

1 Scott C. Glovsky, Bar No. 170477
2 Law Offices of Scott C. Glovsky
3 225 S. Lake Avenue, Suite 1000
4 Pasadena, CA 91101
5 Telephone (626) 243-5598
6 Facsimile (866) 243-2243

7
8 Attorneys for Plaintiffs

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

11 ANDREW A. ARCE, a minor, by and
12 through his Guardian ad Litem,
13 GUILLERMO ARCE; GUILLERMO
14 ARCE,

15 Plaintiffs,

16 vs.

17 KAISER FOUNDATION HEALTH PLAN,
18 INC., AND DOES 1 THROUGH 100,
19 INCLUSIVE,

20 Defendants.

Case No.: BC 388689

Hon. Emilie H. Elias
[Dept. 308]

**NOTICE OF ERRATA REGARDING
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Date Action Filed: April 8, 2008
Trial Date: None set

21
22 Plaintiffs make this notice to correct the omission of text from plaintiffs' First Amended
23 Complaint. The omitted text is as follows:

24 On page 1, line 13, after the word "Arce,"

25 "Individually and on behalf of other similarly-situated persons,"

26 ///

27 ///

28 ///

On page 16, line 5, in paragraph 68, after the text “17200.”

- I. Plaintiffs, individually and on behalf of other similarly situated people, allege as follows: Plaintiffs are bringing this cause of action for injunctive relief and declaratory relief as a class action on behalf of the proposed class pursuant to Code of Civil Procedure section 382. The proposed class consists of three subclasses. First, all California residents who were Kaiser policyholders or health plan members whose applied behavioral analysis for an autism spectrum disorder was wrongfully determined to be not covered in violation of California law. Second, all California residents who were Kaiser policyholders or health plan members whose speech therapy for an autism spectrum disorder was wrongfully determined to be not covered in violation of California law. Third, all California residents who were Kaiser policyholders or health plan members whose occupational therapy for an autism spectrum disorder was wrongfully determined to be not covered in violation of California law
- II. Excluded from the class are defendants, their officers, directors, and employees; any entity in which any defendant has a controlling interest, the defendants’ affiliates, legal representatives, attorneys, heirs or assigns; the defendants’ immediate families; any federal, state, or local government entity, any judge, justice or judicial officer presiding over this matter, the members of their immediate families, and their judicial staffs; and any insured or member whose coverage is subject to the provisions of the Employee Retirement Income Security Act.
- III. This action has been brought and may properly be maintained as a class action pursuant to the provisions of Code of Civil Procedure section 382 because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.
- **Numerosity**: The class is so numerous that individual joinder of all members would be impracticable. While the exact number of class members is unknown, upon information and belief, plaintiffs allege that the proposed class would include hundreds, if not thousands, of policyholders.
 - **Commonality**: Common questions of law and fact that pertain to all class members, and which predominate over other questions that affect only individual class members,

1 include, without limitation, whether defendants, in violation of California law, have a
2 pattern and practice of unlawfully, unfairly or fraudulently denying, refusing to cover,
3 and refusing to pay for speech therapy, occupational therapy and/or applied behavioral
4 analysis, and whether such conduct is in bad faith, in violation of California law, and
5 whether Kaiser's conduct violated the UCL.

- 6 • **Typicality**: Plaintiffs' claim is typical of the claims of the members of the class
7 because all members of the class had their speech therapy, occupational therapy and/or
8 applied behavioral analysis denied as part of defendants' unlawful, unfair and
9 fraudulent pattern and practice of denying coverage for these services for autism
10 spectrum disorders.
- 11 • **Superiority**: A class action is superior to other available means for the fair and
12 efficient adjudication of this controversy since individual joinder of all class members
13 is impracticable. Class action treatment will permit a large number of similarly-
14 situated persons to prosecute their common claims in a single forum simultaneously,
15 efficiently, and without the unnecessary duplication of effort and expense that
16 numerous individual actions would engender. The prosecution of separate actions by
17 individual class members would create a risk of inconsistent and varying adjudications
18 concerning the subject of this action, which could establish incompatible standards of
19 conduct for defendants under the law alleged in this action. This class action will
20 permit an orderly and expeditious administration of class claims, economies of time,
21 effort and expense will be fostered, and uniformity of decisions will be ensured.

22 ///

23 ///

24 ///

25 ///

26 ///

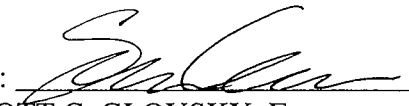
27 ///

28 ///

1 A copy of the First Amended Complaint that includes the omitted text is attached as
2 exhibit A.

3 Dated: July 3, 2008

4 LAW OFFICES OF SCOTT C. GLOVSKY

5
6 BY: 
7 SCOTT C. GLOVSKY, Esq.
8 Attorneys for Plaintiff
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Scott C. Glovsky, Bar No. 170477
2 Law Offices of Scott C. Glovsky
3 225 S. Lake Avenue, Suite 1000
4 Pasadena, CA 91101
5 Telephone (626) 243-5598
6 Facsimile (866) 294-2501

7 Attorneys for Plaintiffs

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

11 ANDREW A. ARCE, a minor, by and
12 through his Guardian ad Litem,
13 GUILLERMO ARCE; GUILLERMO
14 ARCE, individually and on behalf of other
15 similarly-situated persons,

16 Plaintiffs,

17 vs.

