The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHONDRO; 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.

NO. 2:17-cv-01611-RSL

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT

Noted on Motion Calendar: April 16, 2021

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I. INTRODUCTION

In *Schmitt v. Kaiser Health Plan of Washington*, 965 F.3d 945, 949 (9th Cir. 2020), the Ninth Circuit held that disabled insureds may challenge health benefit designs that discriminate on the basis of disability. The decision was ground-breaking. In a case of first impression, the Ninth Circuit held that "[t]he ACA specifically prohibits discrimination in plan benefit design, and a categorical exclusion of treatment for hearing loss would raise an inference of discrimination against hearing disabled people, notwithstanding that it would also adversely affect individuals with non-disabling hearing loss." *Id.* The holding was extended when, in December 2020, the Ninth Circuit further held that the unique impact of certain health benefit designs on disabled insureds may result in disability discrimination ***even when the program also burdens many non-disabled insureds.*** *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1211 (9th Cir. Dec. 9, 2020) (*citing Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).[1]

Concluding that insurers may be liable for discriminatory benefit design, the Ninth Circuit reversed and remanded this case. The Court directed Plaintiffs to amend their complaint because the Hearing Loss Exclusion here was not a "categorical exclusion." Since the plans included coverage for cochlear implants, the Court was unable to determine under the existing allegations whether that limited benefit adequately served the needs of disabled hearing-impaired insureds. The Ninth Circuit directed Plaintiffs to amend their complaint to include allegations that the insurers' "coverage of cochlear implants is inadequate to serve the health needs of hearing disabled people as a group" and that "the [Hearing Loss E]xclusion is likely to predominately affect disabled persons." *Schmitt*, 965 F.3d at 959, n.8. The Ninth Circuit

[1] On January 15, 2021, an Order was issued in *Doe* denying CVS's motion for panel rehearing and rehearing en banc. *See Doe v. CVS*, Case No. 19-15074, Dkt. No. 140.

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further confirmed that, at the pleadings stage of the litigation, the question to be considered by this Court should merely be "whether the blanket exclusion of non-cochlear treatment raises the inference of discrimination." *Id.*, at 958.

The Fourth Amended Complaint ("FAC") follows the Ninth Circuit's instructions to a "T." *See* Dkt. No. 65. It alleges, with citations to authority, that people generally avoid seeking treatment for hearing impairments, and especially avoid hearing aids, until and unless they are experiencing substantial limitations in their own lives. *Id.*, ¶¶50-53. As a result, the insureds who need services that would be denied as a result of the Hearing Loss Exclusion are entirely or overwhelmingly disabled. *Id.* The FAC further alleges that very few people with disabling hearing loss are eligible to receive cochlear implants or BAHAs. *Id.*, ¶¶67-73. Thus, the coverage offered for hearing loss under the Kaiser plans does not meet the needs of the hearing disabled as a group and raise the inference of discrimination. That is all that is necessary to plead a claim of disability discrimination under Section 1557. *Schmitt*, 965 F.3d at 958-59.

In its Motion to Dismiss, Kaiser argues that those allegations are still insufficient. Its objections are twofold: ***First,*** Kaiser argues that Plaintiffs have not pled a close enough "fit" between persons with disabling hearing loss and the Hearing Loss Exclusion, asserting that the Exclusion is both over- and under-inclusive. Dkt. No. 72, pp. 8-18. ***Second,*** Kaiser claims that there is no plausible allegation of "intentional discrimination" based solely on disability. *Id.*, pp. 19-21. Both arguments are simply an attempt re-litigate issues that were decided by the Ninth Circuit in *Schmitt* and *Doe*.

In *Schmitt,* the Ninth Circuit Court directly addressed Kaiser's over- and under-inclusive arguments in holding that an overinclusive exclusion (*i.e.*, one that applies to some or even many non-disabled insureds) may still be discriminatory. *Id.*, at 958, *citing to Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach* ("*Pacific Shores*"), 730 F.3d 1142,

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1160 (9th Cir. 2013). It further held that allegations that cochlear implants do not "serve the needs of most individuals with hearing disability" would likely support a claim of discrimination. *Schmitt,* 965 F.3d at 959. The Ninth Circuit also concluded that an allegation that a benefit design is discriminatory is necessarily an allegation of an intentional act. "The claim at issue here – that Kaiser designed its plan benefits in a discriminatory way – inherently involves intentional conduct." *Id.*, at 954, *citing Mark H. v. Lemahieu,* 513 F.3d 922, 936 (9th Cir. 2008). In sum, ***all of the necessary allegations are made in Plaintiffs' Fourth Amended Complaint.*** Any further proof of the alleged "fit" between the Hearing Loss Exclusion and the treatment needed by hearing disabled insureds and Kaiser's intent must wait until after discovery. *Schmitt,* 965 F.3d at 959, n. 8.

Finally, Kaiser argues that Plaintiffs' breach of contract claim for violation of RCW 48.43.0128, Washington's recently-enacted health insurance anti-discrimination law, cannot be pursued because there is no private cause of action under the statute. Dkt. No. 72, p. 2. Kaiser is simply wrong.

First, both Washington law and Kaiser's own contracts specifically incorporate the non-discrimination requirements of RCW 48.43.0128 as additional contractual terms. *See* Dkt. No. 18-1, p. 3 out of 66; Dkt. No. 65, *Appendix A,* p. 65; RCW 48.18.510. *See e.g., Z.D. v. Grp. Health Coop.*, 829 F. Supp. 2d 1009, 1013 (W.D. Wash. 2011) (Applying the Washington Mental Health Parity Act as an additional term of the Plan, this Court concluded "[t]he problem for Defendants lies in the fact that Washington law governs the Plan").

