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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 F.A., by and through his parents and  
10 guardians, P.A. and F.A., individually, on  
11 behalf of similarly situated individuals, and  
12 on behalf of THE NEIMAN MARCUS GROUP  
13 LLC HEALTH AND WELFARE BENEFIT  
14 PLAN,

15 Plaintiff,

16 v.

17 THE NEIMAN MARCUS GROUP LLC  
18 HEALTH AND WELFARE BENEFIT PLAN;  
19 and THE NEIMAN MARCUS GROUP LLC,

20 Defendants.

NO. 2:17-cv-1571

COMPLAINT  
(CLASS ACTION)

[REDACTED]

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**I. PARTIES**

1. *F.A.* Plaintiff F.A. is the three-year-old son and dependent of P.A. and F.A. and resides in King County, Washington. F.A. is a beneficiary, as defined by ERISA § 3(8), 29 U.S.C. § 1002(8), of The Neiman Marcus Group LLC Health and Welfare Benefit Plan. F.A.’s coverage is through P.A.’s employment with The Neiman Marcus Group LLC.

2. *The Neiman Marcus Group LLC Health and Welfare Benefit Plan.* The Neiman Marcus Group LLC Health and Welfare Benefit Plan (“Plan”) is an employee welfare benefit plan under the Employment Retirement Security of Act of 1974

1 (“ERISA”). The Plan provides health benefits for The Neiman Marcus Group LLC  
2 employees and their dependents such as F.A.

3 3. *The Neiman Marcus Group LLC.* Defendant The Neiman Marcus  
4 Group LLC. (“Neiman”) is the “Plan Sponsor” and “Plan Administrator” and is a named  
5 fiduciary under ERISA.

6 **II. JURISDICTION AND VENUE**

7 4. Jurisdiction of this Court arises pursuant to ERISA § 502(e)(1),  
8 29 U.S.C. § 1132(e)(1).

9 5. Venue is proper under ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2),  
10 because, *inter alia*, a defendant resides or may be found in this district.

11 6. In conformity with 29 U.S.C. §1132(h), plaintiff has served this  
12 Complaint by certified mail on the Secretary of Labor and the Secretary of Treasury.

13 **III. NATURE OF THE CASE**

14 7. F.A. seeks to end Defendants’ standard practice of insurance  
15 discrimination against F.A. and other enrollees with developmental mental health  
16 conditions, including but not limited to autism spectrum disorder (“ASD”).  
17 Neurodevelopmental therapies (“NDT”) (speech, occupational and physical therapies to  
18 treat developmental mental health conditions) and early and intensive provision of  
19 medically necessary Applied Behavior Analysis (“ABA”) therapy can dramatically  
20 improve the health and life-long well-being of enrollees with developmental mental  
21 health conditions, including ASD. Defendants, however, exclude all coverage of  
22 medically necessary NDT and ABA services to treat developmental mental health  
23 conditions like ASD. Plaintiff seeks to enforce the Federal Mental Health Parity Act and  
24 the applicable provisions of the Affordable Care Act, though ERISA and the terms of the  
25 Plan, to end such discriminatory practices.

1           8.       On October 3, 2008, Congress passed the Paul Wellstone and Pete  
2 Domenici Mental Health Parity and Addiction Equity Act of 2008, commonly known as  
3 the Federal Mental Health Parity Act. The Federal Parity Act expanded the scope of  
4 previous federal legislation on access to mental health coverage and was “designed to  
5 end discrimination in the provision of coverage for mental health and substance use  
6 disorders, as compared to medical and surgical conditions.” *Coalition for Parity v.*  
7 *Sebelius*, 709 F. Supp. 2d 10, 13 (D.D.C. 2010). The Federal Parity Act requires that the  
8 exclusions and limitations imposed on mental health services are “no more restrictive”  
9 than those applied to substantially all medical and surgical benefits. *See* 29 U.S.C.  
10 § 1185a(a)(3); 42 U.S.C. § 300gg-5(a)(3); 26 U.S.C. § 9812(a)(3). The Federal Parity Act  
11 took effect as of October 3, 2009.