18 KAISER FOUNDATION HEALTH PLAN,
19 INC., AND DOES 1 THROUGH 100,
20 INCLUSIVE,

21 Defendants.

Case No.: BC 388689

FIRST AMENDED COMPLAINT

1. Breach of the Duty of Good Faith and Fair Dealing;
2. Breach of Contract;
3. Business & Professions Code section 17200; and
4. Business & Professions Code section 17500

22 Plaintiff Andrew A. Arce, by and through his Guardian ad Litem, and plaintiff Guillermo
23 Arce allege based on the knowledge of Guillermo Arce with respect to his own acts and on
24 information and belief with respect to all other matters:

25 ///

26 ///

27 ///

28 ///

GENERAL ALLEGATIONS

1.

INTRODUCTION

1. Plaintiff Andrew Arce is a 26-month old boy with autism. The Kaiser Foundation Health Plan has been wrongfully denying care for Andrew along with thousands of other autistic children. Although California's Mental Health Parity laws require Kaiser to provide care for the treatment of autism, and early treatment leads autistic children to make substantial and sustained gains in IQ, language, academic performance, and adaptive behavior, Kaiser refuses to provide the care that autistic children desperately need to achieve their full potential.

2. In 1999, the California Legislature enacted the California Mental Health Parity Act. In that Act, the Legislature *mandated* that health care plans and health care insurers provide treatment for mental illnesses, including **autism**, to the same extent that they provide treatment for physical illnesses. The Legislature even made it a *crime* to willfully violate the statute – a crime repeatedly committed on a daily basis by Kaiser.

3. In enacting that statute, the Legislature specifically acknowledged that because “[t]he failure to provide adequate coverage for mental illnesses in private health insurance policies has resulted in significant increased expenditures for state and local governments,” it was important to require health care plans to cover care and treatment for mental illnesses, including autism. Yet – every day – Kaiser undermines 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 covered under its plans and by sending them to government supported “Regional Centers” for evaluation and treatment.

4. Foisting its statutory duty to provide such treatment onto California's taxpayers in part allowed Kaiser to make “gigantic jumps in net income, operating income and investment income for the third quarter ending September” 2007. (San Francisco Business Times, 11/7/07, Chris Rauber). In fact, Kaiser more than *doubled* its net income during that same time period. But it

1 did so on the back of California's taxpayers.

2 5. This action is intended to require Kaiser to honor its statutory and contractual
3 obligations with respect to both plaintiff Andrew A. Arce and all other California plan members
4 requiring medically necessary diagnosis, care and treatment for autism, and to relieve California's
5 taxpayers from the burden placed on them by Kaiser's violation of the law.

7 2.

8 **THE CALIFORNIA MENTAL HEALTH PARITY ACT**

9
10 6. In 1999, the California Legislature enacted AB 88 (Stats. 1999, c. 534), commonly
11 known as the Mental Health Parity Act. That Act added a new section to the Health & Safety
12 Code and a new section to the Insurance Code. The new sections in each code require health care
13 plans and health insurance companies to "provide coverage for the diagnosis and medically
14 necessary treatment of severe mental illnesses of a person of any age . . . under the same terms
15 and conditions applied to other medical conditions" (Health & Safety Code section
16 1374.72(a); Insurance Code section 10144.5(a); emphasis added.) Among the conditions which
17 are included in the statute requiring mandatory coverage is autism. (Health & Safety Code
18 section 1374.72(d)(7); Insurance Code section 10144.5(d)(7).

19 7. As reflected in the legislative history of the bill, the intent of the bill was "to prohibit
20 discrimination against people with biologically-based mental illnesses, to dispel unsound
21 distinctions between mental and physical illnesses, and require equitable coverage to prevent
22 adverse risk selection." (Analysis, Assembly Concurrence in Senate Amendments, 9/8/99, pp 2-
23 3.)

24 8. In section 1 of the Act, the Legislature said:

25 (a) The Legislature *finds and declares* all of the following:

26 (1) Mental illness is real.

27 (2) Mental illness can be reliably diagnosed.

28 (3) Mental illness is treatable.

1 (4) Treatment of mental illness is cost-effective.

2 (b) The Legislature further *finds and declares* all of the following:

3 * * *

4 (3) Limitations in coverage for mental illness in private insurance
5 policies have resulted in *inadequate treatment for persons with these*
6 *illnesses*.

7 (4) Inadequate treatment causes relapse and *untold suffering for*
8 *individuals with mental illnesses and their families*.

9 (c) The Legislature further *finds and declares* all of the following:

10 * * *

11 (2) The failure to provide adequate coverage for mental illnesses in
12 private health insurance policies has resulted in *significant increased*
13 *expenditures for state and local governments*.

14 (Emphasis added.)

15 9. The Legislative Counsel's Digest for AB 88, as enacted, also noted that "a willful
16 violation of the provisions relating to health care service plans *is a crime*." (Emphasis added.)

17
18 **3.**

19 **KAISER'S MISREPRESENTATIONS ABOUT ITS PROVISION**
20 **OF COVERAGE FOR TREATMENT OF AUTISM**
21

22 10. Kaiser has a pattern and practice of willfully refusing coverage for diagnosis and
23 treatment of autism, in direct conflict with the mandates of section 1374.72. Not only is this
24 pattern and practice a violation of that statute – and therefore a crime – it is also a direct breach of
25 Kaiser's own representations.