Second, the Washington Legislature authorized RCW 48.43.0128 to be enforced as "unfair discrimination" under RCW 48.30.300, which in turn is a violation of the

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Washington Law Against Discrimination ("WLAD"), that permits private litigation. *See* RCW 49.60.030(2).

The Court should reject Defendants' Motion to Dismiss in full.

II. FACTS

A. Plaintiffs' Fourth Amended Complaint Adequately Pled All Required Facts.

The Fourth Amended Complaint sets forth all the facts necessary for relief:

- Plaintiffs each were or are enrolled in a Kaiser health plan. Dkt. No. 72, ¶¶6-8, 24, 89.
- Each Plaintiff is a qualified individual with a disability, whose hearing loss limits a major life activity, such as working or learning.. *Id.*, ¶¶6-8, 24, 74-88; 29 U.S.C. § 705(20)(B).
- Plaintiffs all require outpatient office visits with audiologists and durable medical equipment in the form of hearing aids, in order to treat their hearing loss. *Id.*, ¶¶6-8, 24, 74-88; s*ee* Dkt. No. 21, *Exh. A.*
- Kaiser is a "health program or activity" part of which receives federal financial assistance. Dkt. No. 65, ¶¶16, 92; 42 U.S.C. § 18116; 45 C.F.R. § 92.4. As a result, Kaiser is a "covered entity" and bound to comply with Section 1557, 42 U.S.C. § 18116(a).
- Kaiser's health plans cover outpatient medical/surgical office visits and durable medical equipment. Dkt. No. 65, ¶¶13, 112.
- Kaiser's health plans exclude all coverage of treatment for hearing loss, including outpatient medical office visits and durable medical equipment, except for that related to cochlear implants. *Id.*, ¶¶13-14.
- Plaintiffs alleged that Kaiser's Hearing Loss Exclusion was a "deliberate discriminatory action" because Kaiser designed the Hearing Loss Exclusion to exclude most of the health care needs of hearing disabled insureds as a group. *Id.*, ¶¶18, 99, 103-105.
- Plaintiffs alleged that Kaiser's Hearing Loss Exclusion affects mostly insureds with disabling hearing loss. *Id.*, ¶¶50-61, 100-105. Most non-disabled insureds with hearing loss do not seek treatment, since their hearing loss does not interfere with their major life activities. *Id.*, ¶54.

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To the extent any non-disabled insureds with hearing loss seek treatment for their hearing loss, most if not all, would not meet Kaiser's definition of "medical necessity." *Id.*, ¶¶55-56. The number of non-disabled enrollees subject to denial of claims under the Hearing Loss Exclusion is extremely small and possibly non-existent. *Id.*, ¶¶56, 58.

- Plaintiffs also alleged that the Hearing Loss Exclusion eliminates meaningful access to coverage for most disabled insureds with hearing loss. *Id.*, ¶¶57, 61, 100. Regence's coverage related to cochlear implants only meets the needs of approximately 5% of hearing disabled insureds. *Id.*, ¶¶64-73, 102.

- Plaintiff Schmitt inquired as to whether Kaiser would cover her office visits with her audiologist and her hearing aids, but was informed by Kaiser, consistent with its Plan, that there was no coverage. *Id.*, ¶24. Plaintiffs Mohundro and O.L. submitted claims to Kaiser for coverage of hearing treatment, which were denied pursuant to the Hearing Loss Exclusion. *Id.*,¶¶24, 86.

- Given the unambiguous language of the Hearing Loss Exclusion and the representations of Kaiser's customer service representative, and the denials to Mohundro and O.L., any submission of a claim or appeal by Plaintiffs or members of the proposed class would have been futile. *Id.*, ¶107; *see* Dkt. No. 21, *Exh. B*.

B. But for Kaiser Hearing Loss Exclusion, Schmitt's Treatment for Hearing Loss Would Be Covered

Plaintiffs' Kaiser policies cover outpatient medical office visits and durable medical equipment. *See* Dkt. No. 18-1, p. 40 out of 66 ("Covered outpatient medical and surgical services in a provider's office, including chronic disease management."); p. 22 out of 66 ("Durable medical equipment: Equipment which can withstand repeated use, is primarily and customarily used to service a medical purpose, is useful only in the presence of an illness or injury and is used in the member's home."). Plaintiffs alleged that they require coverage of medically necessary outpatient medical office visits to an audiologist and needed medical equipment, in the form of hearing aids, to treat their

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disability of hearing loss. Dkt. No. 65, ¶¶6-8, 24, 74-88. But for the Hearing Loss Exclusion, the medically necessary treatment and equipment would have been covered.

C. Kaiser Contracted To Not Discriminate on the Basis of Disability.

Kaiser's policy confirms that it may not discriminate on the basis of disability in its services, including the design and administration of benefits. *See* Dkt. No. 18-1, p. 14 out of 66, ¶E, pp. 65-66 out of 66; Dkt. No. 65, *Appendix A*, p. 8. Kaiser contractually promised to follow both Section 1557 ***and*** its implementing federal regulations:

> **8. Compliance with Law.**
>
> The Group and Group Health [now Kaiser] ***shall comply with all applicable state and federal laws and regulations*** in performance of this Agreement.

