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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANDREW A. ARCE, a minor, by and through his Guardian ad Litem, GUILLERMO ARCE; GUILLERMO ARCE, individually and on behalf of other similarly-situated persons, Plaintiffs, v. KAISER FOUNDATION HEALTH PLAN, INC., AND DOES 1 through 100, INCLUSIVE Defendants.	CASE NO. BC 388 689 NOTICE OF DEMURRER AND DEMURRER OF KAISER FOUNDATION HEALTH PLAN, INC. TO FIRST AMENDED COMPLAINT'S INARBITRABLE CLASS CLAIMS FOR INJUNCTIVE RELIEF UNDER THE UCL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [Code of Civil Procedure §§ 1281.2, 1281.4] DATE: September 22, 2008 TIME: 9:00 a.m. DEPT: 308 JUDGE: Hon. Emilie H. Elias [Central Civil West Courthouse] [ACTION FILED: April 8, 2008] [NO TRIAL DATE SET] [FILED CONCURRENTLY WITH ARBITRATION PETITION AS RESPONSIVE PLEADING TO FIRST AMENDED COMPLAINT]

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 22, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 324 of the above-entitled Court, located at 600 S. Commonwealth Avenue, Los Angeles, California 90005, defendant and petitioner Kaiser Foundation Health Plan, Inc. ("Kaiser") will and hereby does demur to the First Amended Complaint's inarbitrable class claims for injunctive relief under Business & Professions Code section 17200 *et seq*.

This Demurrer is based upon this Notice; the attached Demurrer, Memorandum of Points and Authorities, and Request For Judicial Notice, filed in support thereof; the pleadings and other papers on file in this action; and such further evidence and argument of counsel as may be presented at or before the hearing on this matter.

DEMURRER

Kaiser hereby demurs to the First Amended Complaint, and Notice of Errata Regarding Plaintiffs' First Amended Complaint ("Notice of Errata"), as follows:

DEMURRER TO THIRD CAUSE OF ACTION

1. The Third Cause of Action, which as amended by the Notice of Errata, seeks class-wide injunctive relief on behalf of the public, fails to state a viable claim under Business & Professions Code section 17200 *et seq*. (the "UCL"). (Code Civ. Proc. sec. 430.10(e).) An adequate basis to support exercise of equitable jurisdiction by this Court under the UCL does not exist as: (a) the Notice of Errata amendment in which class-wide injunctive relief on behalf of the public is sought was filed without leave of court in violation of Code Civ. Proc. sec. 472 after filing of the First Amended Complaint; (b) this Court's equitable jurisdiction is not properly invoked to enforce a regulatory provision of the Knox-Keene Act (Health & Saf. Code sec. 1374.72 (the "Mental Health Parity Act")) because compliance with that Act is to be implemented and regulated by the California Department of Managed Health Care ("DMHC"); (c) an adequate remedy in the form of the Independent Medical Review ("IMR") process for the denial of care under the Mental Health Parity Act already exists and is being administered under the jurisdiction of the DMHC; and (d) having this Court assume the role of the DMHC in making medically necessary treatment

determinations is not a proper exercise of this Court's equitable jurisdiction under the UCL. Additionally, and assuming *arguendo* that this Court's equitable jurisdiction could be properly invoked, the requisite community of interest under Code Civ. Proc. sec. 382 cannot be established on a class-wide basis to support a public injunction as individual issues of medical necessity respecting the appropriateness of the particular treatment sought for each putative class member predominate in this case. Accordingly, Kaiser's Demurrer to the Third Cause of Action should be sustained, without leave to amend, as Plaintiffs cannot plead facts sufficient to support issuance of the class-wide injunctive relief sought in this case.

