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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

FAYE GETUBIG, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

KAISER FOUNDATION HEALTH
PLAN, INC. and DOES 1-50, inclusive,

Defendants.

Case No. **22CV015742**

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF BUS. & PROF.
CODE SEC. 17200, ET SEQ.**

JURY TRIAL DEMANDED

NATURE OF CLAIM

1. The coronavirus which causes COVID-19 (“COVID”) has killed more than 1 million Americans and more than 90,000 Californians since it first appeared in the United States in 2020. Responding to this public health emergency, the U.S. Food and Drug Administration granted emergency authorization for several diagnostic tests to detect the COVID virus. The FDA advised that people who were potentially exposed to the virus and who those who showed symptoms of COVID should be tested and, if positive, should self-isolate to protect the general public, especially the vulnerable members of our communities.

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1 2. Making COVID tests *absolutely free* was a cornerstone of the
2 government’s response to protect the public from the lethal virus. That’s why in March 2020, the
3 government required all health insurance providers in the United States to cover the costs of
4 COVID tests, and it expressly prohibited insurers from passing on *any of the costs* to consumers.
5 For example, the law expressly prohibited insurers from charging members for any deductibles,
6 co-pays, or any other cost sharing associated with any COVID test.

7
8 3. Defendant Kaiser Health Plan, Inc. (“Kaiser”) is California largest health
9 insurance provider and provides coverage for more than 40% of all Californians. Kaiser has
10 instituted an illegal, unfair, and fraudulent business practice of charging its members co-pays and
11 deductibles for COVID tests in direct violation of the law. For example, when plaintiff Faye
12 Getubig received a COVID test in June 2022, Kaiser billed her \$310 for the test.

13
14 4. Kaiser’s business practice of illegally charging consumers exorbitant prices
15 for COVID tests hurts not only the consumers who have to pay these illegal charges, it also hurts
16 the general public. After all, if Kaiser charges \$310 for a COVID test, fewer people will be able
17 to afford to be tested, even if the Centers for Disease Control recommends that they should be
18 tested. And when fewer people who have been exposed to COVID are tested, the more likely it is
19 that COVID will continue to spread through our community, causing many more Californians to
20 suffer serious illness and death.

21
22 5. An injunction that requires Kaiser to follow the law by covering the full
23 cost of all COVID tests will protect the general public by ensuring that everyone who needs to be
24 tested for COVID can be tested without having to pay the exorbitant illegal costs that Kaiser is
25 currently charging.

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PARTIES

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3 6. Plaintiff FAYE GETUBIG is an individual who, during all times relevant
4 to this Complaint, resided in California.

5
6 7. Defendant KAISER FOUNDATION HEALTH PLAN, INC. is a
7 corporation organized and existing under the laws of California with its principal place of
8 business at One Kaiser Plaza in Oakland, California. In 2020 alone, Kaiser reported revenue of
9 over \$92 billion and net income of over \$6.3 billion.

10
11 8. Plaintiff is ignorant of the true names and capacities of Defendants DOES
12 1 through 50, inclusive, and therefore sues these Defendants by fictitious names. Plaintiff will
13 amend this Complaint to insert the true names and capacities of these Defendants when they are
14 learned.

15
16 9. At all times herein mentioned, each Defendant, including DOES 1 through
17 50, was an alter ego, agent, partner, joint venturer, representative, employee, affiliate, manager,
18 co-manager and/or co-conspirator of each other Defendant and at all times was acting within the
19 course and scope of said agency, partnership, joint venture, representation, employment
20 affiliation, management, co-management or conspiracy. Whenever reference is made in this
21 Complaint to any act of “Defendants,” each such allegation shall mean that each defendant,
22 including DOES 1 - 50, acted both individually and jointly with the other defendants. Actions
23 taken by or omissions made by Defendants' employees or agents in the course of their
24 employment or agency are considered to be actions or omissions of Defendants for the purposes
25 of this Complaint.