Dkt. No. 18-1, p. 3 out of 66 (emphasis added); Dkt. No. 65, *Appendix A*, p. 65 ("KFHPWAO will comply with any new requirements as necessary under federal laws and regulations"). Kaiser further represented that it "does not discriminate on the basis of … disability. Group Health [now Kaiser] does not exclude people or treat them differently because of … disability…." *Id.*, pp. 65-66 out of 66. These representations were required (at least through August 18, 2020) when an insurer, such as Kaiser, receives federal financial assistance that subjects it to Section 1557. *See former* 45 C.F.R. § 92.8.[2]

For this reason, whether or not Kaiser's plan complied with the Washington Essential Health Benefits ("EHB") Benchmark plan, *see* Dkt. No. 72, p. 9, is irrelevant. Kaiser has an independent duty to ensure that both the design and administration of its health plans are non-discriminatory. *See Schmitt*, 965 F.3d at 955-957.

[2] This rule was repealed effective August 18, 2020. 85 Fed. Reg. 37160, 37245 (June 19, 2020).

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D. Kaiser Applied the Hearing Loss Exclusion to Deny Coverage of Medically Necessary Hearing Aids to Plaintiffs and Others.

Despite its representations, Kaiser designed, marketed and administered a standard exclusion that discriminates on the basis of a disabling condition, hearing loss. Specifically, all "programs or treatments for hearing loss" are excluded, with one exception, treatment related to Cochlear Implants ("CIs"):

Hearing Examinations and Hearing Aids	**Preferred Provider Network**	**Out of Network**
Hearing aids including hearing aid examinations.	Not covered; ***Member pays 100%*** of all charges	Not covered; ***Member pays 100%*** of all charges
Exclusions: ***Programs or treatments for hearing loss*** or hearing care including, but not limited to, externally worn hearing aids or surgically implanted hearing aids and the surgery and services necessary to implant them other than for cochlear implants; hearing screening tests including but not limited to non-cochlear hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them other than for cochlear implants; hearing screening tests required under Preventive Services.		

Dkt. No. 18, pp. 29 of 66 (emphasis in original and added). *See also* Dkt. No. 65, *Appendix A,* pp. 28-29 (In 2020, the Exclusion was essentially the same but with additional coverage for Bone-Anchored Hearing Aids ("BAHAs")).

E. Procedural Facts

This case was filed on October 30, 2017 and an amended complaint was filed on December 12, 2017. *See* Dkt. No. 1, 12. Kaiser brought its first Motion to Dismiss on January 5, 2018. Dkt. No. 17. Shortly thereafter, the Court permitted the filing of Plaintiffs' Second Amended Complaint. Dkt. Nos. 28, 29. After briefing on the Motion to Dismiss was complete, oral argument was heard on August 2, 2018. Dkt. No. 37. The

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Court granted Defendants' Motion, dismissing Plaintiffs' claims with prejudice. Dkt. Nos. 42, 43.

Plaintiffs appealed the Order of Dismissal to the Ninth Circuit Court of Appeals. Oral argument on the appeal was heard on November 8, 2019. The Ninth Circuit issued its decision on July 14, 2020, reversing the District Court's Order of Dismissal and holding that Plaintiffs' theory under Section 1557 was correct, but that they must amend their complaint to properly allege those claims. *Schmitt,* 965 F.3d at 960. The mandate was issued on September 4, 2020. Dkt. No. 52. Plaintiffs' Third Amended Complaint was filed on October 20, 2020, which added an additional claim under RCW 48.43.0128. *See* Dkt. No. 58. Plaintiffs added an additional named plaintiff, O.L., by and through her parents, J.L. and K.L., without changing the claims in the Fourth Amended Complaint. *See* Dkt. No. 65. Kaiser moved to dismiss the Fourth Amended Complaint on March 19, 2021. Dkt. No. 72.

III. ARGUMENT

A. Legal Standard

"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, 1949 (2009).

> A claim has facial plausibility 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. (citation omitted). As a result, dismissal is not proper "if there is any set of facts consistent with the allegations in the complaint that would entitle the plaintiff to relief." *D.T. v. NECA/IBEW Family Med. Care Plan*, 2017 U.S. Dist. LEXIS 195186, at *3 (W.D. Wash. Nov. 28, 2017), *citing to Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

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B. Plaintiffs Adequately Alleged Disability Discrimination Under Section 1557.

Under Section 1557, Plaintiffs must allege the following: (1) they are individuals with disabilities, in this case disabling hearing loss, (2) they are otherwise qualified to receive the benefit in dispute (coverage for outpatient office visits and durable medical equipment for treatment of hearing loss), (3) they were/are denied the benefit solely by reason of their disability, and (4) Kaiser is a covered entity that receives federal financial assistance. *See Schmitt,* 965 F.3d at 954. Kaiser only disputes the third requirement: Plaintiffs' allegation that they were denied benefits solely by reason of their disability. *See* Dkt. No. 72, p. 1.

1. "Disability" Under Section 1557 Incorporates Both "Impairment" and "Substantial Limitation" as Defined by Federal Law.

Under Section 1557's implementing regulations, the term "disability" is to be defined consistent with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which in turn incorporates the definition of "disability" in the Americans with Disabilities Act ("ADA") as amended in 2008. *Schmitt*, 965 F.3d at 954; *see* 45 C.F.R. § 92.102(c). The ADA, in turn, defines "disability" with respect to an individual as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). Under that definition, an individual is disabled when his or her objectively determinable impairment limits a major life activity "of such individual," meaning activities that the individual actually undertakes.

"Disability" thus requires two elements: ***First,*** there must be a measurable impairment. *See* Dkt. No. 65, ¶¶42-44. As plead by Plaintiffs, all class members meet this requirement.

Second, the impairment must "substantially limit" (as defined by the ADA and Section 504) the major life activities of the individual(s) in question. Since this case addresses only the needs of people ***who seek medical treatment and equipment*** for their

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hearing impairments, few, if any, insureds do so unless their life activities have become "substantially limited" by their hearing impairments. When those two factors – impairment and substantial limitation – both exist, the individual meets the federal definition of disability. As explained below, the Hearing Loss Exclusion targets the needs of people who seek medical treatment and equipment for their hearing impairments, all or nearly all of whom are disabled.

