for Defendants

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