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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
11

12 HASSAN JAAFAR,

13 Plaintiff,

14 vs.

15 KAISER FOUNDATION HEALTH
16 PLAN, INC.,

17 Defendant.
18
19

Case No.

**COMPLAINT FOR
VIOLATIONS OF ERISA (CLAIM
FOR BENEFITS AND TO REMEDY
FIDUCIARY BREACHES UNDER
29 U.S.C. § 1132(a))**

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21 Plaintiff, Hassan Jaafar, herein sets forth the allegations of his Complaint
22 against Defendant Kaiser Foundation Health Plan, Inc.
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JURISDICTION AND VENUE

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2 1. This action is brought under 29 U.S.C. §§ 1132(a), (e), (f) and (g) of the
3 Employee Retirement Income Security Act of 1974 (hereinafter “ERISA”) as it
4 involves a claim by Plaintiff for employee benefits under an employee benefit plan
5 regulated and governed under ERISA. Jurisdiction is predicated under these code
6 sections as well as 28 U.S.C. § 1331 as this action involves a federal question. This
7 action is brought to obtain benefits under the terms of an employee benefit plan, to
8 enforce Plaintiff’s rights under the terms of an employee benefit plan, and to remedy
9 fiduciary breaches. Plaintiff seeks relief, including but not limited to: payment of
10 plan benefits, other appropriate equitable relief to remedy fiduciary breaches,
11 prejudgment and post-judgment interest, and attorneys’ fees and costs.

12 2. Venue is proper within the Central District of California pursuant to
13 29 U.S.C. § 1132(e)(2) because the claims at issue herein were administered in this
14 judicial district.

PARTIES

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16 3. Plaintiff, Hassan Jaafar, is and was at all times relevant, a resident of the
17 City of Los Angeles, California.

18 4. Plaintiff was at all times relevant a participant in the Kaiser Permanente
19 Traditional HMO Plan for United Airlines, Inc. (the “Plan”), an employee benefit
20 group health plan regulated by ERISA, administered and underwritten by Defendant
21 Kaiser Foundation Health Plan, Inc. (“Kaiser”), and sponsored by Plaintiff’s
22 employer, United Airlines.

23 5. Plaintiff is informed and believes that the Plan is authorized to transact
24 and is transacting business in this judicial district, the Central District of California,
25 and can be found in the Central District of California.

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FACTUAL ALLEGATIONS

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2 6. In August, Mr. Jaafar, a 58-year-old husband and father, suffered a
3 sudden seizure while on a trip. An MRI determined that the likely culprit was a
4 legion in Mr. Jaafar’s left frontal lobe.

5 7. Upon his return home, Mr. Jaafar met with a neurosurgeon, Dr. Patrick
6 Gabikian, at Kaiser Los Angeles Medical Center, who informed him that the legion
7 most likely was a brain tumor called a giablastoma multiforme. Dr. Gabikian
8 confidently told Mr. Jaafar that, if a scheduled biopsy confirmed this diagnosis, Mr.
9 Jaafar’s only treatment option would be radiation therapy and chemotherapy because,
10 based only on the MRI, Dr. Gabikian could tell that any attempted removal of the
11 tumor would leave Mr. Jaafar unable to speak, eat or swallow. According to Dr.
12 Gabikian, with radiation and chemotherapy, Mr. Jaafar could only expect to live only
13 two more years, and without that treatment he would die much sooner.

14 8. Dr. Gabikian performed the biopsy on August 25, 2017. The pathology
15 report that came back a couple of weeks later confirmed that the tumor was indeed a
16 giablastoma multiforme.

17 9. Given this shocking news, and Dr. Gabikian’s dire prognosis, Mr. Jaafar
18 and his family sought a second opinion from Dr. Linda Liau, a neurosurgeon at
19 UCLA, on September 18, 2017. Contrary to what Dr. Gabikian had concluded, Dr.
20 Liau informed Plaintiff and his family that she believed she could safely remove the
21 tumor in its entirety. She noted, however, that she would have to perform a number
22 of brain mapping tests before she could confirm that the tumor was operable,
23 procedures which Dr. Gabikian had never mentioned. Plaintiff scheduled these tests
24 for the following week and immediately began to seek authorization from Kaiser to
25 undergo these tests at UCLA so that he and his family would not have to pay for the
26 tests out-of-pocket.