2. Kaiser's Hearing Loss Exclusion is Targeted at Hearing Disabled Insureds.

As alleged by Plaintiffs, most if not all of insureds with hearing impairment ***who seek medically necessary hearing treatment*** are disabled, as defined by federal law. Dkt. No. 65, ¶¶50-61, 100-105. While many people experience hearing impairment without being disabled, their impairment is not sufficiently *limiting* to cause the individuals to seek medical treatment or equipment for the impairment. *Id.*, ¶¶54-55. As pled, since Kaiser's Hearing Loss Exclusion denies treatment overwhelmingly to hearing disabled insureds, sufficient discriminatory intent is present to infer discriminatory intent. *See Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 705 (9th Cir. 2009).

This comports with common sense. People do not seek hearing aids for aesthetic, non-medical or cosmetic reasons, and few if any people seek hearing aids unless their ability to function is significantly impacted, due to the stigma associated with hearing loss. *See id.*, ¶¶50-51. Indeed, hearing aids are not inherently desirable and are widely shunned, even when needed. *Id.* As a result, hearing-impaired insureds who seek medically necessary treatment are very likely to be "disabled" under federal law, because their hearing loss is substantially interfering with their daily activities sufficiently to overcome the stigma against the use of hearing aids. *See id.* Thus, it is quite plausible that all or most insureds who are subject to the Exclusion are "disabled" under Section 1557. Dkt. No. 65, ¶¶50-61. As pled, the "fit" between the Hearing Loss

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Exclusion and the proposed class of hearing disabled insureds is sufficiently close to infer that Kaiser's design and administration of the Hearing Loss Exclusion is discriminatory. *Pacific Shores*, 730 F.3d at 1160, n. 23.

Kaiser dismisses these allegations as "circular reasoning" and "implausible" because it claims that Plaintiffs allege some people with "moderate" or "mild" impairments might be disabled, while others with "serious" hearing loss may not be. *See* Dkt. No. 72, pp. 6-7. [3] Kaiser muddles together various statistical studies referenced in Plaintiffs' allegations to reach this conclusion. *See id.* Plaintiffs' allegations, however, are much more straightforward – if a person is so impaired in their daily activities as to need medical treatment and equipment for their hearing loss, then they are disabled consistent with federal law. *See* Dkt. No. 65, ¶52 ("[V]irtually all people who seek or obtain hearing aids so do because they have experienced limitations in their own life activities, such as hearing, communicating, learning or working, which experiences make them people with disabilities under Section 504 and [the] ACA"). In any event, since this is a factual issue, it may only be decided after discovery. The Court need not address Kaiser's "apples and oranges" mixing of studies at this stage in the litigation. *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

In response, Kaiser argues that all insureds are subject to the Hearing Loss Exclusion, such that it is applied "evenhandedly" to those with disabilities and those without, alike. Dkt. No. 72, pp. 14-18. Kaiser lost this argument before the Ninth Circuit.

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[3] The following hypothetical illustrates this principle. An elementary school teacher who must understand the soft and high-pitched voices of children might be substantially limited in work by a hearing impairment, but the same level of impairment might pose no limitation on the work of a tax accountant working from mostly from documents and in a quiet office. Because the teacher is substantially limited in work, he or she is "disabled" under federal law; for the same reason he or she is likely to seek treatment for the hearing impairment. At the same time, and with the same impairment, the accountant may neither be disabled or in need of treatment.

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See Schmitt, 965 F.3d at 955 (rejecting Kaiser's argument and holding that, under the ACA, benefit design of health plans must be non-discriminatory); *see also Doe,* 982 F.3d at 1212 ("[T]he meaningful access standard … does not require [Plaintiffs] to allege that their deprivation was unique to those [with disabilities], nor that the deprivation was severe – only that they were not provided meaningful access to the benefit."). Under Section 1557, insurers like Kaiser can no longer avoid liability for discriminatory benefit design with the argument that they include the discriminatory exclusion in plans offered to all insureds.

C. Kaiser Misconstrues Discrimination Law When It Argues that Plaintiffs Must Demonstrate the "Fit" of the Proxy to the Protected Class at the Pleadings Stage.

Ignoring Plaintiffs' well-pled complaint, Kaiser argues that since the Hearing Loss Exclusion is both "over-exclusive" (since it may apply to non-disabled insureds) and "under-inclusive" (since Kaiser offers hearing benefits in the form of CIs and more recently BAHAs to some hearing-disabled insureds), Plaintiffs must demonstrate that "both of these groups are so small that the Court can reasonably infer the intentional discrimination" in order to proceed. Dkt. No. 72, p. 13. Kaiser is wrong for at least the following three reasons:

First, Kaiser is wrong as a matter of law. Over-discrimination remains prohibited under *Schmitt*. *Id.,* 965 F.3d at 958 ("That the hearing loss exclusion also affects some non-disabled individuals does not doom [Plaintiffs'] claim per se"). Plaintiffs' claims are properly pled even if non-disabled insureds with hearing loss could theoretically be subject to the Exclusion. *See Rice v. Cayetano*, 528 U.S. 495, 514, 120 S. Ct. 1044 (2000). This is true even when ***many*** non-disabled individuals are impacted:

> A willingness to inflict collateral damage by harming some, or even all, individuals from a favored group in order to successfully harm members of a disfavored class does not

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> cleanse the taint of discrimination; it simply underscores the depth of the defendant's animus.

