

The Honorable Robert S. Lasnik

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs,

v.

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

Defendants.

)
) CASE NO. 2:17-cv-1611-RSL
)
)
) DECLARATION OF MEDORA A.
) MARISSEAU IN SUPPORT OF
) DEFENDANTS' OPPOSITION TO
) PLAINTIFFS' MOTION FOR CLASS
) CERTIFICATION

) Noting Date: March 3, 2023
)
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I Medora A. Marisseau, declare under penalty of perjury under the laws of the United States, as follows:

1. I am one of the attorneys for Defendants in this case. I have personal knowledge of the information contained in this declaration.

- 1 2. I have been personally involved in handling discovery responses, including Plaintiffs’
2 request for enrollment data for Kaiser Foundation Health Plan of Washington and Kaiser
3 Foundation Health Plan of Washington Options (collectively Kaiser) for their fully insured
4 plans issued in Washington, excluding Medicare Advantage Plans.
5
- 6 3. In order to determine enrollment under Kaiser insured plans in Washington which cover
7 hearing aids under a hearing aid rider (versus those that did not cover hearing aids and
8 contained the Exclusion), Kaiser used a set of hearing aid rider codes and ran the searches.
9 These searches were run in early 2021. I sent an email to Plaintiffs’ counsel in June of
10 2021 outlining the estimated enrollment data for each group based on those searches.
11
- 12 4. It was subsequently noticed that several hearing aid rider codes were missing from the data
13 set used for the prior search. A new search for enrollment figures in the two groups was
14 re-run in October 2022 using the updated list of hearing aid rider codes. This enrollment
15 data was provided in Defendants’ initial response to Plaintiffs’ Interrogatory No. 7.
16
- 17 5. Thereafter, it was discovered that enrollees under Federal Employee Health Benefit plans
18 were included in the enrollee data run. Because enrollees under these FEHB plans should
19 not have been included at all, the enrollment data was re-run excluding all FEHB plan
20 enrollees. These results (and the reason for the supplemental response) were provided to
21 Plaintiffs in Defendants’ Supplemental Response to Interrogatory No. 7. These discovery
22 responses are an exhibit to Plaintiffs’ Motion. See Dkt. 91-2.
- 23 6. During the December 23, 2022, deposition of Kaiser’s 30(b)(6) witness (Jessica Hamp),
24 Plaintiffs’ counsel specifically asked about the enrollment numbers provided in the
25 Supplemental Response to Interrogatory No. 7 (Exhibit 2 to the 30(b)(6) Deposition):
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27

1 Q. And so if I was looking to identify the number of Washington insureds in
2 Kaiser health plans which did not have any hearing aid coverage from 2014 to
3 2022 I would look to the supplemental answer to Interrogatory No. 7 in this
4 exhibit, is that right?

5 A. Yes. Correct.

6 The witness was also asked:

7 Q. All right. And does this list of enrollees in Exhibit 2 in the Supplemental
8 Answer, does that include people who are enrolled in large groups, small groups
9 and individual market plans?

10 A. Yes.

11 A true copy of pages 24-26 of the 30(b)(6) Deposition transcript (Jessica Hamp) is attached
12 as **Exhibit 1**.

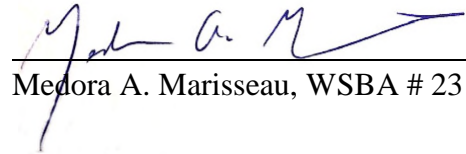
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14
15 7. Defendants requested discovery relating to the opinions set forth in the Declaration of
16 Frank Fox. In response, Plaintiffs produced pages of entirely blacked out communications,
17 making it impossible to know what facts and assumptions were provided to Plaintiffs'
18 expert. Nevertheless, the Declaration admits his opinion was not based on the correct
19 enrollment data provided in Defendants' Supplemental Response to Interrogatory No. 7.
20 Instead, he stated his analysis was based on my June 2021 email from more than a year
21 earlier (see Dkt. 97, ¶8, note 1), rather than the subsequent and correct enrollment
22 information produced in formal discovery responses, which testimony from Kaiser's
23 30(b)(6) witness confirmed was accurate.