27 10. In the meantime, on September 22, 2017, Plaintiff and his wife again
28 met with Dr. Gabikian to discuss what Dr. Liau had told them. Dr. Gabikian reacted

1 by stating that Dr. Liao was simply seeking “publicity” and reiterating that he was
2 certain that, if the tumor were removed, Mr. Jaafar would suffer a stroke and be left
3 unable to speak or to eat without a feeding tube. Dr. Gabikian then stressed that the
4 tumor was growing wildly and aggressively, putting Mr. Jaafar in greater danger the
5 longer he waited, and he pushed Mr. Jaafar to begin immediate chemotherapy and
6 radiation. The Jaafar family, however, insisted that they wanted Mr. Jaafar to
7 undergo the brain mapping procedures to determine whether his tumor could actually
8 be removed and his life saved.

9 11. On September 27, 2017, after a phone call from Mr. Jaafar’s family, Dr.
10 Gabikian’s nurse care manager, Sheila, called Mr. Jaafar’s wife, Houba, to inform her
11 that Kaiser had approved the brain mapping tests at UCLA, but that Kaiser had also
12 scheduled a meeting with another Kaiser neurosurgeon, a Dr. Rudi Scharnweber, for
13 the following Monday, October 2, 2017. The Jaafar family agreed to this meeting.

14 12. Dr. Liao called the Jaafar family on Friday September 29, 2017, to tell
15 them that the brain mapping tests revealed in detail exactly where the tumor was and
16 that the tumor could be removed safely. These tests also confirmed that the tumor
17 was, as Dr. Gabikian had noted, growing very quickly. Indeed, a new branch of the
18 tumor that had not been there two weeks previously was now fast approaching Mr.
19 Jaafar’s speech center, making it imperative, in Dr. Liao’s view, that the tumor be
20 removed as soon as possible. With that in mind, Mr. Jaafar scheduled the surgery for
21 the following Tuesday, October 3, 2017, and the family once again began the arduous
22 process of attempting, through numerous phone calls, to get Kaiser’s approval for this
23 critical surgery.

24 13. On October 2, 2017, the day before the scheduled surgery, Mr. Jaafar
25 and his wife met with Dr. Scharnweber at Kaiser, as they had agreed to do, to discuss
26 Mr. Jaafar’s diagnosis and treatment. Dr. Scharnweber agreed to push for
27 authorization, noting that UCLA had the resources and technology to do the surgery.
28 He stressed, however, that Mr. Jaafar would need to get his radiation and

1 chemotherapy afterwards at Kaiser, to which Mr. Jaafar readily agreed. Mr. Jaafar
2 and his wife left the appointment feeling that Kaiser would authorize and pay for the
3 scheduled surgery.

4 14. Much to their surprise and dismay, however, Dr. Gabikian's nurse care
5 manager, Sheila, called Houba later that afternoon and told her that Dr. Scharnweber
6 had decided that he could do the surgery at Kaiser and that he had scheduled it for
7 October 9, 2017, a week later. Houba objected that that they had been told that tumor
8 was growing at such a fast pace that waiting another week was likely to endanger Mr.
9 Jaafar or render the tumor inoperable (as Kaiser had insisted it was until that day). A
10 number of phone calls between Houba, Sheila and someone in Kaiser's Member
11 Services, followed, at which point Sheila agreed to try to get authorization from the
12 top chief at Kaiser.

13 15. Instead, an hour later, Dr. Scharnweber called and spoke to Mr. Jaafar's
14 daughter, Paulina. He informed her that he had scheduled the surgery for Mr. Jaafar
15 for October 9, 2017. When Paulina objected that her father could not safely wait that
16 long, Dr. Scharnweber told her that he would call his boss and push for authorization
17 of the surgery at UCLA, as he had already promised to do. Houba received a phone
18 call a few minutes later from Sheila saying the same thing, leaving the family once
19 again with the impression that authorization would be granted. Indeed, Sheila said
20 she would be in the office at 7:30 a.m. the next morning in order to call UCLA with
21 the authorization just before the surgery was to be performed.