Pacific Shores, 730 F.3d at 1159. At this stage, the precise manner in which the Hearing Loss Exclusion affects non-disabled individuals need not be demonstrated by Plaintiffs, because evidence is exclusively controlled by Kaiser.[4] *See Schmitt,* 965 F.3d at 959, n. 8.

Similarly, it does not matter that Kaiser provides coverage of CIs and BAHAs. *See Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002) (The "appropriate treatment of some disabled persons does not permit [a covered entity] to discriminate against other disabled people under any definition of 'meaningful access.'"). In any event, as alleged by Plaintiffs, CIs and BAHAs only meet the needs of a tiny portion of hearing disabled insureds, approximately just 5% of the group. Dkt. No. 65, ¶¶73. Thus, about 95% of hearing disabled insureds are excluded from the essential treatment to ameliorate their disability. This is more than sufficient for the Court to infer that Kaiser's Hearing Loss Exclusion plausibly results in discrimination. *Schmitt,* 965 F.3d at 958-960. And, while Kaiser quibbles with Plaintiffs' statistics, ***it does not claim that these two treatments "serve the needs of most individuals with a hearing disability,"*** which is the standard the Ninth Circuit laid down. *Schmitt,* 965 F.3d at 959 (emphasis added); *see Doe*, 982 F.3d at 1212 (Section 1557 disability discrimination claim is pled when Plaintiffs assert that meaningful access to a health benefit was denied due to their disabling condition). Any

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[4] Kaiser argues that Plaintiffs must demonstrate "near unanimity" between the proxy and the disability in order for their claim to make it beyond the pleadings stage. *See* Dkt. No. 72, pp. 8-13. ***This is not the law***. Every case cited by Kaiser for this proposition was decided on the ***merits*** – not at the pleadings stage. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 606, 113 S. Ct. 1701, 1704 (1993); *Pacific Shores*, 730 F.3d at 1159; *Davis v. Guam*, 932 F.3d 822, 829 (9th Cir. 2019); *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 182 (3d Cir. 2005); *Erie Cty. Retirees Ass'n v. Cty. of Erie*, 220 F.3d 193, 196 (3d Cir. 2000); *Hollonbeck v. United States Olympic Comm.*, 513 F.3d 1191, 1193 (10th Cir. 2008); *Bowers v. NCAA*, 563 F. Supp. 2d 508, 516 (D.N.J. 2008). And ***none of the cases involve proxy discrimination related to health insurance benefit design***. Plaintiffs are not required to prove the precise "fit" of the proxy at this stage; all they are required to do is to offer plausible factual allegations regarding it. *Schmitt,* 965 F.3d. at 959, n. 8.

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more precision about the impact of Kaiser's coverage of CIs and BAHAs on the claims in this litigation must await discovery.

Second, Kaiser ignores that the legal definition of disability, incorrectly focusing only on the term "impairment." As noted above, "disability" under Section 1557 encompasses both impairment ***and*** substantial limitation. As alleged by Plaintiffs, non-disabled insureds with hearing impairment, *i.e.,* those who do not experience "substantial limitation," rarely, if ever, seek treatment or equipment. *Id.,* ¶55. Insureds who do not seek treatment are completely unaffected by the Hearing Loss Exclusion.

This leads to Kaiser's ***third*** mistake: Kaiser assumes that the Exclusion "applies" to people with varying degrees of hearing impairment, regardless of disability, ***even when they do not seek treatment,*** simply by virtue of the Exclusion being present in all insureds' health policies. *See* Dkt. No. 72, pp. 10-11. But the directive from the Ninth Circuit was not to consider how the plain language of the Exclusion could theoretically be "applied" to all insureds; rather, this Court must consider whom the Exclusion actually ***affects:***

> [Plaintiffs] may be able to meet th[eir] burden, for example, by alleging facts showing how the needs of hearing disabled persons differ from the needs of persons whose hearing is merely impaired, such that the exclusion is likely to predominately ***affect*** disabled persons.

Schmitt, 965 F.3d at 959, n. 8 (emphasis added). In other words, if the Exclusion has the practical effect of excluding the health coverage generally needed by the hearing disabled insureds as a group, then the inference of discrimination is plausibly alleged. *Id.* As the Ninth Circuit concluded, Section 1557 imposes an "affirmative obligation" on insurers "to consider the needs of disabled people and not design plan benefits in a way that discriminates against them." *Id.,* at 955; *Doe,* 982 F.3d at 1212. An exclusion of coverage for non-cochlear hearing loss treatment discriminates against disabled

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insureds with hearing loss because it is designed to largely exclude the critical health treatment and equipment that most hearing disabled insureds need. After all, the whole purpose of an exclusion is to bar the payment of benefits to people who seek and need treatment.

In sum, the Ninth Circuit has stated what must be alleged for a Section 1557 claim of disability discrimination to survive a motion to dismiss: Plaintiffs need only allege sufficient facts to plausibly create an ***inference*** of discrimination. *Id.*, at 960; *see also Doe*, 982 F.3d at 1212 (*Doe* plaintiffs adequately alleged that they were denied meaningful access to prescription drug benefits when they alleged that the defendants' mail-order program prevented them from receiving effective treatment for HIV/AIDS). Plaintiffs carefully followed the Ninth Circuit's instructions, and easily meet this relatively low threshold.

D. The Court Should Reject Kaiser's Arguments Regarding Cost.

Kaiser argues that Plaintiffs have not plausibly alleged that they are discriminated against by Kaiser "solely" based on disability since the Court may ***assume*** that cost is an additional non-discriminatory reason for the exclusion. Dkt. No. 72, pp. 18-21. The Court should reject Kaiser's proposed "assumption."