26
27 10. There exists a unity of interest and ownership between each Defendant,
28 including DOES 1 - 50, and each other Defendant such that any individuality and separateness

1 between each Defendant has ceased and each is an alter ego of the other. At all times mentioned
2 herein, each of Defendant has committed acts establishing alter ego liability including but not
3 limited to: the use of the same office or business location as each other Defendant; the
4 employment of the same employees and attorney as each other Defendant; the failure to
5 adequately capitalize and/or the total absence of capitalization; the use of the business entity as a
6 mere shell, instrumentality or conduit for a single venture or the business of an individual or
7 another business entity; the concealment and misrepresentation of the identity of the responsible
8 ownership, management and financial interest; the disregard of legal formalities and the failure to
9 maintain arms-length relationships with other Defendants; sole ownership of all the stock by one
10 individual or members of one family; confusion of business records of the separate Defendants;
11 and the co-mingling of funds and assets and the unauthorized diversion of funds and assets for
12 other than business entity uses. As such, adherence to the fiction of the separate existence of each
13 Defendant as an entity distinct from each other would permit an abuse of the corporate and LLC
14 privileges and would promote injustice.

15
16 11. Each Defendant was but an instrumentality or conduit of the other in the
17 prosecution of a single venture, namely the management, ownership and operation of residential
18 properties. Therefore, it would be inequitable for any Defendant to escape liability for an
19 obligation incurred as much for that Defendant's benefit as for the other Defendants.

20 21 **FACTUAL BACKGROUND**

22 23 **A. Federal Law Prohibits Kaiser From Charging Members For COVID Tests**

24
25 12. The Families First Coronavirus Response Act (“FFCRA”), passed in
26 March 2020, as amended by the Coronavirus Aid, Relief, and Economic Security Act (“CARES
27 Act”), enacted on March 27, 2020, mandates that Kaiser provide its members with coverage for
28 all diagnostic tests that detect COVID, as well as the services furnished during office visits that

1 result in an order for or administration of a COVID test. Kaiser is expressly prohibited from
 2 passing on *any costs* for these services, including any deductibles, copayments, or coinsurance.

3
 4 13. Specifically, section 6001 of the FFCRA, as amended by the CARES Act,
 5 provides that:

6
 7 A group health plan and a health insurance issuer offering group or individual health
 8 insurance coverage including a grandfathered health plan (as defined in section 1251(e)
 9 of the Patient Protection and Affordable Care Act)) **shall provide coverage, and shall
 10 not impose any cost sharing (including deductibles, copayments, and coinsurance)
 11 requirements or prior authorization or other medical management requirements, for
 12 the following items and services furnished during any portion of the emergency period
 13 defined in paragraph (1)(B) of section 1135(g) of the Social Security Act (42 U.S.C.
 14 1320b-5(g)) beginning on or after the date of the enactment of this Act:**

15
 16 (1) **An in vitro diagnostic test defined in section 809.3 of title 21, Code of
 17 Federal Regulations (or successor regulations) for the detection of SARS-
 18 CoV-2 or the diagnosis of the virus that causes COVID-19, and the
 19 administration of such a test, that—**

20 (A) is approved, cleared, or authorized under section 510(k), 513, 515, or
 21 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360(k), 360c,
 22 360e, 360bbb-3);

23 (B) the developer has requested, or intends to request, emergency use
 24 authorization under section 564 of the Federal Food, Drug, and Cosmetic
 25 Act (21 U.S.C. 360bbb-3), unless and until the emergency use
 26 authorization request under such section 564 has been denied or the
 27 developer of such test does not submit a request under such section within
 28 a reasonable timeframe;

(C) is developed in and authorized by a State that has notified the Secretary
 of Health and Human Services of its intention to review tests intended to
 diagnose COVID-19; or

(D) other test that the Secretary determines appropriate in guidance.

(2) Items and services furnished to an individual during health care provider office
 visits (which term in this paragraph includes in-person visits and telehealth visits),

1 17. Kaiser performed a standard COVID test on Ms. Getubig. The test was a
2 standard COVID test, consisting of a single nasal swab that was inserted into each of her nostrils.

3
4 18. When Ms. Getubig received her test results, the tests results showed that
5 Kaiser had performed a “multiplex” test which tested for the virus that causes COVID as well as
6 two influenza viruses.