DEMURRER TO FOURTH CAUSE OF ACTION

2. The Fourth Cause of Action, which as amended by the Notice of Errata seeks class-wide injunctive relief on behalf of the public, fails to state a viable claim under the UCL or under Business & Professions Code section 17500 *et seq.* (the "FAL"). (Code Civ. Proc. sec. 430.10(e).) An adequate basis to support exercise of equitable jurisdiction by this Court under the UCL or the FAL does not exist as: (a) the Notice of Errata amendment in which class-wide injunctive relief on behalf of the public is sought was filed without leave of court in violation of Code Civ. Proc. sec. 472 after filing of the First Amended Complaint; (b) this Court's equitable jurisdiction is not properly invoked to enforce a regulatory provision of the Knox-Keene Act (Health & Saf. Code sec. 1374.72 (the "Mental Health Parity Act")) because compliance with that Act is to be implemented and regulated by the California Department of Managed Health Care ("DMHC"); (c) an adequate remedy in the form of the Independent Medical Review ("IMR") process for the denial of care under the Medical Health Parity Act already exists and is being administered under the jurisdiction of the DMHC; and (d) having this court assume the role of the DMHC in making medically necessary treatment determinations is not a proper exercise of this Court's equitable jurisdiction under the UCL. Additionally, and assuming *arguendo* that this Court's equitable jurisdiction could be properly invoked, the requisite community of interest under Code Civ. Proc. sec. 382 cannot be established on a class-wide basis to support a public injunction as individual issues of medical necessity respecting the appropriateness of the particular treatment sought for each putative class member, and reliance by that putative class member on particular representations on Kaiser's

website, predominate in this case. Accordingly, Kaiser's Demurrer to the Fourth Cause of Action under the UCL and FAL should be sustained, without leave to amend, as Plaintiffs cannot plead facts sufficient to support issuance of the class-wide injunctive relief sought in this case.

Dated: August 8, 2008

ARNOLD & PORTER LLP
LAW + BRANDMEYER, LLP

By: 
LAWRENCE A. COX
Attorneys for Defendant
KAISER FOUNDATION HEALTH PLAN, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

Kaiser Foundation Health Plan, Inc. ("Health Plan" or "Kaiser") submits this Memorandum of Points and Authorities in support of its Demurrer to First Amended Complaint's Inarbitrable Class Claims for Injunctive Relief Under the UCL.

I. PREFATORY STATEMENT

Plaintiffs cannot establish a legal basis for issuance of the class-wide injunctive relief sought in the First Amended Complaint and the Notice of Errata amendment ("Notice of Errata") for multiple reasons discussed in detail below. First, as a procedural matter, the Notice of Errata amendment was filed without leave of court and, thus, violates Code Civ. Proc. sec. 472. Second, and more fundamentally, this Court's equitable jurisdiction under Business & Professions Code section 17200 *et seq.* (the "UCL") is not properly invoked to enforce a regulatory provision of the Knox-Keene Act (Health & Saf. Code sec. 1374.72 (the "Mental Health Parity Act")) because compliance with that provision is to be implemented and regulated by the California Department of Managed Health Care ("DMHC"). Moreover, an adequate remedy in the form of the Independent Medical Review ("IMR") process for the denial of care under that Act already exists and is being administered under the jurisdiction of the DMHC. Therefore, having this Court assume the role of the DMHC in making medically necessary treatment determinations is not a proper exercise of this Court's equitable jurisdiction. Third, and assuming *arguendo* that this Court's equitable jurisdiction could be properly invoked, the requisite community of interest under Code Civ. Proc. sec. 382 cannot be established on a class-wide basis to support a public injunction. Individual issues of medical necessity respecting the appropriateness of the particular treatment sought for each putative class member, and reliance by that putative class member on particular representations on Kaiser's website, predominate in this case.

As a consequence, Kaiser's Demurrer to First Amended Complaint's Inarbitrable Class Claims for Injunctive Relief Under the UCL should be sustained, without leave to amend, as to the Third and Fourth Causes of Action in the First Amended Complaint and the Notice of Errata amendment.

II. THE INARBITRABLE CLASS CLAIMS FOR INJUNCTIVE RELIEF UNDER THE UCL WERE IMPROPERLY FILED WITHOUT LEAVE OF COURT[1]

Plaintiffs' Notice of Errata setting forth the class claims in this case as an amendment to the First Amended Complaint was *not* filed in accordance with Code Civ. Proc. sec. 472. As a leading procedural treatise explains:

> Each party has the *right* to amend its pleading *once* -- without leave of court -- within a brief time after its original pleading is filed. The purpose is to facilitate prompt correction of errors or deficiencies in the original pleading.

(Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2008) ¶ 6:602, p. 6-154 (emphasis original).) Here, of course, Plaintiffs' exercised their right to amend the original Complaint, once, when the First Amended Complaint was filed.

Plaintiffs' further amendment of that pleading by filing the Notice of Errata is a *second* amendment for which leave of court was required, but not obtained. Thus, Kaiser's demurrer to the class claims for injunctive relief in the First Amended Complaint is properly sustained on this procedural ground alone.

III. AN ADEQUATE LEGAL BASIS DOES NOT EXIST FOR THE EXERCISE OF EQUITABLE JURISDICTION BY THIS COURT UNDER THE UCL

Not every section of the Knox-Keene Act is properly enforced by courts under the UCL. (*Samura v Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-02.) In *Samura*, the plaintiff sued Kaiser under the UCL and claimed that Kaiser's member agreements violated a Knox-Keene provision that required such contracts to be "fair, reasonable, and consistent with the objectives of this chapter." (*Samura, supra,* 17 Cal.App.4th at 1301, *quoting* Health & Saf. Code sec. 1367(h)(1).) The questioned contract provision gave Kaiser a right to be reimbursed from a member's third-party tort recovery, and the trial court ordered Kaiser to re-write and clarify its third-party tort recovery provisions in plain English under the UCL. (*Id.* at 1291.)

[1] Plaintiffs' class claims for a public injunction under the UCL are not subject to arbitration. (*Coast Plaza Doctors Hospital v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 692 n.11 [holding "injunctive relief for the benefit of the public at large as a remedy" to be "inarbitrable" as Coast Plaza did not seek "a benefit unique to itself" under the UCL].)

The Court of Appeal reversed, and concluded that the trial court had improperly tried to enforce compliance with the "regulatory guidelines and requirements of the Knox-Keene Act." (*Id.* at 1301.) In the instant case, Health & Safety Code sec. 1374.72 requires Kaiser to "provide coverage for the diagnosis *and medically necessary treatment* of severe mental illnesses of a person of any age, and of serious emotional disturbances of a child as specified in subdivisions (d) and (e)...." (§ 1374.72(a).) (Emphasis has been supplied unless otherwise noted.) And "pervasive developmental disorder for autism" is a serious emotional disturbance of a child specified in subdivision (d) of sec. 1374.72. However, it is apparent both from the legislative history of the Mental Health Parity Act, and from the Independent Medical Review ("IMR") process administered by the DMHC pursuant to Health & Safety Code § 1374.30, that a proper basis for exercise of this Court's equitable jurisdiction under the UCL is lacking in this case.

As reflected in the Assembly Journal Legislative Intent correspondence appended as a Historical and Statutory Note to the Mental Health Parity Act itself (*see* Kaiser's Request for Judicial Notice ("RJN"), Ex. B), it was the intent of the Legislature that the DMHC would be responsible for regulation of Knox-Keene providers' compliance with this law. The Mental Health Parity Act's legislative authors, Assemblywoman Helen Thomson and Senator Don Perata, specifically state:

> This letter is to clarify the authors' intent of AB 88, Chapter 534, Statutes of 1999.
>
> AB 88 was introduced in the spirit of bringing about fairness and equal treatment by the health plans and insurance industry for those suffering from severe mental illnesses. Historically health insurance products do not provide coverage for the treatment of mental illness under the same terms and conditions that are provided for other illnesses. The bill is intended to end those discriminatory insurance practices.
>
> * * *
>
> *The intent of this letter is to provide guidance to the Department of Managed Health Care, which is responsible for the implementation and oversight of AB 88,* to insure that its implementation reflects the true intent and spirit of this important new law.
>
> Sincerely,
> ASSEMBLYWOMAN HELEN M. THOMSON
> SENATOR DON PERATA

(RJN, Ex. B.) Thus, it was the Legislature's intent that this Act be implemented and overseen by the DMHC, rather than by the judicial process under the UCL.