First, whether or not cost is a permissible basis for excluding disability-related benefits cannot be decided on this Motion to Dismiss. The Department of Health and Human Services ("HHS") originally concluded that exclusions related to disabling conditions may only be based upon scientific or medical reasons. *See* 81 Fed. Reg. 31405 ("Scientific or medical reasons can justify distinctions based on the grounds enumerated in Section 1557"). This was consistent with existing Section 504 caselaw. *See Woolfolk v. Duncan*, 872 F. Supp. 1381, 1389 (E.D. Pa. 1995) (Under Section 504, a provider may only withhold treatment based upon a "bona fide medical reason"); *Glanz v. Vernick*, 750 F.

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Supp. 39, 46 (D. Mass. 1990) (same). Similar standards are required under the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S. Ct. 2196 (1998). In the context of the ACA, a "reasonable, non-discriminatory basis" for an exclusion should be grounded in medical and scientific reasons.

Second, Kaiser's implied concerns about cost may prove to be a pretext for discrimination. When such claims are offered without evidence, they may "perpetuate[ ] unwarranted assumptions" that disabled people are unable to benefit from treatment or are unworthy of the cost involved. *Cf. Olmstead v. L.C.*, 527 U.S. 581, 600, 119 S. Ct. 2176 (1999). Anti-discrimination laws are meant to "replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284-85, 107 S. Ct. 1123 (1987). Indeed, Kaiser's factual claim that it offers hearing aid coverage in a rider for extra premium payment (while improper on a motion to dismiss) is likely additional evidence of Kaiser's discrimination. *See* Dkt. No. 72, p. 21. After all, what could be more discriminatory than making disabled insureds (and their employers) pay more in premiums to cover the outpatient office visits and durable medical equipment that they need, when the same or similar services for others is automatically covered without a special rider? In other words, it is certainly plausible that Kaiser's decision to carve out a separate rider to provide coverage for hearing disabled insureds, rather than spreading the risk for such coverage across its entire population (as is done with most other health benefits) is illegal discrimination.

Third, even now, after three years of litigating, Kaiser does not offer any actual reason, justification or explanation for its Hearing Loss Exclusion, apart from hinting that it was due to "cost." If Kaiser had a genuine reason for the Exclusion, it would have likely disclosed it by now. It is more than plausible that Kaiser excluded this coverage

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due to "thoughtlessness, indifference or benign neglect" without any reasoning or analysis. *See Crowder v. Kitigawa,* 81 F.3d 1480, 1484 (9th Cir. 1996). This is precisely the kind of illegal discrimination that Section 1557 was designed to eliminate.

E. Kaiser's Remaining Arguments Are Meritless.

Much of the remainder of Kaiser's brief is aimed at obscuring Plaintiffs' straightforward allegations:

1. Kaiser's Manipulation of Various Statistics is Ultimately Irrelevant.

Kaiser argues various statistics demonstrate that the majority of people with hearing impairments are not disabled. *See* Dkt. No. 72, pp. 10-11. ***Whether this is true or not is irrelevant.*** The problem for Kaiser is that, as alleged by Plaintiffs, most if not all of the insureds who need medical treatment and devices for their hearing loss, such that they are subject to the Hearing Loss Exclusion are disabled. Dkt. No. 65, ¶¶50-61, 100-105. These pleadings must be taken at face-value at this stage of the litigation.

2. Federal Disability Discrimination Law Does Not Specify a Cut-Off Between Disability and Non-Disability.

Kaiser faults Plaintiffs with failing to specify where, along the continuum of hearing loss, the cut-off lies between a non-disabling and a disabling hearing impairment. Dkt. No. 72, p. 6. Federal anti-discrimination law does not require a bright-line cut-off between those who are disabled and those who are not. Congress declined to define "disability" based upon a specific level of impairment. Instead, Congress concluded that disability is a substantial impairment of "major life activities" including hearing, ***as experienced by the individuals themselves***. *See* 42 U.S.C. § 12102(2)(A). Federal regulators found that this is "not meant to be a demanding standard" and should be construed "broadly, in favor of expansive coverage." 28 C.F.R. § 36.105(d)(1)(i). Under this standard, the proposed class, all insureds whose hearing loss impairs their

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daily activities so substantially as to drive them to seek medically necessary treatment for it, meet the federal definition of disability. Plaintiffs' theory is more than plausible.

3. It is Irrelevant that Not All Hearing Disabled Insureds Are Subject to the Hearing Loss Exclusion.

Kaiser further objects that Plaintiffs' proposed class "excludes those who have substantial limitations in hearing if they believe their hearing is adequate or they have not sought the type of hearing aids excluded by the Plan." Dkt. No. 72, p. 11. To be sure, there are likely hearing disabled insureds who are not "subject to" the Hearing Loss Exclusion, either because they do not believe that they need treatment or their needs are met in other ways. Those individuals – whether disabled or not – are not ***affected*** by the Hearing Loss Exclusion. They do not seek treatment for their disability, and their claims are not excluded under the Kaiser policy. They are simply not among the disabled individuals discriminated against by Kaiser under the Hearing Loss Exclusion. *See Lovell,* 303 F.3d at 1054.