24
25 8. During discovery, audiology records for Plaintiff Andrea Schmitt were obtained. They
26 show she purchased hearing aids in December 2016 from a non-Kaiser provider, while she
27

1 was covered under a Kaiser HMO plan that covered hearing aids when purchased in-
2 network. A true copy of the relevant audiology record is attached as **Exhibit 2.**

3 I declare under penalty and perjury under the laws of the United States that the foregoing
4 is true and correct.

5
6 Executed on this 21st day of February, 2023.

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9 Medora A. Marisseau, WSBA # 23114
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CERTIFICATE OF SERVICE

I, Luci Brock, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to this action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104. On this day, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the parties listed below in the manner indicated.

Eleanor Hamburger
Richard E. Spoonemore
SIRIANNI YOUTZ SPOONEMORE HAMBURGER
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Attorneys for the Plaintiffs

Via U.S. Mail
 Via Hand Delivery
 Via Electronic Mail
 Via Overnight Mail
 CM/ECF via court's website

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Attorneys for the Plaintiffs

Via U.S. Mail
 Via Hand Delivery
 Via Electronic Mail
 Via Overnight Mail
 CM/ECF via court's website

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Executed on this 21st day of February, 2023, at Seattle, Washington.

s/Luci Brock

Luci Brock
Legal Assistant

Exhibit 1

1 Q. And that's how this answer to Interrogatory
2 No. 7 was developed?

3 A. Yes.

4 Q. Okay. And then I just want you to take a
5 look at the supplemental answer on page two.

6 A. Yes.

7 Q. And this references that the initial
8 response included numbers of people in the federal
9 employee benefit plans.

10 Do you see that?

11 A. Yes.

12 Q. And it says what should not have been
13 included.

14 Do you see that?

15 A. Yeah.

16 Q. Do you understand why the federal employee
17 benefit plans were not included?

18 A. Yes.

19 Q. Can you explain?

20 A. So with our federal employee benefit plans,
21 those are not fully insured plans that are filed with
22 our Washington OIC. They are overseen by the OPM, the
23 Office of Personnel Management, at a federal level.

24 Q. Are they self-funded plans?

25 A. I can't say that confidently but I know they

1 are treated as such. They adhere to federal laws like
2 self-funded plans.

3 Q. All right. Fair enough.

4 And so if I was looking to identify the
5 number of Washington insureds in Kaiser health plans
6 which did not have any hearing aid coverage from 2014
7 to 2022 I would look to the supplemental answer to
8 Interrogatory No. 7 in this exhibit, is that right?

9 A. Yes. Correct.

10 Q. Okay. Great. Thank you.

11 And then do you know how many plans are
12 reflected in the under no hearing aid coverage in the
13 Supplemental Answer to Interrogatory No.~7?

14 A. I do not know the plan total numbers off the
15 top of my head. I'm sure I've seen it in the Excel,
16 though.

17 Q. Okay. So it may be in another file that
18 we're going to look at?

19 A. Yes.

20 Q. Let me just see if I can go straight to
21 that.

22 When I come across it we'll do that. It's
23 just --

24 A. Okay.

25 Q. All right. And does this list of enrollees

1 in Exhibit 2 in the Supplemental Answer, does that
2 include people who are enrolled in large groups, small
3 groups and individual market plans?

4 A. Yes.

5 Q. Okay. All right. Turning to 1.(c), does
6 Kaiser administer hearing loss exclusions for any
7 ERISA self-funded plans?