7
8 19. Ms. Getubig received a bill from Kaiser showing that Kaiser billed \$536
9 for a “FLU VIRUS DETECTION LAB TEST” and that Ms. Getubig was responsible to pay
10 \$310.00 of the \$536.00 charge. Although Ms. Getubig disputed this charge as being illegal,
11 Kaiser continued to charge her \$310.

12
13 20. Ms. Getubig is not alone. She is aware that Kaiser has charged other
14 members for a COVID test in the exact same manner at it charged her. While she does not yet
15 know the exact number of member Kaiser charged, she believes that Kaiser has a systemic
16 practice of charging its members for this type of COVID test.

17
18 21. The COVID test Kaiser provided to Ms. Getubig is an “in vitro diagnostic
19 test . . . for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19”
20 as described in section 6001 of the FFCRA.

21
22 22. A “multiplex” test is a *single test* that has the ability to detect multiple
23 viruses. The Centers for Disease Control describes the COVID/Influenza Multiplex assay as a
24 single test that “detects two types of influenza viruses (A and B) and SARS-CoV-2 *at the same*
25 *time.*”² The CDC goes on to say that the COVID/Influenza Multiplex Assay is “a *single test* that
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27 _____
28 ² Centers for Disease Control, “CDC Diagnostic Tests for COVID-19”. Accessed on August 3, 2022 at
<https://www.cdc.gov/coronavirus/2019-ncov/lab/testing.html>

1 diagnoses current infection with one or more of these viruses allows public health laboratories to
2 continue influenza surveillance while they are also testing for SARS-CoV-2.”

3
4 23. On August 21, 2021, the U.S. Food and Drug Administration granted
5 Emergency Use Authorization for the COVID-19 / Influenza multiplex assay because of the
6 COVID health emergency. The FDA stated in the EUA that: “EUA is appropriate to protect the
7 public health or safety under section 564(g)(2)(C) of the Act (21 U.S.C. § 360bbb-3(g)(2)(C)). .
8 ..”³ Accordingly, the FDA authorized use of the COVID/Influenza Multiplex Assay pursuant to
9 section 564 of the Act.

10
11 24. Consequently, the COVID/Influenza Multiplex Assay fits the definition of
12 the types of tests for which insurers are prohibited from charging. Specifically, the multiplex
13 assay is “An in vitro diagnostic test defined in section 809.3 of title 21, Code of Federal
14 Regulations (or successor regulations) for the detection of SARS–CoV–2 or the diagnosis of the
15 virus that causes COVID–19, and the administration of such a test,” [section 6001(1); it was
16 “approved, cleared, or authorized under section . . . 564 of the Federal Food, Drug, and Cosmetic
17 Act,” [section 6001(1)(A)] and “the developer has requested, or intends to request, emergency
18 use authorization under section 564 of the Federal Food, Drug, and Cosmetic Act. . . .” [section
19 6001(1)(B).]

20
21 25. Because the “multiplex” COVID-19 test that was provided to Ms. Getubig
22 is an “in vitro diagnostic test . . . for the detection of SARS–CoV–2 or the diagnosis of the virus
23 that causes COVID–19” as described in section 6001 of the FFCRA, it was illegal for Kaiser to
24 charge Ms. Getubig \$310 for the test.

25
26
27 ³ U.S. Food and Drug Administration, Letter Granting Emergency Use Authorization for Influenza SARS-CoV-2
28 (Flu SC2) Multiplex Assay, accessed August 3, 2022 at <https://www.fda.gov/media/139744/download>

1 **C. Kaiser’s Illegal Charges For COVID-19 Tests Injures Class Members And The**
2 **General Public**

3
4 26. Making COVID tests free and easy to obtain is one of the centerpieces of
5 the government’s response to stop the transmission of the deadly virus. For example, the
6 National Institutes of Medicine states “Testing, particularly of asymptomatic and pre-
7 symptomatic individuals, is key to interrupting this spread.”⁴ Likewise, Chiquita Brooks-LaSure,
8 the Centers for Medicare Services Administrator, said that “Testing is critically important to help
9 reduce the spread of COVID-19, as well as to quickly diagnose COVID-19 so that it can be
10 effectively treated.”⁵