26 11. On its website, Kaiser represents that it will "[p]rovide assessment, consultation,
27 treatment of children, adolescents, and their families from a developmental, multidisciplinary, and
28 best practices perspective." (See <http://www.permanente.net/homepage/kaiser/pages/d11809->

1 top.html.) It also says that it will “[m]aintain commitment to early identification and treatment”
2 and will “[e]ducate, support and empower families.”

3 12. Those representations are false. In fact, Kaiser does not fulfill any of those promises.
4

5 4.

6 **THE PARTIES**

7 13. Plaintiff Andrew A. Arce (“Andrew”) is a minor, born December 14, 2005, who is
8 represented in this action by his father, Guillermo Arce as his Guardian ad Litem.

9 14. Plaintiff Guillermo Arce is the father of plaintiff Andrew A. Arce, a minor, and, as
10 such is legally responsible for payment of all medical care and treatment provided to Andrew.
11 Plaintiffs are both residents of the County of Los Angeles and the contract at issue in this action
12 was entered into in Los Angeles County and the defendants’ performance under the contract is
13 owed in Los Angeles County.

14 15. Defendant Kaiser Foundation Health Plan (“Kaiser”) is a California corporation
15 authorized to transact and transacting business in California with its principal place of business in
16 California.

17 16. The true names or capacities, whether individual, corporate, associate, or otherwise,
18 of defendants DOES 1 through 100, are unknown to plaintiffs, who therefore sue said defendants
19 by such fictitious names. Each of the defendants sued herein as a DOE is legally responsible in
20 some manner for the events and happenings referred to, and legally caused injury and damages
21 proximately thereby to plaintiffs as herein alleged. DOES 1 through 100 are citizens and
22 residents of the State of California. Plaintiffs will ask leave of this court to amend this complaint
23 to insert their true names and capacities in place and instead of the fictitious names when the
24 same become known to plaintiffs.

25 17. At all relevant times, defendants, and each of them, were joint venturers, independent
26 contractors, or the agents and employees of each of the remaining defendants, and at all times
27 may have been acting within the purpose and scope of said agency and employment, and if so,
28 each defendant has ratified and approved the acts of his agent.

FACTUAL BACKGROUND

18. At all relevant times, Andrew has been covered under a health care plan issued by Kaiser, member number 00-16761608. The material terms of the Kaiser plan require it to provide assessment, diagnosis and medically-necessary treatment to Andrew.

19. Pursuant to California's mental health parity law, Health & Safety Code section 1374.72, health care plans are required to provide medically necessary care and treatment, including hospital care, doctor visits, outpatient services and prescription drugs, for treatment of specified mental illnesses at a level equal to the provision of benefits for physical illnesses. Section 1374.72(d)(7) specifically mandates that such coverage must be provided by health care plans for medically necessary diagnosis, care and treatment of autism.

20. Andrew was born on December 14, 2005 and is currently 2-1/2 years old.

21. Because of certain symptoms, Andrew was referred by his pediatrician in October 2, 2007 to speech and occupational therapists for an assessment to rule out autism as the cause of Andrew's problems, including lack of speech, and lack of affection. Andrew was not given an appointment until October 15, 2007 (and Kaiser later cancelled this appointment).

22. Kaiser itself acknowledges the critical importance of prompt diagnosis and early intervention for children diagnosed with autism. As Kaiser says on its own website: "It's very important that children be *diagnosed as early as possible so we can provide critical intervention and education services.*" (See <http://www.kpsacramento.org/index.php?content=76>; emphasis added.) This statement is an acknowledgment of numerous studies and reports demonstrating that with a young child, like Andrew, earlier diagnosis and earlier and more comprehensive intervention are the most effective and that delay in diagnosis and intervention – even of a few weeks – can result in lost opportunities for treating the condition.

23. The day before the scheduled assessment appointment, Kaiser called Guillermo to cancel the appointment, and offered an appointment yet another two weeks later. Guillermo objected to the delay and, ultimately, the assessment was performed on October 23, 2007. At that

1 time, it was determined that Andrew needed to be evaluated by Kaiser's Interdisciplinary Team
2 for an official diagnosis. Kaiser told Guillermo that the appointment would have to be scheduled
3 for December 5, 2007 because one member of the team was on sick leave. Thus, since the initial
4 referral in October, Andrew's assessment was delayed for more than three months.

5 24. While waiting for the KID's Clinic appointment, Andrew's pediatric neurologist
6 prescribed Pediasure – a liquid food replacement – for Andrew because, as a result of his
7 condition, he does not realize there is food in his mouth and he does not swallow. As a result of
8 this condition, Andrew chronically becomes dehydrated and suffers from diarrhea. In the first of
9 many refusals that would come during the next few months, Kaiser refused to pay for the
10 Pediasure, despite the fact that it was determined to be medically necessary by Andrew's pediatric
11 neurologist. Instead, Kaiser referred the Arces to their local Regional Center maintained through
12 taxpayer funding by the California Department of Developmental Services. The Regional Center
13 – and the taxpayers that support it – began to pay for the Pediasure necessary to keep Andrew
14 alive.