Indeed, the experience of Plaintiffs Andrew Arce and Guillermo Arce as alleged in the First Amended Complaint confirms that an adequate remedy already exists for members of health care service plans who believe they have been denied medically necessary treatment under the Mental Health Parity Act. According to the First Amended Complaint:

> On April 21, [2008] the DMHC issued its IMR ruling, *completely vindicating Guillermo's request*, ... and ordering Kaiser to provide applied behavioral analysis therapy at 20 hours per week, occupational therapy for 10 hours per month, and speech therapy twice per week for Andrew, as requested.

(First Amended Complaint, ¶ 48.) And, of course, Plaintiffs cannot allege that Kaiser has failed, in any respect, to provide all of the treatment determined to be medically necessary by the DMHC under the Mental Health Parity Act for Andrew Arce.

Nor is there anything to prevent all members of the putative class in this case from pursuing the same form of IMR relief from the DMHC as the Arce family pursued and obtained in this case. Kaiser has attached as Exhibit A to the RJN the DMHC's IMR determinations for applied behavioral analysis, occupational therapy, speech therapy, and other treatments sought for autism under the Mental Health Parity Act. A quick review of these rulings establishes that, in some instances, the health plan's denial of the requested care was upheld, in other instances that denial was overturned, *but in all instances the decision of what was medically necessary under the Act turned on the individual medical condition of the patient involved.* (*See* RJN, Ex. A at pp. 3-127.)

In effect, Plaintiffs' class-wide UCL injunctive relief claims ask this Court to assume the DMHC's role by attempting to determine what is a medically necessary autism treatment for each class member. And to do so for a putative class consisting of "all California residents who are Kaiser policyholders or Health Plan members whose applied behavioral analysis, [speech therapy, or occupational therapy] for an autism spectrum disorder was wrongfully determined to be not covered in violation of California law" (Notice of Errata, I, p. 2). In deference to the existing statutory scheme and the DMHC's expertise in this area, this Court should exercise its discretion

and decline to invoke its equitable jurisdiction under the UCL for that purpose. As the Court explained in *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292:

> There are various theories underlying the application of judicial abstention in UCL lawsuits. Courts may abstain when a lawsuit involves determining *complex economic policy* which is best handled by the legislature or an administrative agency. [Citation omitted.] Judicial abstention is [also] appropriate in cases where granting injunctive relief would be *unnecessarily burdensome* for the trial court to monitor and enforce *given the availability of more effective means of redress*. [Citation omitted.]

(*Id.* at 1298.) In *Alvarado* the Court ruled that a demurrer had been properly sustained without leave to amend where a private plaintiff sought UCL injunctive relief based on the purported violation of nursing hour requirements enforceable by the Department of Health Services. The Court concluded that:

> The surrounding statutory framework confirms that the Legislature intended the DHS to enforce section 1276.5, subdivision (a) [of the Health & Safety Code]. ... In addition, the DHS is better equipped to determine compliance with the statute [and with exceptions thereto]. ... *We find that calculating on a class-wide basis whether skilled nursing or intermediate facilities are in compliance... is a task better accomplished by an administrative agency than by trial courts*. ... The DHS has the power, expertise and statutory mandate to regulate and enforce section 1276.5. Given this alternative and more effective means of ensuring compliance with section 1276.5, we conclude the trial court did not abuse its discretion by applying the abstention doctrine.

(*Id.* at 1305-1306.)