11
12 27. Kaiser’s practice of illegally charging patients for COVID tests results in
13 fewer Californians being tested for COVID. For example, “In a 2019 Kaiser Family
14 Foundation/LA Times Survey, about half of respondents with employer-sponsored insurance said
15 someone in their household skipped or postponed medical care or prescription drugs in the past
16 year because of the cost. Seventeen percent say they had to make what they feel are difficult
17 sacrifices in order to pay health care or insurance costs.”⁶ Likewise, The Centers for Disease
18 Control has stated that “factors that may affect both access to, and use of, testing services include:
19 lack of health insurance [and] concern about the costs or co-pays. . . .”⁷

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21 _____
22 ⁴ National Institutes for Health and Aging, “Why COVID-19 testing is the key to getting back to normal,” accessed
on 8/3/2022 at <https://www.nia.nih.gov/news/why-covid-19-testing-key-getting-back-normal>

23 ⁵ U.S. Department of Health and Human Services, “Biden-Harris Administration Requires Insurance Companies and
24 Group Health Plans to Cover the Cost of At-Home COVID-19 Tests, Increasing Access to Free Tests,” accessed on
8/3/2022 at [https://www.hhs.gov/about/news/2022/01/10/biden-harris-administration-requires-insurance-companies-
group-health-plans-to-cover-cost-at-home-covid-19-tests-increasing-access-free-tests.html](https://www.hhs.gov/about/news/2022/01/10/biden-harris-administration-requires-insurance-companies-group-health-plans-to-cover-cost-at-home-covid-19-tests-increasing-access-free-tests.html)

25 ⁶ Kaiser Family Foundation, ‘Five Things to Know about the Cost of COVID-19 Testing and Treatment,’ accessed
26 on August 2, 2022 at [https://www.kff.org/coronavirus-covid-19/issue-brief/five-things-to-know-about-the-cost-of-
covid-19-testing-and-treatment/](https://www.kff.org/coronavirus-covid-19/issue-brief/five-things-to-know-about-the-cost-of-covid-19-testing-and-treatment/)

27 ⁷ Centers for Disease Control, ‘Health Equity in SARS-CoV-2 Testing,’ accessed on August 3, 2022 at
28 <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/index.html>

1 31. The members of the Class are so numerous that joinder of all members is
2 impracticable. While the exact number of Class members is unknown to Plaintiff at this time and
3 can only be ascertained through appropriate discovery, Plaintiff is informed and believes, and on
4 that basis alleges, that hundreds or thousands of individuals are members of the Class. The precise
5 number of Class members and their addresses are unknown to Plaintiff, but will be ascertained
6 through appropriate and reasonable discovery. Class members may be notified of the pendency of
7 this action by published or mailed notice.

8
9 32. There are numerous and substantial questions of law and fact common to
10 the Class, including:

- 11
- 12 a. Whether Defendants' business practice of charging its members for *in vitro*
13 COVID tests is an illegal business practice;
 - 14
 - 15 b. Whether Defendants' business practice of charging its members for *in vitro*
16 COVID tests is an unfair business practice;
 - 17
 - 18 c. Whether Defendants' business practice of charging its members for *in vitro*
19 COVID tests is a fraudulent business practice;
 - 20
 - 21 d. Whether each Defendant is the alter ego, agent, partner, joint venturer,
22 representative, employee, affiliate, manager, co-manager and/or co-
23 conspirator of each other Defendant and, at the times relevant to this
24 Complaint, was acting within the course and scope of said agency,
25 partnership, joint venture, representation, employment affiliation,
26 management, co-management or conspiracy;
 - 27
 - 28

1 e. The nature and extent of injunctive relief and damages to which the
2 proposed Class Members are entitled as a result of Defendants' wrongful
3 conduct; and

4
5 f. The nature and extent of injunctive relief to which the general public are
6 entitled as a result of Defendants' wrongful conduct.

7
8 33. Plaintiff's claims are typical of the claims of the Class she seeks to
9 represent because Kaiser charged her for receiving an *in vitro* diagnostic test for the detection of
10 SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that meets the definition
11 provided in section 6001 of the Families First Coronavirus Response Act ("FFCRA"), as
12 amended by the Coronavirus Aid, Relief, and Economic Security Act.