15 25. Two days before *that* appointment, Kaiser called again and again cancelled the
16 appointment, stating that a team member was on sick leave and offered an appointment in January
17 or February. Guillermo declined such a long-delayed appointment, knowing the importance of
18 early diagnosis and intervention, asked for an out-of-network referral and filed a grievance. In
19 fact, the assessment team that Kaiser was insisting be utilized for Andrew had been out of
20 commission since October 2007 and all regularly scheduled diagnostic clinics had been cancelled
21 because of the absence of the pediatric neurologist on the team. There was no date certain as to
22 when the team would meet again.

23 26. On or about December 18, 2007, Kaiser refused to permit Andrew's assessment to be
24 made out-of-network, in spite of the long delays in providing that assessment in-network,
25 asserting that Andrew's assessment was "not . . . urgent" and that the "consultation does not need
26 to be expedited" – all this despite Kaiser's own acknowledgment that it is "very important that
27 children be diagnosed as early as possible so we can provide critical intervention and education
28 services." Thus, even though Kaiser was unable to provide the care in-network, it refused to

1 permit the assessment to be made out-of-network, leaving Andrew in a health care limbo.

2 27. On or about December 21, 2007, Kaiser called Guillermo and informed him that his
3 grievance would be heard on January 2, 2008.

4 28. On or about December 27, 2007, Guillermo filed a complaint with the Department of
5 Managed Health Care regarding Kaiser's failure and refusal to timely provide the assessment,
6 diagnosis and care Andrew needed including, without limitation, feeding therapy, speech therapy
7 and an assessment outside of Kaiser.

8 29. On or about January 2, 2008, Kaiser's reviewers upheld its denial of the December
9 18 request for services.

10 30. On or about January 3, Kaiser offered an appointment for a 2-hour evaluation for
11 January 16.

12 31. On January 4, Guillermo pointed out to Kaiser that given Kaiser's delay, Andrew
13 should be given an immediate appointment and requested that Andrew be immediately scheduled
14 to begin 10 hours per month of occupational therapy/sensory integration, speech therapy and
15 behavior modification therapy, all as recommended in various reports provided by Guillermo to
16 Kaiser issued by specialists in the field through the California Department of Developmental
17 Services Regional Center.

18 32. On that same day, Guillermo requested an independent medical review from the
19 California Department of Managed Care of Kaiser's denial of the requested care and treatment
20 and provided the Regional Center reports to the DMHC supporting the need for the recommended
21 care.

22 33. On January 24, Kaiser denied Guillermo's appeal and offered an evaluation
23 appointment for February 13.

24 34. On February 6, Guillermo submitted another IMR application to DMHC for
25 occupational therapy, feeding assessment and speech therapy for Andrew.

26 35. On or about February 11, a report was issued by one of Kaiser's doctors who
27 performed a swallowing study on Andrew. That doctor, Dr. Watanabe, concluded that the study
28 was normal and that Andrew needed occupational therapy, speech therapy and physical therapy to

1 address his inability to eat normally.

2 36. On or about February 13, Kaiser's interdisciplinary team concluded that Andrew
3 does have autism and recommended *two hours* of occupational therapy per month to address his
4 feeding problem.

5 37. On or about February 14, Guillermo wrote to Kaiser, demanding that the treatment
6 protocol established by the Regional Center (i.e., 10 hours per month at a sensory integration
7 clinic, in addition to speech therapy and other therapy) be provided and appealed Kaiser's
8 recommended provision of only two hours per month of treatment.

9 38. On or about February 25, at an occupational therapy session at Kaiser, the Kaiser
10 therapist committed assault and battery on Andrew by grabbing him by the shirt, putting a head
11 lock on him with her arm and attempting to force food into his mouth.

12 39. On or about March 6, Kaiser again refused to provide the requested treatment,
13 asserted that Andrew's difficulty feeding is a "behavioral" issue, not a medical one, and that one
14 to two hours per month of parent training and two hours per month of occupational therapy was
15 sufficient. Kaiser asserted that with regard to any other interventions requested, they were
16 behavioral in nature, not medical, and could be provided by the Regional Center.

17 40. During this process, Guillermo also requested that a second opinion be obtained from
18 an out-of-plan specialist, in order to obtain another assessment of Andrew's needs. Kaiser
19 refused.

20 41. During the course of the IMR reviews requested by Guillermo, Kaiser provided
21 misinformation to the DMHC reviewers. Guillermo was repeatedly required to correct the
22 misinformation provided by Kaiser.

23 42. During March and April, 2008, and despite almost daily communications from
24 Guillermo, Kaiser refused to provide requested medical records, refused to correct falsifications
25 in Andrew's medical records (including the false statement that Kaiser had provided a 'feeding
26 assessment' when, in fact, it had not), and refused to provide further therapy for Andrew.

27 43. During March and April, 2008, Kaiser repeatedly refused to provide further
28 intervention and treatment for Andrew, asserting that there are "no evidence-based psychotherapy

1 interventions to treat autism” and that “due to his young age” Andrew “is not a candidate for
2 medications for treatment associated behavioral symptoms.”

3 44. Throughout this time period, Kaiser repeatedly refused to provide Applied
4 Behavioral Therapy to Andrew, contending that such treatment is merely “educational,” and
5 should be provided by the Regional Centers, which are supported by taxpayer money.