Likewise, in the instant case there are multiple grounds for this Court to decline to exercise its equitable jurisdiction under the UCL. The First Amended Complaint contains various references to issues of economic policy that are best addressed by the Legislature or the DMHC, rather than the courts. For example, Plaintiffs allege that Kaiser has undermined "the goal of relieving the taxpayers from the onerous burden of paying for the treatment of mental illnesses by willfully refusing to provide treatment to autistic children... [and] foisting its statutory duty to provide such treatment onto California's taxpayers" (First Amended Complaint, ¶¶ 3, 4). Further, that "this action is intended to require Kaiser to honor its statutory contractual obligations with respect to... requiring medically necessary diagnosis, care and treatment for autism, and to relieve California's taxpayers from the burden placed on them by Kaiser's violation of the law" (First Amended

Complaint, ¶ 5). Obviously, such issues of complex economic policy are not the proper province of UCL claims. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554.) In *Wolfe* the Court affirmed the sustaining of a demurrer in a UCL lawsuit brought against residential property insurers for refusing to sell homeowners' earthquake coverage, holding that the UCL:

> does not permit unwarranted judicial intervention in an area of complex economic policy [footnote omitted]. Most important... are the Legislature's attempts to grapple with the... problem. ... The Legislature's express intent to address these issues, mandates *judicial restraint....*

(*Wolfe, supra,* 46 Cal.App.4th at 560-562; *accord California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 217-218 [UCL injunction establishing amount of bank's fee for returned items reversed as "abuse of discretion" related to "a question of economic policy" that "is primarily a legislative and not a judicial function"].)

Furthermore, it is apparent in this case that having this Court act as a "claims superintendent" for the DMHC would be unnecessarily burdensome given the availability of the more effective IMR process presently administered by the DMHC itself. (*Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, 599.) In *Diaz* the plaintiff sought injunctive relief to prohibit ranchers from employing illegal immigrants as farm workers. The Court concluded that equitable jurisdiction under the UCL should not be invoked because there was a more effective federal remedy for dealing with the issue. (*Id.* at 599; *accord Desert Healthcare Dist. v. Pacific Care, FHP, Inc.* (2001) 94 Cal.App.4th 781, 795-796 [order sustaining demurrer without leave to amend affirmed with regard to UCL claim based on the Knox-Keene Act to avoid placing the trial court "deep into the thicket of the health care finance industry," which "courts are ill-equipped to meddle in"].)

Accordingly, as an adequate basis to support exercise by this Court of its equitable jurisdiction under the UCL and FAL does not exist for the class-wide public injunction sought by Plaintiffs, Kaiser's Demurrer to the Third and Fourth Causes of Action may be sustained without leave to amend.

IV. PLAINTIFFS' CLASS CLAIMS LACK THE REQUISITE COMMUNITY OF INTEREST TO SUPPORT A PUBLIC INJUNCTION UNDER CODE CIV. PROC. § 382

The putative class defined by Plaintiffs in the Notice of Errata (at I, p. 2) consists of all Kaiser members in California that were denied applied behavioral analysis, speech therapy or occupational therapy for an autism spectrum disorder *in violation of California law*. As discussed above, the Mental Health Parity Act (Health & Safety Code § 1374.72) is the law in question, and it requires that only "medically necessary treatment" be provided for autism spectrum disorders (§ 1374.72(a)). And as reflected in the DMHC's IMR rulings, what is "medically necessary" for one autism patient may well not be "medically necessary" for another patient or group of patients. Fundamentally this determination must be made on an individualized, not a class-wide, basis.

The courts have consistently held that such individualized medical issues make class certification impossible as there must be a "well-defined community of interest in the questions of law and fact involved affecting the parties to be represented" for class certification to be appropriate under Code Civ. Proc. sec. 382. For example, in *Brown v. Regents of the University of California* (1984) 151 Cal.App.3d 982, the plaintiff sued the University of California, Davis, Medical Center over its purportedly substandard coronary care. The Court of Appeal noted that a "class member's particular medical condition and method of treatment must be examined in order to determine proximate cause of any claimed damage and the extent of such damage." (*Id.* at p. 989.) Resolution of the case "involve[d] questions of what [was] medically appropriate for a particular patient under his particular circumstances." (*Id.*) As a result, the Court of Appeal concluded "the complaint raises numerous and substantial individual questions of fact such that it is not reasonably possible plaintiffs will be able to establish a sufficient community of interest to warrant a class action." (*Id.* at p. 989.)