12           9.       The Federal Mental Health Parity Act requires Defendants to cover  
13 all outpatient, intermediate and inpatient services that are medically necessary to treat  
14 mental health conditions, if it also covers those services for medical/surgical conditions.  
15 It further requires that Defendants ensure that treatment limitations on services to treat  
16 DSM mental health conditions are no more restrictive than the predominate treatment  
17 limitations imposed on substantially all of the Plan’s medical and surgical services.  
18 29 U.S.C. § 1185a(3)(A)(ii).

19           10.       Defendants do not apply the Federal Mental Health Parity Act  
20 requirements to all services that are necessary to treat mental health conditions. While  
21 defendants purport to cover treatment for ASD, they have adopted a uniform policy  
22 excluding all coverage for ABA therapy to treat ASD, even when medically necessary.  
23 F.A. was denied his pre-service request for coverage of ABA services to treat his ASD.  
24 When F.A. appealed, Defendants denied his appeal, asserting that ABA therapy was  
25 excluded from coverage.

1 11. Defendants have also adopted a uniform policy excluding all  
2 coverage for NDT services, even when medically necessary. Defendants exclude all  
3 NDT, asserting that the Plan only covers speech, occupational and physical therapy for  
4 “non-chronic conditions, and acute illnesses and injuries” while excluding all coverage  
5 of those same services for treatment of developmental disabilities like ASD. F.A.’s claims  
6 for NDT services to treat his ASD was denied by defendants. When F.A.’s provider  
7 appealed on F.A.’s behalf, Defendants denied the appeal(s), asserting that F.A.’s NDT  
8 services were excluded, solely because it was provided to treat his ASD.

9 12. Defendants’ uniform exclusion of ABA and NDT coverage in its  
10 Plan, policy and practices violates the requirements of the Federal Mental Health Parity  
11 Act (29 U.S.C. § 1185a), the Affordable Care Act (42 U.S.C. §§300gg-3(a); 300gg-(4)(a))  
12 and their implementing regulations which are incorporated as “terms of the plan[s]” into  
13 the Plan under ERISA. By failing to comply with the Federal Mental Health Parity Act,  
14 the Affordable Care Act, and the terms of the Plan, the Defendants are systemically and  
15 uniformly failing to properly process claims and administer the Plan. The Plan’s  
16 participants and beneficiaries have not received the benefits they are entitled to under  
17 the Plan as modified by federal law. The Plan’s participants and beneficiaries are being  
18 misinformed by Defendants with respect to their right to coverage under the Plan and  
19 federal law.

20 13. This lawsuit seeks remedies for Defendants’ breach of fiduciary  
21 duty under ERISA, arising out of their failure to comply with the terms of the Plan and  
22 relevant federal law. It further seeks to recover the benefits that have been wrongfully  
23 denied to F.A. and the class he seeks to represent. It also seeks a court order declaring  
24 Defendants’ exclusions, limitations, policies and practices related to NDT and ABA  
25 therapy to treat developmental mental health conditions illegal and void. The lawsuit  
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1 further seeks an injunction to prevent any future or ongoing efforts by Defendants to use  
2 and enforce any exclusions, limitations, policies or practices that impermissibly deny,  
3 exclude or limit beneficiaries' access to medically necessary NDT ABA therapy to treat  
4 ASD and other developmental conditions under the Plan. Finally, it seeks to require  
5 Defendants to provide accurate information concerning the legally-required coverage of  
6 ABA and NDT under the Plan.

7 **IV. CLASS ALLEGATIONS**

8 14. *Definition of Class.* F.A. proposes the following class:

9 All individuals who:

10 (a) have been, are, or will be participants or beneficiaries under  
11 The Neiman Marcus Group LLC Health and Welfare Benefit  
12 Plan in effect or renewed on or after October 3, 2009 and/or  
13 the relevant limitations period; and

14 (b) have received, require, or are expected to require Applied  
15 Behavior Analysis (ABA) therapy and/or  
16 Neurodevelopmental Therapy (NDT) (speech, occupational  
17 and physical therapies) for the treatment of developmental  
18 mental health conditions, including but not limited to autism  
19 spectrum disorder.