6 45. On or about April 7, 2008, Guillermo and Andrew went to an appointment with Dr.
7 David Reynolds, a Kaiser child psychiatrist, for evaluation and discussion of treatment options.
8 Dr. Reynolds acknowledged at that appointment that the Journal of Pediatrics provides therapies
9 for the treatment of autism, but that Kaiser “doesn’t get involved with the treatment.” Rather, Dr.
10 Reynolds informed Guillermo, Kaiser merely confirms the diagnosis and its “practice is to send
11 patients with autism to the community for treatment.”

12 46. On or about April 9, Kaiser’s Regional Appeals Committee met to review the appeal
13 of its denials and issued a letter to Guillermo confirming those denials.

14 47. To add insult to injury, Kaiser recommended to Guillermo that he see a psychiatrist.

15 48. On April 21, the DHMC issued its IMR ruling, completely vindicating Guillermo’s
16 requests, rejecting Kaiser’s position and ordering Kaiser to provide Applied Behavioral Analysis
17 therapy at 20 hours per week, occupational therapy for 10 hours per month and speech therapy
18 twice per week for Andrew, as requested.

19 20 **FIRST CAUSE OF ACTION**

21 **(Breach of the Duty of Good Faith and Fair Dealing)**

22 PLAINTIFFS, FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT KAISER
23 AND DOES 1 THROUGH 100, INCLUSIVE, AND EACH OF THEM, FOR BREACH OF THE
24 DUTY OF GOOD FAITH AND FAIR DEALING, ALLEGE:

25 49. Plaintiffs incorporate by reference each and every paragraph of the General
26 Allegations as though set forth in full in this cause of action.

27 (a) Under California law, the duty of good faith and fair dealing exists in every
28 contract. Essentially, the doctrine provides that each party to a contract should

1 act reasonably and in good faith. (*Foley v. Interactive Data Corp.* (1988) 47
2 Cal.3d 654, 684.) In the insurance context, that doctrine imposes additional
3 requirements on insurers (*Egan v. Mutual of Omaha Life Ins. Co.* (1979) 21
4 Cal.3d 809);

5 (b) Fully and fairly evaluate all claims for benefits; an insurer cannot ignore
6 evidence that supports the claim, while focusing on facts justifying denial, nor
7 can it ignore objective standards in making its claim decisions (*Tomaselli v.*
8 *Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1281; *Hughes v. Blue*
9 *Cross of No. Calif.* (1989) 215 Cal.App.3d 832, 845-846);

10 (c) Not refuse coverage on the basis of an arbitrary or unreasonable interpretation
11 of its policy (*Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d
12 610, 621);

13 (d) Not refuse coverage in conflict with controlling law (*Moore v. American*
14 *United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 621);

15 (e) Provide benefits ***promptly*** and without any unreasonable ***delay*** (*Fleming v.*
16 *Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 37);

17 50. Furthermore, health care plans like those issued by Kaiser are subject to the same tort
18 liability for breach of the duty of good faith and fair dealing as other insurers, despite the fact that
19 they are regulated under the Health & Safety Code rather than the Insurance Code. This is
20 because, with respect to the duties owed to plan members, health care plans are, for all intents and
21 purposes, insurers. (*Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 3, fn. 1; *Smith v.*
22 *PacifiCare Behavioral Health of Calif., Inc.* (2001) 93 Cal.App.4th 139, 162.)

23 51. Defendant Kaiser issued a health care plan contract to Andrew, the material terms of
24 which include, without limitation, the provision that Andrew was to have timely access to
25 medically necessary diagnosis, assessment, evaluation, care and treatment. Even if the plan did
26 not expressly provide treatment for autism, the Mental Health Parity Act expressly provides that
27 such treatment is to be provided.

28 52. In conflict with its own contractual obligations and in conflict with the Mental Health

1 Parity Act, Kaiser breached its duty of good faith and fair dealing owed to Andrew by failing to
2 provide him with prompt and timely access to medically necessary diagnosis, assessment,
3 evaluation, care and treatment for autism.

4 53. Plaintiffs are informed and believe and thereon allege that Kaiser and Does 1-100,
5 inclusive, have breached their duties of good faith and fair dealing owed to plaintiffs by other acts
6 or omissions of which plaintiffs are presently unaware and which will be shown according to
7 proof at the time of trial.

8 54. As a proximate result of the aforementioned unreasonable and bad faith conduct of
9 defendants, plaintiffs have suffered, and will continue to suffer in the future, damages under the
10 plan contract, plus interest, and other economic and consequential damages, for a total amount to
11 be shown at the time of trial.

12 55. As a further proximate result of the aforementioned wrongful conduct of defendants
13 as alleged in this cause of action, plaintiffs have suffered anxiety, worry, mental, and emotional
14 distress, all to plaintiffs' general damage in a sum to be determined at the time of trial.

15 56. As a further proximate result of the aforementioned wrongful conduct of defendants
16 as alleged in this cause of action, Andrew has suffered physical injury, including developmental
17 delays and other physical injuries.

18 57. As a further proximate result of the unreasonable and bad faith conduct of defendants
19 as alleged in this cause of action, plaintiffs were compelled to retain legal counsel and expend
20 costs in an effort to obtain the benefits due under the plan contract. Therefore, defendants as
21 alleged in this cause of action are liable to plaintiffs for those attorneys' fees and litigation costs
22 reasonably necessary and incurred by plaintiffs in order to obtain the plan benefits in a sum to be
23 determined at trial.