4. Plaintiffs Adequately Alleged Deliberate Discrimination.

Kaiser misquotes the Ninth Circuit decision in *Schmitt* to argue that Plaintiffs failed to sufficiently allege "discriminatory motivation" by Kaiser. *See* Dkt. No. 72, p. 13, *misquoting Schmitt,* 965 F.3d at 959. Both *Schmitt* and *Doe* fully dispose of Kaiser's argument. In *Schmitt,* the Court concluded that an allegation that a benefit design is discriminatory is necessarily an allegation of an intentional act. *See Schmitt,* 965 F.3d at 954, *citing Mark H. v. Lemahieu,* 513 F.3d 922, 936 (9th Cir. 2008). In *Doe,* the Ninth Circuit rejected classifications of disability discrimination under Section 1557 as either intentional or disparate impact. *Id.,* 982 F.3d at 1210. Instead, the focus is on "whether disabled persons had been denied 'meaningful access' to [ ] services." *Id.* Thus, the Court must consider whether the Kaiser coverage that is limited to only CIs and BAHAs

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provides "meaningful access" to ACA-mandated benefits needed by the hearing disabled. *See id.,* at 1211. Where, as here, a plaintiff alleges that they cannot receive effective treatment under their Kaiser plan because of their disability, a claim for intentional disability discrimination under Section 1557 is adequately pled. *Id.,* at 1212. *See* Dkt. No. 65, ¶¶18, 59-61, 103-105.

5. Removal of the Hearing Loss Exclusion Will Not Result in Individually Curated Coverage.

Kaiser complains that if Plaintiffs prevail, eliminating the Hearing Loss Exclusion could "define the benefit so narrowly as to require an insurer to curate coverage for individual's health care needs." Dkt. No. 72, p. 5-6, *citing Schmitt,* 965 F.3d at 959. To the contrary, removing the Exclusion ***broadens*** the definition of outpatient medical services and durable medical equipment to include treatment and services related to hearing loss, permitting hearing disabled insureds to have the same access to these generic services as everyone else. *See e.g.,* Dkt. No. 18-2, p. 3 (when BAHAs are covered by Kaiser, they are covered generically "at the medical benefit" and "under the plan's prosthetic devices benefit."). In any event, the Court cannot determine whether the coverage Plaintiffs seek would result in individually "curated" coverage at this stage of the litigation.

F. Plaintiffs Adequately Allege a Breach of Contract Claim for Kaiser's Violation of RCW 48.43.0128.

To demonstrate liability for breach of the insurance contract, Plaintiffs must show (1) a valid contractual duty; (2) breach of that duty; and (3) the breach was a proximate cause of Plaintiffs' injuries. *Nw. Mfrs. v. Dep't of Labor*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Since June 2020, Kaiser had the contractual duty to comply with RCW 48.43.0128, which, upon enactment, entered into and modified Plaintiffs' insurance contracts as an additional term, eliminating all non-conforming terms.

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First, Kaiser specifically promised, in the contract, to comply with all governing state law provisions, including RCW 48.43.0128. *See* Dkt. No. 18-1, p. 3 out of 66; Dkt. No. 65, *Appendix A*, p. 65. Kaiser's breach of RCW 48.43.0128 is a breach of this promise. Kaiser ignores this contractual promise entirely.

Second, as a matter of state law, Kaiser's contract must comply with RCW 48.43.0128. Under RCW 48.18.510, should the Court conclude that Kaiser's Hearing Loss Exclusion does not comply with RCW 48.43.0128, the Exclusion in Plaintiffs' contract (and that of other class members) must be "construed and applied" in accordance with the state non-discrimination statute. *See also* RCW 48.18.200(2).

Third, it is "Insurance Law 101" that all relevant state insurance requirements are incorporated into the insurance contract. *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334 (1993); *O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 707, 335 P.3d 416 (2014); *see also UNUM Life Ins. v. Ward*, 526 U.S. 358, 376-77, 119 S. Ct. 1380 (1999). The "terms of" an insurance contract include any applicable law:

> It is fundamental insurance law that existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable, and, together with settled judicial constructions thereof, become a part of the contract as much as if they were actually incorporated therein.

Plumb v. Fluid Pump Serv., Inc., 124 F.3d 849, 861 (7th Cir. 1997). As Kaiser knows well, Washington law permits a challenge under a state insurance law to be brought as a breach of contract claim. *See e.g., O.S.T.*, 181 Wn.2d at 695 (breach of contract claim brought to enforce Washington's Mental Health Parity Act, RCW 48.44.341). Kaiser and its predecessor, Group Health Cooperative, have been subject to similar breach of contract claims many times before. *See e.g., Stabelfeldt v. Kaiser Foundation Health Plan,* King Cty. Sup. Ct. No. 18-2-00939-1-SEA (J. Galvan, 2018) (breach of contract claim brought to enforce state insurance regulations); *Nixon v. Group Health Coop.,* King Cty,

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Sup. Ct. No. 14-2-31663-1-SEA (J. Chun, 2014) (breach of contract claim brought to enforce Washington Mental Health Parity Act).

Kaiser argues that a 2011 U.S. Supreme Court decision overturns this long-standing feature of state insurance law. *See* Dkt. No. 72, p. 24, *citing Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 114 (2011). The case simply does not stand for the proposition that Kaiser asserts. In *Astra USA*, a federal statute did not create a private right of action for non-insurance entities that contracted with the federal government. *Id.* The Supreme Court held that "If 340B entities may not sue under the statute, it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute." *Id.*

In stark contrast, Washington's Legislature has decided that insurance contracts automatically incorporate the relevant provisions of the Insurance Code – even if the literal terms of the health plan conflict. RCW 48.18.510; RCW 48.18.200(2). That incorporation would be meaningless if insureds could not enforce the relevant state statutory provisions pursuant to a breach of contract claim.