20 15. *Size of Class.* The class of persons who have received, require or  
21 are expected to require ABA and/or NDT therapy for the treatment of developmental  
22 mental health conditions, and who have been, are or will be beneficiaries under the Plan,  
23 is expected to number in the hundreds and is so large that joinder of all members is  
24 impracticable.

25 16. *Class Representative F.A.* Named plaintiff F.A. is an enrollee in the  
26 Plan. F.A. is diagnosed with ASD, a condition that is listed in the most recent DSM. F.A.  
needs ABA and NDT services to treat his ASD. Defendants denied F.A.'s requests for  
coverage of ABA and NDT services as excluded under the plan. His claims are typical

1 of the claims of the other members of the class, and through his parents, he will fairly  
2 and adequately represent the interests of this class.

3           17. *Common Questions of Law and Fact.* This action requires a  
4 determination of whether Defendants' policies and practices that deny, exclude and/or  
5 limit coverage of ABA and NDT therapy to treat developmental mental health conditions  
6 violates the terms of the Plan, the Federal Mental Health Parity Act and the Affordable  
7 Care Act. Adjudication of this issue will in turn determine whether Defendants are liable  
8 under ERISA for their conduct.

9           18. *Separate suits would create risk of varying conduct requirements.*  
10 The prosecution of separate actions by class members against Defendants would create  
11 a risk of inconsistent or varying adjudications with respect to individual class members  
12 that would establish incompatible standards of conduct. Certification is therefore proper  
13 under Federal Rule of Civil Procedure 23(b)(1).

14           19. *Defendants have acted on grounds generally applicable to the class.*  
15 By applying policies and practices that result in the exclusion of coverage of ABA and  
16 NDT therapy to treat developmental mental health conditions, Defendants have acted  
17 on grounds generally applicable to the class, rendering declaratory relief appropriate  
18 respecting the entire class. Certification is therefore proper under Federal Rule of Civil  
19 Procedure 23(b)(2).

20           20. *Questions of law and fact common to the class predominate over*  
21 *individual issues.* The claims of the individual class members are more efficiently  
22 adjudicated on a class-wide basis. Any interest that individual members of the classes  
23 may have in individually controlling the prosecution of separate actions is outweighed  
24 by the efficiency of the class action mechanism. Upon information and belief, there is no  
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1 pending class action suit filed against the Defendants for the same relief requested in this  
2 action.

3 21. *Venue.* This action can be most efficiently prosecuted as a class  
4 action in the Western District of Washington, where Defendants do business and where  
5 F.A. resides. Issues as to Defendants' conduct in applying standard policies and  
6 practices towards all members of the class predominate over questions, if any, unique to  
7 members of the class. Certification is therefore additionally proper under Federal Rule  
8 of Civil Procedure 23(b)(3).

9 22. *Class Counsel.* F.A. has retained experienced and competent class  
10 counsel.

11 **V. FACTUAL BACKGROUND**

12 23. During certain time periods on and after October 3, 2009, F.A. and  
13 members of the class have been, are or will be participants or beneficiaries of the Plan,  
14 which is subject to ERISA pursuant to 29 U.S.C. § 1003.

15 24. Since October 3, 2009, and continuing to the present, F.A. and other  
16 members of the class have been diagnosed with developmental mental health conditions  
17 including ASD.

18 25. F.A. and other members of the class have required, currently require  
19 or will require ABA and/or NDT services to treat their developmental mental health  
20 conditions. As defined by the Plan and relevant state and federal law, their ABA and  
21 NDT services are "mental health services." Defendants, however, have excluded all  
22 coverage of such treatment through the application of exclusions and limitations.