13
14 34. Plaintiff will fairly and adequately represent and protect the interests of the
15 members of the Class. Plaintiff has retained counsel competent and experienced in complex class
16 action litigation. Class counsel will consist of Kenneth Seeger and Brian Devine of the law firm
17 of Seeger Devine LLP in San Rafael, California. Seeger Devine LLP are experienced class action
18 attorneys: they have successfully represented plaintiffs in class action cases, including cases
19 against health insurance companies, and they have significant experience with high- stakes and
20 complex litigation. Plaintiff does not have any claims that are antagonistic to those of the Class.

21
22 35. Class certification is appropriate because Defendants' course of dealing
23 with members of the Class adversely affects all members of the Class, thereby making
24 appropriate final and injunctive relief corresponding to declaratory relief with respect to the Class
25 as a whole, whereby Defendants would be compelled to cease such course of dealing.

26
27 36. Class certification is appropriate because common issues of law and fact
28 relative to Defendants' course of dealing are common to the members of the Class, and said

1 questions of law or fact predominate over any questions affecting only individual members,
2 thereby rendering the class action superior to other available methods for the fair and efficient
3 adjudication of this controversy.

4
5 **FIRST CAUSE OF ACTION**
6 **(Violations of Bus. & Prof. Code section 17200, et seq.)**

7 37. Plaintiff incorporates by reference the previous paragraphs of this
8 Complaint as if fully set forth here and further alleges as follows.

9
10 38. Between March 27, 2020 and the present, Defendants violated California
11 Business and Professions Code section 17200, *et seq.* by engaging in unlawful, unfair, and
12 fraudulent business acts and practices as set forth above and as follows.

13
14 39. Defendants have the business practice of illegally charging patients for
15 COVID tests, including multiplex COVID/Influenza tests. Defendants do so without any
16 legitimate basis and for the sole purpose of converting money that rightfully belongs to Plaintiff
17 and Class Members to Defendants' own uses.

18
19 40. Members of the general public—even those members of the public who are
20 not Kaiser members—have been, continue to be, and are likely to be damaged by Defendants'
21 unfair, unlawful, and/or fraudulent conduct. For example, by illegally charging its members for
22 COVID-19 tests, Kaiser has made it more difficult for Kaiser members to afford to be tested for
23 COVID-19, even when they have been exposed to the virus or are showing symptoms. Because
24 fewer Kaiser members who need to be tested will be tested, members of the general public—
25 including non-Kaiser members—are more likely to be exposed to the virus from an untested
26 Kaiser member.

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1. A preliminary injunction requiring Defendants to follow the law and not charge its members for any an in vitro diagnostic test for the detection of SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that meets the definition provided in section 6001 of the Families First Coronavirus Response Act (“FFCRA”), as amended by the Coronavirus Aid, Relief, and Economic Security Act.

2. A permanent injunction requiring Defendants to follow the law and not charge its members for any an in vitro diagnostic test for the detection of SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that meets the definition provided in section 6001 of the Families First Coronavirus Response Act (“FFCRA”), as amended by the Coronavirus Aid, Relief, and Economic Security Act.

3. A permanent injunction requiring Defendants to notify all Class Members that they have a right to obtain COVID tests, including COVID/Influenza Multiplex tests without charge and that any charges previously passed on to them are illegal and should be refunded;

4. A permanent injunction ordering Defendants to properly train its employees to ensure that they comply with the law;

5. Restitution of the money and property wrongfully obtained by Defendants through their use of their fraudulent, unfair, and illegal practices;

6. Exemplary and punitive damages;

7. Attorney's fees and costs incurred in this litigation; and

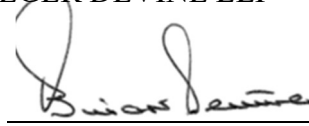
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8. Such other and further relief as the court may deem just and proper.

DATED: August 8, 2022.

SEEGER DEVINE LLP

By



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Attorneys for Plaintiff and Proposed
Class Counsel

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