22 16. Once again, however, things did not go as promised and neither UCLA
23 nor the Jaafar family had heard anything from Kaiser by the time Mr. Jaafar was
24 taken into surgery on the morning of October 3, 2017. Consequently, the family
25 members collected all the credit cards they had and created payment plans with the
26 credit card companies in order to pay for the surgery. Around 8:30 that morning,
27 Paulina called Sheila to find out what was happening with the authorization. A few
28 minutes later, when Mr. Jaafar was already in surgery, Sheila called back to inform

1 Paulina that a Dr. Rahman, whom Mr. Jaafar had never met or spoken to, had denied
2 the authorization because he said he could do the surgery the following week on
3 October 9, 2017. When Paulina objected that her father was already in surgery and
4 could not wait another week, Sheila informed her that Dr. Rahman had said that “he
5 can do the surgery better than Dr. Liau.”

6 17. Later that same day, Plaintiff’s family appealed the denial of benefits,
7 which Kaiser apparently treated as a grievance. By letter of November 9, 2017,
8 Kaiser states that “Mr. Jaafar was scheduled for surgery on October 9, 2017 [at
9 Kaiser] and at UCLA on October 3, 2017.” Without a full discussion of the course of
10 events leading up to Mr. Jaafar’s surgery at UCLA – including the fact that a Kaiser
11 neurosurgeon had repeatedly told the Jaafar family that Kaiser could not do the
12 surgery, and that the October 9, 2017 surgery was not scheduled until just hours
13 before the surgery at UCLA – this letter misleadingly states that “[d]ue to
14 dissatisfaction of initial recommendation and the date surgery was scheduled in-Plan,
15 Mr. Jaafar elected to have surgery at UCLA Medical Center.” This letter also
16 inaccurately concludes that “[t]here was no medical indications that required Mr.
17 Jaafar to have surgery on October 3, 2017 versus October 9, 2017,” when, in fact,
18 doctors from both Kaiser and UCLA had stressed that the tumor was growing very
19 quickly, putting Mr. Jaafar in greater danger with each passing day.

20 18. On November 7, 2017, Kaiser issued another denial in a letter
21 denominated a “Post-Service Claim Decision Notice.” This letter states that “[w]hile
22 it is certainly Mr. Jaafar’s right to seek and receive care outside of the Plan, the
23 Kaiser Foundation Health Plan does not provide payment for care that a member
24 elects to receive from non-Plan providers.” The letter goes on to state that ‘Mr.
25 Jaafar’s Evidence of Coverage with the Health Plan specifies that all non-emergent
26 care must be provided, prescribed, authorized or directed by the Permanente Medical
27 Group physician in order to be covered.’ Without any discussion of the many
28 attempts by Mr. Jaafar and his family to get authorization prior to the surgery and

1 Kaiser’s failure to make and communicate a clear decision prior to the surgery, the
2 letter concludes that “[t]he care Mr. Jaafar received from UCLA Medical Center was
3 self-referred and not authorized.”

4 19. Following a written appeal of the denial by Mr. Jaafar’s family on
5 November 20, 2017, Kaiser again denied the claim for coverage and reimbursement
6 of the cost of the surgery. This letter states that “Member Services Team Manager”
7 “met as a committee to discuss and evaluate your request.” This letter explains that
8 “[w]e denied your request because the out-of-Plan care that you received was not
9 prescribed, authorized or directed by Southern California Permanente Medical Group
10 physician.” It goes on to state that “[t]he care Mr. Jaafar received from the non-Plan
11 provider was self-referred and not authorized by us. It is therefore not a covered
12 benefit.”

13 20. Mr. Jaafar requested external review by the Department of Managed
14 Health & Care, which affirmed the denial of coverage by letter of January 22, 2018.