24 58. Defendants' conduct described herein was intended by the defendants to cause injury
25 to plaintiff or was despicable conduct carried on by the defendants with a willful and conscious
26 disregard of the rights of plaintiffs, or subjected plaintiffs to cruel and unjust hardship in
27 conscious disregard of plaintiffs' rights, or was an intentional misrepresentation, deceit, or
28 concealment of a material fact known to the defendants with the intention to deprive plaintiffs of

1 property, legal rights or to otherwise cause injury, such as to constitute malice, oppression or
2 fraud under California Civil Code section 3294, thereby entitling plaintiffs to punitive damages in
3 an amount appropriate to punish or set an example of defendants.

4 59. Defendants' conduct described herein was undertaken by the corporate defendants'
5 officers or managing agents, identified herein as DOES 1 through 100, inclusive, who were
6 responsible for claims supervision and operations, underwriting, communications and/or
7 decisions. The aforementioned conduct of said managing agents and individuals was therefore
8 undertaken on behalf of the corporate defendants. Said corporate defendants further had advance
9 knowledge of the actions and conduct of said individuals whose action and conduct were ratified,
10 authorized, and approved by managing agents whose precise identities are unknown to plaintiff at
11 this time and are therefore identified and designated herein as DOES 1 through 100.

12 13 **SECOND CAUSE OF ACTION**

14 **(Breach of Contract)**

15 PLAINTIFFS, FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT
16 KAISER AND DOES 1 THROUGH 100, INCLUSIVE, AND EACH OF THEM, FOR
17 BREACH OF CONTRACT, ALLEGE:

18 60. Plaintiffs incorporate by reference each and every paragraph of the General
19 Allegations as though set forth in full in this cause of action.

20 61. Defendant Kaiser issued a health care plan contract to Andrew, the material terms of
21 which include, without limitation, that Andrew was to have timely access to medically necessary
22 diagnosis, assessment, evaluation, care and treatment for autism.

23 62. Kaiser breached its contractual duties owed to Andrew by failing to provide him with
24 timely access to medically necessary diagnosis, assessment, evaluation, care and treatment for
25 autism.

26 63. Plaintiffs are informed and believe and thereon allege that Kaiser and Does 1-100,
27 inclusive, have breached their contractual duties owed to plaintiffs by other acts or omissions of
28 which plaintiffs are presently unaware and which will be shown according to proof at the time of

1 trial.

2 64. As a proximate result of the aforementioned unreasonable and bad faith conduct of
3 defendants, plaintiffs have suffered, and will continue to suffer in the future, damages under the
4 plan contract, plus interest, and other economic and consequential damages, for a total amount to
5 be shown at the time of trial.

7 **THIRD CAUSE OF ACTION**

8 **(Violation of Business & Professions Code section 17200)**

9 PLAINTIFFS, FOR A THIRD CAUSE OF ACTION AGAINST KAISER FOR
10 VIOLATIONS OF BUSINESS & PROFESSIONS CODE SECTION 17200, ALLEGE:

11 65. Plaintiffs incorporate by reference each and every paragraph of the General
12 Allegations as though set forth in full in this cause of action.

13 66. The Unfair Competition Law ("UCL") prohibits unfair competition, which is defined
14 as including "any unlawful, unfair or fraudulent business act or practice." (Business &
15 Professions Code section 17200.) The UCL's "purpose is to protect both consumers and
16 competitors by promoting fair competition in commercial markets for goods and services. (*Kasky*
17 *v. Nike, Inc.* (2002) 27 Cal.4th 939, 949. The UCL is broadly worded, and "was intentionally
18 framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the
19 innumerable new schemes which the fertility of man's invention would contrive." (*Barquis v.*
20 *Merchants Collection Association* (1972) 7 Cal.3d 94, 112.)

21 67. There are four, alternative, types of conduct regulated by the UCL, i.e., conduct
22 which is "unlawful," "unfair," or "fraudulent" and conduct which violates Business & Professions
23 Code section 17500, the False Advertising Law ("the FAL").

24 (a) The unlawful prong proscribes "anything that can properly be called a business
25 practice and that at the same time is forbidden by law." (*People v. McKale*
26 (1979) 25 Cal.3d 626, 632.) In this case, Kaiser's refusal to provide coverage
27 for diagnosis and treatment of autism under the same terms and conditions
28 applied to other medical conditions is unlawful and in violation of Health &

1 Safety Code section 1374.72.

2 (b) Additionally, Kaiser's false and misleading advertising about the care and
3 treatment it provides for patients with autism violated Health & Safety Code
4 section 1360, which prohibits the use of any advertising or solicitation that is
5 untrue, misleading or deceptive.

6 (c) The California courts have developed several tests for application of the unfair
7 prong under the UCL. The most stringent test, articulated by the California
8 Supreme Court in *Cel-Tech Communications, Inc. v. Los Angeles Cellular*
9 *Telephone Co.* (1999) 20 Cal.4th 163, 187, for application in antitrust contexts,
10 provides that a business practice is unfair when the defendant's conduct
11 "threatens an incipient violation of [the law], or violates the policy or spirit of a
12 [law] because its effects are comparable to or the same as a violation of the
13 law, *or otherwise significantly threatens or harms competition.*" (Emphasis
14 added.) Kaiser's conduct in this case violates this test because, by refusing to
15 provide coverage for autism, Kaiser spends less money providing benefits to
16 its patient population, in comparison with a competitor who does provide
17 coverage for autism, and Kaiser thereby obtains a competitive advantage and
18 harms its competition in the health care plan marketplace.