23 26. The application of these uniform Plan exclusions and limitations is  
24 not "at parity" with the Plan's coverage of medical/surgical services. As a result, F.A.  
25 and other members of the class have paid for ABA and NDT services out of their own  
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1 pockets, or face the imminent threat that they will have to do so in the near future. Other  
2 class members have been forced to forgo needed treatment due to Defendants' conduct.

3 27. In light of the established Plan documents, statements and written  
4 representations by Defendants to the parents and providers of F.A. and other members  
5 of the class, any attempt by class members to pursue administrative remedies is futile.  
6 Nonetheless, F.A. has completed the internal appeal process within the Plan to no avail.  
7 He has exhausted his administrative remedies.

8 **VI. CLAIMS FOR RELIEF**

9 **FIRST CLAIM:**  
10 **BREACH OF FIDUCIARY DUTIES**  
11 **ERISA §§ 404(a)(1), 502(a)(2); 29 U.S.C. §§ 1104(a), 1132 (a)(2)**

12 28. F.A. re-alleges all paragraphs above.

13 29. Defendant The Neiman Marcus Group LLC is a plan fiduciary  
14 under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it is the Plan Administrator.  
15 Defendant Neiman exercises discretionary authority or discretionary control with  
16 respect to the denial and appeal of denied claims under the Plan.

17 30. ERISA imposes strict fiduciary duties upon plan fiduciaries. ERISA  
18 § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C), states, in relevant part, that a plan fiduciary  
19 must discharge its duties with respect to a plan "solely in the interest of the participants  
20 and beneficiaries and ... in accordance with the documents and instruments governing  
21 the plan insofar as such documents and instruments are consistent with the provisions  
22 of this title and Title IV."

23 31. ERISA § 409(a), 29 U.S.C. § 1109(a), states, in relevant part:

24 Any person who is a fiduciary with respect to a plan who  
25 breaches any of the responsibilities, obligations, or duties  
26 imposed upon fiduciaries by this title shall be personally liable  
to make good to such plan any losses to the Plan resulting from  
each such breach, and to restore to such plan any profits of



1 such fiduciary which have been made through each such  
2 breach, and to restore to such plan any profits of such fiduciary  
3 which have been made through use of assets of the Plan by the  
4 fiduciary, and shall be subject to such other equitable or  
remedial relief as the court may deem appropriate, including  
removal of such fiduciary.

5 32. The terms of an ERISA plan include provisions of substantive  
6 federal law, such as the requirements in the Federal Parity Act and the Affordable Care  
7 Act. Defendants have failed to comply with the terms of the Plan, which include the  
8 requirements of the Federal Mental Health Parity Act, the Affordable Care Act and their  
9 implementing regulations as well as other federal law.

10 33. Defendants violated their obligations under ERISA § 404(a)(1),  
11 29 U.S.C. § 1104(a)(1), by failing to act in accordance with the documents and  
12 instruments governing the Plan, and breached their fiduciary duties to the Plan, F.A. and  
13 all class members.

14 34. As a direct and proximate result of these acts and omissions, F.A.,  
15 class members and the Plan have suffered losses (including harm to the integrity of the  
16 Plan) and are entitled to relief under ERISA against Defendants.

17 35. F.A., class members and the Plan seek recovery of all losses to F.A.,  
18 the Plan and class members arising from the breaches of fiduciary duties when treatment  
19 required by the terms of the Plan as modified by the Federal Parity Act, the Affordable  
20 Care Act, and their implementing regulations was denied.

21 **SECOND CLAIM:**  
22 **CLAIM FOR RECOVERY OF BENEFITS, CLARIFICATION OF RIGHTS**  
23 **UNDER TERMS OF THE PLANS AND CLARIFICATION OF**  
24 **RIGHT TO FUTURE BENEFITS UNDER THE PLAN**  
25 **ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)**

26 36. F.A. re-alleges all the paragraphs above.