15 **FIRST CAUSE OF ACTION**

16 **FOR IMPROPER DENIAL OF PLAN BENEFITS UNDER ERISA**

17 21. Plaintiff incorporates by reference the preceding paragraphs as though
18 fully set forth herein.

19 22. Plaintiff is informed and believes and thereon alleges that he is entitled,
20 under the terms of the Plan, to coverage of costs of his brain surgery, and that the
21 Plan wrongfully denied his claim for benefits.

22 23. Following the denial of his claim for benefits under the Plan, Plaintiff, as
23 described above, exhausted all administrative remedies required under ERISA and
24 performed all duties and obligations on his part to be performed.

25 24. As a proximate result of the denial of medical benefits, Plaintiff has been
26 damaged in the amount of all of the medical bills incurred for the treatment, in a total
27 sum to be proved at the time of trial.
28

1 25. As a further direct and proximate result of this improper determination
2 regarding the medical claim, Plaintiff, in pursuing this action, has been required to
3 incur attorneys' fees and costs. Pursuant to 29 U.S.C. §1132(g)(l), Plaintiff is entitled
4 to have such fees and costs paid by Defendant.

5 26. Due to the wrongful conduct of Defendant, Plaintiff is entitled to enforce
6 his rights to benefits under the terms of the Plan.

7 **SECOND CAUSE OF ACTION**

8 **FOR BREACH OF FIDUCIARY DUTY UNDER 29 U.S.C. § 1104**

9 27. In making the benefit determinations in this case, Kaiser was acting as
10 an ERISA fiduciary, subject to ERISA's strict duties of prudence and loyalty. 29
11 U.S.C. § 1104; *see Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008).

12 28. Upon information and belief, Kaiser violated these duties by, among
13 other things, (1) failing to ensure that a neurosurgeon at its facility performed the
14 proper tests to determine the treatment options for a plan member with a life-
15 threatening brain tumor; (2) repeatedly suggesting that authorization for brain surgery
16 at UCLA would be forthcoming; (3) failing to make and communicate a benefit
17 determination in a timely manner concerning critically needed treatment for a patient
18 with a life-threatening brain tumor; and (4) telling a critically ill plan participant with
19 a life-threatening and extremely fast-growing brain tumor wait to another week to
20 undergo surgery because a neurosurgeon at Kaiser thought he could "do the surgery
21 better." Through these and other actions, Kaiser violated its duty to act with the
22 utmost care and strictest loyalty towards the interests of Mr. Jaafar, a Plan participant,
23 and, indeed, threatened his health and well-being, and caused him and his family
24 unwarranted distress.

25 29. As a direct and proximate result of these actions, and the resulting
26 injuries and damages sustained by Plaintiff as alleged herein, Plaintiff is entitled to
27 and hereby requests that, in the event that this Court determines that Plan benefits
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1 covering the costs of the surgery are not available under the terms of the Plan, this
2 Court grant Plaintiff the following relief pursuant to 29 U.S.C. §1132(a)(3):

3 a. Reimbursement for the costs of Mr. Jaafar’s brain surgery as a
4 matter of promissory estoppel;

5 b. Such other appropriate equitable relief as the Court deems
6 necessary and proper to protect the interests of Plaintiff under the Plan.

7 **PRAYER FOR RELIEF**

8 Wherefore Plaintiff prays for judgment against Defendant and that the
9 judgment grant the following relief:

10 1. Payment of all benefits due to Plaintiff under the Plan.

11 2. In the alternative, payment of the costs of the brain surgery as a matter
12 of promissory estoppel.

13 3. Payment of pre-judgment and post-judgement interest as allowed under
14 ERISA.

15 4. Payment of all costs and reasonable attorneys’ fees incurred in pursuing
16 this action, pursuant to 29 U.S.C. §1132(g).

17 5. For such other relief as the Court deems just and proper.

18
19 Dated: August 13, 2018

KANTOR & KANTOR, LLP

20
21 By: /s/ Lisa S. Kantor
22 Lisa S. Kantor,
23 Attorneys for Plaintiff,
24 Hassan Jaafar
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