19 (d) The fraud prong of the UCL affords "protection against the probability or
20 likelihood as well as the actuality of deception or confusion." (*Payne v. United*
21 *California Bank* (1972) 23 Cal.App.3d 850, 856.) The test is whether the
22 public is "likely to be deceived" by the defendant's representations, not
23 whether they are actually false. (*Committee on Children's Television v.*
24 *General Foods Corp.* (1983) 35 Cal.3d 197, 211.) Kaiser's representations on
25 its website that it provides "assessment, consultation, treatment of children . . .
26 from a developmental, multidisciplinary, and best practices perspective," that it
27 provides coverage for diagnosis and treatment of autism in a "coordinated and
28 integrated medical setting" and that it "maintain[s] a commitment to early

1 identification and treatment” are, in light of the facts in this case, statements
2 that are not only likely to mislead the public, they are false.

3 68. Kaiser’s conduct as alleged above, in failing to comply with the standards, policies
4 and procedures provided pursuant to Health & Safety Code section 1374.72 has committed acts of
5 unfair competition as set forth in Business & Professions Code section 17200.

6 I. Plaintiffs, individually and on behalf of other similarly situated people, allege as
7 follows: Plaintiffs are bringing this cause of action for injunctive relief and declaratory
8 relief as a class action on behalf of the proposed class pursuant to Code of Civil
9 Procedure section 382. The proposed class consists of three subclasses. First, all
10 California residents who were Kaiser policyholders or health plan members whose
11 applied behavioral analysis for an autism spectrum disorder was wrongfully determined
12 to be not covered in violation of California law. Second, all California residents who
13 were Kaiser policyholders or health plan members whose speech therapy for an autism
14 spectrum disorder was wrongfully determined to be not covered in violation of
15 California law. Third, all California residents who were Kaiser policyholders or health
16 plan members whose occupational therapy for an autism spectrum disorder was
17 wrongfully determined to be not covered in violation of California law

18 II. Excluded from the class are defendants, their officers, directors, and employees; any
19 entity in which any defendant has a controlling interest, the defendants’ affiliates, legal
20 representatives, attorneys, heirs or assigns; the defendants’ immediate families; any
21 federal, state, or local government entity, any judge, justice or judicial officer presiding
22 over this matter, the members of their immediate families, and their judicial staffs; and
23 any insured or member whose coverage is subject to the provisions of the Employee
24 Retirement Income Security Act.

25 III. This action has been brought and may properly be maintained as a class action pursuant
26 to the provisions of Code of Civil Procedure section 382 because there is a well-defined
27 community of interest in the litigation and the proposed class is easily ascertainable.

- 28 • **Numerosity**: The class is so numerous that individual joinder of all members would
be impracticable. While the exact number of class members is unknown, upon

1 information and belief, plaintiffs allege that the proposed class would include
2 hundreds, if not thousands, of policyholders.

- 3 • **Commonality**: Common questions of law and fact that pertain to all class members,
4 and which predominate over other questions that affect only individual class members,
5 include, without limitation, whether defendants, in violation of California law, have a
6 pattern and practice of unlawfully, unfairly or fraudulently denying, refusing to cover,
7 and refusing to pay for speech therapy, occupational therapy and/or applied behavioral
8 analysis, and whether such conduct is in bad faith, in violation of California law, and
9 whether Kaiser's conduct violated the UCL.
- 10 • **Typicality**: Plaintiffs' claim is typical of the claims of the members of the class
11 because all members of the class had their speech therapy, occupational therapy and/or
12 applied behavioral analysis denied as part of defendants' unlawful, unfair and
13 fraudulent pattern and practice of denying coverage for these services for autism
14 spectrum disorders.
- 15 • **Superiority**: A class action is superior to other available means for the fair and
16 efficient adjudication of this controversy since individual joinder of all class members
17 is impracticable. Class action treatment will permit a large number of similarly-
18 situated persons to prosecute their common claims in a single forum simultaneously,
19 efficiently, and without the unnecessary duplication of effort and expense that
20 numerous individual actions would engender. The prosecution of separate actions by
21 individual class members would create a risk of inconsistent and varying adjudications
22 concerning the subject of this action, which could establish incompatible standards of
23 conduct for defendants under the law alleged in this action. This class action will
24 permit an orderly and expeditious administration of class claims, economies of time,
25 effort and expense will be fostered, and uniformity of decisions will be ensured.
26

27 69. Kaiser's conduct in making false and misleading representations regarding the care
28 and treatment provided for autism violated the FAL, as more fully set forth in the Fourth Cause of

1 Action, *infra*.

2 70. Plaintiffs are informed and believe and thereon allege that Kaiser's acts of unfair
3 competition are continuing in nature.

4 71. Plaintiffs have suffered an injury in fact and have lost money or property as the
5 result of Kaiser's conduct and respectfully request that injunction against Kaiser issue to enjoin it
6 from continuing to engage in the unfair competition alleged herein.

7 72. Plaintiffs further respectfully request that the court order any other and further
8 equitable relief deemed necessary by the court.