Similarly, in *Kennedy v. Baxter Health Care Corp.* (1996) 43 Cal.App.4th 799, the Court of Appeal affirmed the denial of class certification in an action by plaintiffs with medical problems allegedly caused by latex gloves. The court held "the most obvious impediment to class treatment of plaintiffs' complaint is the enormous number of individual questions that will inevitably arise on the question of causation." (*Id.* at p. 811.) For example, "allergic reactions may be caused by the interaction of latex and certain foods, bringing into question the diets of each plaintiff." (*Id.*)

Compounding such individual proof problems in the case at bar is Plaintiffs' effort to state class-wide relief for purported violations of the FAL in the Fourth Cause of Action. While Plaintiffs allege that "Kaiser's conduct in making false and misleading representations regarding the care and treatment provided for autism violated the FAL" (First Amended Complaint, ¶ 69), the purportedly false and misleading representations are allegedly contained on Kaiser's website where it "represents that it will 'provide assessment, consultation, treatment of children, adolescents, and their families from a developmental, multi-disciplinary, and best practices perspective.' (*See* http://www.permanente.net/homepage/kaiser/pages/d11809-top.html.)" (First Amended Complaint, ¶ 11.) Thus, this class claim would require proof that Kaiser members who are alleged to have been denied treatment for autism under the Mental Health Parity Act actually read and relied upon the "misrepresentations" in question.

Significantly, neither the First Amended Complaint nor the Notice of Errata allege that Guillermo Arce, in fact, read and relied upon the website quotations at issue. This defect, standing alone, is sufficient to defeat Plaintiffs' efforts to maintain the Fourth Cause of Action for Violation of the FAL as a class action. *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1100-1101:

> Akkerman did not adequately define the class, nor did he prove that his claims were typical of those within it. ... He claims Mecta disseminated a booklet which falsely minimizes the risk of memory loss [from its device] but... Akkerman did not show how he could easily identify those who were deceived.... Akkerman also alleged that he was an adequate class representative for patients who were deceived by Mecta. *But he does not claim that he ever read or received the Mecta booklet or that Mecta deceived him...* and from this, the trial court could find that Akkerman's individual claim involved medical malpractice, not Mecta's false advertising... [and] that Akkerman was not an adequate representative for that class.

Plaintiffs' efforts to obtain class-wide injunctive relief based on the FAL are similarly defective as a matter of law.

Again *Brown, supra,* 151 Cal.App.3d at 989-990 is illustrative. There the plaintiffs allege they were induced to receive coronary care at the University of California, Davis, medical facility "by certain affirmative misrepresentations or the failure to disclose certain facts." (*Id.* at p. 989.) In affirming an order denying class certification, the Court of Appeal observed that "whether a

particular class member relied on a representation, for example, will require close scrutiny of what was said between a class member and his physician" and the trial court would have to deal with "the variable nature of [that] dialogue," issues that are incapable of class-wide resolution (*id.* at pp. 989-990). As in *Brown*, here the determination of whether any particular putative class member relied upon the purported misrepresentations by Kaiser on its website would require individualized proof that is antithetical to class-wide relief.

Finally, superiority of class treatment for Plaintiffs' claims under the UCL does not exist in the instant case. To be superior, "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460; *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 772-773 [same].) Superiority does not exist "if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover...." (*City of San Jose, supra,* 12 Cal.3d at 459.) Again, to be entitled to injunctive relief in this case each member of the putative class would need to demonstrate that the treatment Kaiser declined to provide was "medically necessary treatment for severe mental illness" under the Mental Health Parity Act. Such proof could only be accomplished on an individual basis, as the varying outcomes associated with the DMHC's consideration of this exact question in its IMRs for some 100+ health service plan members has already demonstrated. (*See* RJN, Ex. A at pp. 3-127.)

V. CONCLUSION

For all the foregoing reasons, Kaiser's Demurrer to the First Amended Complaint's Inarbitrable Class Claims for Injunctive Relief Under the UCL should be sustained, without leave to amend, as to the Third and Fourth Causes of Action in the First Amended Complaint and the Notice of Errata amendment.

Dated: August 7, 2008

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