8 A. When you say 1.(c), is that a different
9 document?

10 Q. Oh, I'm sorry. I'm referring to the
11 deposition topics in Exhibit 1.

12 A. Okay.

13 MS. MARISSEAU: I'm going to make an
14 objection. That's one of the topics that we objected
15 to.

16 MS. HAMBURGER: I understand. Even though
17 you objected I'm entitled to ask.

18 If you don't get a protective order I'm
19 entitled to ask.

20 Q. (By Ms. Hamburger) Does Kaiser administer
21 these type of exclusions, hearing aids and treatment
22 for hearing loss for any ERISA self-funded plans?

23 A. Self-funded plans are able to collect
24 benefits as they may.

25 So I would say "Yes," that if they're a self

Exhibit 2



Purchase Agreement

Order # _____

OLYMPIA LOCATION
 365 Cooper Pt Rd. NW, Suite #102
 Olympia, WA 98502
 Phone: (360) 704-7900
 Fax: (360) 704-7909

LACEY LOCATION
 130 Marvin Rd., Suite #142
 Lacey, WA 98503
 Phone: (360) 459-2211
 Fax: (360) 459-9337

CAPITAL ENT LOCATION
 404-B Black Hills Lane SW
 Olympia, WA 98502
 Fax: (360) 956-2598

Patient's Name Andrea Schmitt Date 12/08/2016

Address _____ Telephone _____

City Seattle State WA Zip 98118

I, the undersigned, hereby purchase from Ascent Audiology & Hearing the hearing instrument(s) and/or equipment described below according to the terms set forth in this Agreement.

The Hearing Instrument(s) is (check one) New Used Reconditioned Repair/L&D

Warranty Expiration Date 12/19/2019 Date of Last Audiogram 11/23/2016

EAR	MAKE	MODEL	SERIAL #	Color	BATTERY SIZE	PURCHASE PRICE
L	Starkey	Halo 2 i2400 RIC	160865542	Champ	13	\$ 2,500.00
R	Starkey	Halo 2 i2400 RIC	160865524	Champ	13	\$ 2,500.00
Describe options/miscellaneous (e.g. Circuit options, service charges, testing fees, and Rental charges)					Options/Misc.	\$ 0.00
Describe Discount:					Discount	\$ 0.00
Please see your hearing professional for information on Limited Warranty and/or loss or damage protection that applies to your hearing instrument. Manufacturer Warranty: 3 YR Warranty includes repair, loss & damage coverage 25% deductible due w/loss claim Ascent Warranty: 1 box of batteries @ fitting Complimentary visits during return period Office visit fees apply after the return period					Subtotal	\$ 5,500.00
					Ear Molds	\$ 0.00
					Batteries	\$ 0.00
					Tax	\$ 0.00
					Accessories	\$ 0.00
					Total	\$ 5,500.00
					Estimated Insurance	\$ 0.00
					Deposit	\$ 0.00
					Due on Delivery	\$ 5,000.00

Medical Examination Waiver: I have been advised by the undersigned dispenser that the Food and Drug Administration has determined that my best health interest would be served if I had a medical evaluation by a licensed physician (preferably a physician who specializes in diseases of the ear) before purchasing a hearing aid. I do not wish a medical evaluation before purchasing a hearing aid. I am 18 years of age or older.

Alison P. Vega AND _____
 Alison P. Vega, Doctor of Audiology Purchaser's Signature

Return Period: Within thirty (30) days of delivery of your hearing instrument, you may return the instrument for any reason, provided it is returned in satisfactory condition. If the instrument or accessories are at the manufacturer for adjustment or repair, the return period will be extended. In the event of a return, you are entitled to a replacement or a refund of all charges paid, less a \$150 (one hundred fifty dollars) dispensing fee per hearing instrument.

Date of Delivery 8 day of December, 20 16
 Licensee's Signature Alison Vega AND
 Lacey, WA State License No. LD3044
 Purchaser Signature Andrea Schmitt
 Full Name (Print) Andrea Schmitt
 Date 12/8/16
 Return Period Expires _____