9 73. Plaintiffs respectfully request an award of attorneys' fees upon prevailing in the
10 request for relief in this cause of action, pursuant to Code of Civil Procedure section 1021.5.

11
12 **FOURTH CAUSE OF ACTION**

13 **(Violation of Business & Professions Code section 17500)**

14 PLAINTIFFS, FOR A FOURTH CAUSE OF ACTION AGAINST KAISER FOR
15 VIOLATIONS OF BUSINESS & PROFESSIONS CODE SECTION 17500, ALLEGE:

16 74. Plaintiffs incorporate by reference each and every paragraph of the General
17 Allegations as though set forth in full in this cause of action.

18 75. Business and Professions Code section 17500 ("the FAL") provides that it is (a)
19 "unlawful for any person firm, corporation or association" (b) to make or disseminate or cause to
20 be made or disseminated before the public in this state" (c) "any statement concerning . . . [the
21 performance of] services . . . which is untrue or misleading," (d) "which is known, or which by
22 the exercise of reasonable care should be known, to be untrue or misleading," and (e) "with
23 intent directly or indirectly to . . . perform services, professional or otherwise . . . or to induce the
24 public to enter into any obligation relating thereto"

25 76. Like the UCL, the FAL is to be applied broadly and a statement is "untrue or
26 misleading" under the FAL "if members of the public are likely to be deceived." (*Kasky v. Nike*,
27 *supra*, 27 Cal. 4th 939; *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876.)

28 77. Under the FAL, a seller has "a duty of investigation," such that the seller's "failure to

1 verify and investigate breaches of the duty of care when facts are present which would put a
2 reasonable person on notice of possible misrepresentations. (*People v. Superior Court (Forest E.*
3 *Olson, Inc.*) (1982) 137 Cal.App.3d 137, 139.)

4 78. Under the FAL, Kaiser's advertising statements contained on its Internet website
5 regarding the care provided to members for treatment of autism are false, as reflected by the facts
6 alleged in this case. Moreover, before denying the benefits sought on behalf of Andrew, Kaiser
7 had a duty to investigate in order to assure that its denial of care and treatment would not render
8 its advertising statements false. It failed to do so and its misrepresentations regarding the
9 provision of care for treatment of autism are actionable pursuant to the FAL.

10 79. Kaiser's conduct as alleged herein violated the FAL.

11 80. Plaintiffs are informed and believe and thereon allege that Kaiser's violations of the
12 FAL are continuing in nature.

13 81. Plaintiffs have suffered an injury in fact and have lost money or property as the
14 result of Kaiser's conduct and respectfully request that injunction against Kaiser issue to enjoin it
15 from continuing to engage in the false advertising alleged herein.

16 82. Plaintiffs further respectfully request that the court order any other and further
17 equitable relief deemed necessary by the court.

18 83. Plaintiffs respectfully request an award of attorneys' fees upon prevailing in the
19 request for relief in this cause of action, pursuant to Code of Civil Procedure section 1021.5.

20
21 WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as
22 follows:

23 AS TO THE FIRST CAUSE OF ACTION:

- 24 1. For special and general damages according to proof at the time of trial;
25 2. For punitive damages;
26 3. For attorney's fees and litigation costs;
27 4. For costs of suit incurred herein; and
28 5. For such other and further relief as the Court deems just and proper.

1
2 AS TO THE SECOND CAUSE OF ACTION:

- 3 6. For special and general damages according to proof at the time of trial;
4 7. For costs of suit incurred herein; and
5 8. For such other and further relief as the Court deems just and proper.
6

7 AS TO THE THIRD CAUSE OF ACTION:

- 8 9. For injunctive relief;
9 10. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5;
10 11. For costs of suit incurred herein; and
11 12. For such other and proper relief as the Court deems just and proper.
12

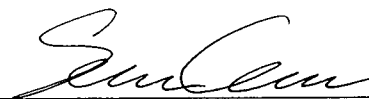
13 AS TO THE FOURTH CAUSE OF ACTION:

- 14 13. For injunctive relief;
15 14. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5;
16 15. For costs of suit incurred herein; and
17 16. For such other and proper relief as the Court deems just and proper.
18

19 Dated this 3rd day of July 2008, at Pasadena, California.
20

21 LAW OFFICES OF SCOTT C. GLOVSKY

22
23 By:



24 SCOTT C. GLOVSKY
25 Attorney for Plaintiff
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 225 South Lake Avenue, Suite 1000, Pasadena, California, 91101.

On July 3, 2008, I served the foregoing documents described as:

NOTICE OF ERRATA REGARDING PLAINTIFFS' FIRST AMENDED COMPLAINT

on all interested parties in this action by placing [] the original [x] a true copy thereof enclosed in sealed envelopes addressed as follows:

Kent T. Brandmeyer
LAW + BRANDMEYER, LLP
245 S. Los Robles Ave., Suite 600
Pasadena, CA 91101
Tel.: (626) 243-5500
Fax: (626) 243-4799
Email: kbrandmeyer@lawbrandmeyer.com

☒ BY MAIL

I caused such envelope to be deposited in the mail at Pasadena, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

☐ BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto. A proof of service executed by the delivery person will be mailed under separate cover.

☐ BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to the above-listed party.

☐ BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to the above-listed party.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of California that the above is true and correct.

Executed on July 3, 2008, at Pasadena, California.


Roberta Liao