1 37. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides that a  
 2 participant or beneficiary may bring an action to “recover benefits due to him under the  
 3 terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights  
 4 to future benefits under the terms of the plan.”

5 38. F.A. and the class are entitled to recover benefits due them under  
 6 the terms of the Plan. They are also entitled to a declaration of present and future rights  
 7 to coverage of ABA and NDT services to treat developmental mental health conditions.

8 **THIRD CLAIM:**  
 9 **CLAIM TO ENJOIN ACTS AND PRACTICES IN VIOLATION OF THE TERMS**  
 10 **OF THE PLANS, TO OBTAIN OTHER EQUITABLE RELIEF AND TO**  
 11 **ENFORCE THE TERMS OF THE PLANS**  
 12 **ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)**

13 39. F.A. re-alleges all the paragraphs above.

14 40. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides that a participant  
 15 or beneficiary may “enjoin any act or practice which violates any provision of this  
 16 subchapter or the terms of the plan.” F.A. and the class seek to enjoin Defendants from  
 17 continuing to apply exclusions and limitations on all coverage of ABA and NDT services  
 18 to treat developmental mental health conditions. F.A. and the class also seek to have  
 19 Defendants provide the class with corrective notice and reformation of the relevant Plan  
 20 documents.

21 41. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), further provides that a  
 22 participant or beneficiary may obtain other appropriate equitable relief to redress  
 23 violations of ERISA or enforce plan terms. To the extent full relief is not available under  
 24 ERISA § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(B) or ERISA § 502(a)(2), 29 U.S.C.  
 25 § 1132(a)(2), then F.A. and the class seek equitable remedies including, without  
 26 limitation, unjust enrichment, disgorgement, restitution, and surcharge arising out of the

1 failure to administer the terms of the Plan as modified by the Federal Parity Act and  
2 implementing regulations.

3 **VII. DEMAND FOR RELIEF**

4 WHEREFORE, F.A. requests that this Court:

5 1. Certify this case as a class action; designate named plaintiff F.A. as  
6 class representative, and designate SIRIANNI YOUTZ SPOONEMORE HAMBURGER, Eleanor  
7 Hamburger and Richard E. Spoonemore as class counsel;

8 2. Enter judgment on behalf of the Plan, F.A. and the class for injury to  
9 the integrity of the Plan and/or losses sustained by such Plan due to Defendants'  
10 breaches of fiduciary duty and failure to pay Plan benefits;

11 3. Declare that Defendants may not apply contract provisions, policies  
12 or practices that wholly exclude or impermissibly limit ABA and/or NDT services to  
13 treat developmental mental health conditions, since such exclusions and/or limitations  
14 are not predominantly applied to medical and surgical services;

15 4. Enjoin Defendants from further violations of the terms of the Plan as  
16 modified by the Federal Parity Act, the Affordable Care Act and their implementing  
17 regulations;

18 5. Enter judgment in favor of F.A. and the class for damages in an  
19 amount to be proven at trial due to the failure to provide benefits due under the Plan as  
20 modified by the Federal Parity Act, the Affordable Care Act and their implementing  
21 regulations;

22 6. Award F.A. and the class their attorney fees and costs under ERISA  
23 § 502(g), 29 U.S.C. § 1132(g); and

24 7. Award such other relief as is just and proper.

1 DATED: October 24, 2017.

2 SIRIANNI YOUTZ  
3 SPOONEMORE HAMBURGER

4 /s/ Eleanor Hamburger  
5 Eleanor Hamburger (WSBA #26478)

6 /s/ Richard E. Spoonemore  
7 Richard E. Spoonemore (WSBA #21833)  
8 701 Fifth Avenue, Suite 3650  
9 Seattle, WA 98104  
10 Tel. (206) 223-0303; Fax (206) 223-0246  
11 Email: [ehamburger@sylaw.com](mailto:ehamburger@sylaw.com)  
12 [r Spoonemore@sylaw.com](mailto:r Spoonemore@sylaw.com)

13 Attorneys for Plaintiff