Fourth, Kaiser is wrong when it asserts that RCW 48.43.0128 may not be enforced by private citizens, apart from a breach of contract claim. The same legislation (SHB 2338 (2020)) also concluded that a violation of RCW 48.43.0128 was "unfair discrimination" under RCW 48.30.300, and therefore subject to Washington's Law Against Discrimination. RCW 49.60.178(1). Violations of Washington's Law Against Discrimination may be enforced by private litigation. RCW 49.60.030(2); *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 950, 946 P.2d 1242 (1997) ("WLAD is not limited to employment discrimination but rather guarantees the right to be free of discrimination in nonemployment settings"). Kaiser ignores this statutory authorization entirely. To make this right even more clear-cut, the Washington Legislature just passed new

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legislation that places RCW 48.43.0128 directly within the scope of the Washington Law Against Discrimination. *See* 2SSB 5313, Sec. 1 (adding RCW 48.43.0128 directly to RCW 49.60.178(1)).[5]

Defendants' cases – *Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 346, 449 P.3d 1040 (2019) and *Cameron v. Physicians Ins.*, 2004 U.S. Dist. LEXIS 15268, at *5-6 (D. Or. July 26, 2004) – are unavailing. *See* Dkt. No. 72, p. 23. Under the three-prong test established in *Bennett v. Hardy,* 113 Wn.2d 912, 783 P.2d 1258 (1990), the statute meets all three requirements: (1) Plaintiffs are within the class for whose benefit the statute was enacted (disabled insureds); (2) the legislature ***explicitly*** created a remedy by including RCW 48.43.0128 as a form of "unfair discrimination" described by RCW 48.30.300 and therefore subject to the WLAD's civil enforcement statute; and (3) adjudicating that a civil remedy exists under RCW 48.43.0128 is consistent with the Legislature's intent. *Id.,* 113 Wn.2d at 920-921.

Fifth, Kaiser asserts it cannot be liable for violating RCW 48.43.0128 because it has followed the Office of the Insurance Commissioner's EHB-Benchmark plan regulations to which this Court must defer. Dkt. No. 72, p. 22. Both the Ninth Circuit and the Washington Supreme Court have rejected this very argument. *See Schmitt,* 965 F.3d at 956-57 ("[W]hether or not [the EHB Benchmark plan] complied with section 1557 is a question of federal law on which we owe the state no deference."); *O.S.T.*, 181 Wn.2d at 700 n. 9 ("[W]e afford agency interpretation deference only if the interpretation is not contrary to the plain language of the statute").

Sixth, Kaiser concedes that the language of RCW 48.43.0128 is substantially different from Section 1557. Dkt. No. 72, p. 23; *compare* 42 U.S.C. § 18116(a) *with*

[5] *See* http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Bills/5313-S2.pdf?q=20210407120446 (last visited 4/7/21).

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RCW 48.43.0128. Importantly, RCW 48.43.0128 does not reference or incorporate Section 504. *See* RCW 48.43.0128. And, since Washington anti-discrimination law related to disability is broader than federal law, RCW 48.43.0128 prohibits disability discrimination in benefit design in circumstances that may not be prohibited under federal law. *See e.g.*, RCW 49.60.040(7)(a) (defining disability); *see e.g., Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 618-627, 444 P.3d 606 (2019) (recognizing obesity as a disability without any "cut-off" for the disabling condition). Under Washington law, any medically cognizable hearing impairment is a "disability" subject to state anti-discrimination protection – no showing of "substantial impairment" is required. *See id.* Plaintiffs have more than adequately pled a claim of disability discrimination pursuant to RCW 48.43.0128.

IV. CONCLUSION

Kaiser's Motion to Dismiss the Fourth Amended Complaint should be denied. According to Kaiser, ***only*** exclusions that do not overdiscriminate or under-discrimination may be pursued – leaving Plaintiffs no redress unless the alleged fit of the exclusion is "just right." In *Schmitt* and *Doe,* the Ninth Circuit rejected Kaiser's "Goldilocks" theory. Consistent with long-standing anti-discrimination law, "a more comprehensive view of the concept of discrimination" is required under Section 1557. *See Olmstead*, 527 U.S. at 598. Plaintiffs have more than adequately pled disability discrimination under Section 1557 and breach of contract pursuant to RCW 48.43.0128.

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DATED: April 12, 2021.

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Attorneys for Plaintiffs

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHONDRO; 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.

NO. 2:17-cv-01611-RSL

[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT

This matter came before the Court on Defendants' 12(B)(6) Motion to Dismiss Fourth Amended Complaint (Dkt. No. 72). Plaintiffs Andrea Schmitt, Elizabeth Mohondro, and O.L. by and through her parents, J.L. and K.L., were represented by Richard E. Spoonemore and Eleanor Hamburger of Sirianni Youtz Spoonemore Hamburger PLLC, and John Waldo, Law Office of John F. Waldo. Defendants Kaiser Foundation Health Plan of Washington; Kaiser Foundation Health Plan of Washington

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Options, Inc.; Kaiser Foundation Health Plan of the Northwest; and Kaiser Foundation Health Plan, Inc., were represented by its counsel, Medora A. Marisseau and Mark A. Bailey, of KARR TUTTLE CAMPBELL.

The Court reviewed and considered the pleadings and record herein, including:

- Defendants' 12(b)(6) Motion to Dismiss Fourth Amended Complaint;
- Plaintiffs' Opposition to Defendants' Motion to Dismiss the Fourth Amended Complaint;
- Defendants' reply brief and all declarations and exhibits in support of Defendants' reply brief, if any; and
- _____
- _____.

Based upon the foregoing, and for good cause shown, the Court DENIES in full Defendants' 12(b)(6) Motion to Dismiss Fourth Amended Complaint.

DATED this _____ day of April, 2021.

_____
Robert S. Lasnik
United States District Court Judge

Presented by:

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