SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

SUSAN FUTTERMAN, ACIANITA LUCERO, and MARIA SPIVEY as individuals, individually and on behalf of all others similarly situated, Plaintiffs, v. KAISER FOUNDATION HEALTH PLAN, INC., and DOES I through XX, inclusive, Defendants.	Case No. RG13 697775 ORDER ON DEMURRER TO AND MOTION TO STRIKE PORTIONS OF FOURTH AMENDED COMPLAINT

On June 24, 2015, the Demurrer of defendant Kaiser Foundation Health Plan, Inc. To Plaintiffs' Fourth Amended Complaint, and the Motion To Strike Plaintiffs' Fourth Amended Complaint came on for hearing, the parties appearing through counsel as reflected in the minutes, and the court now rules as follows:

I. BACKGROUND:

Susan Futterman and Acianita Lucero filed their original complaint in this action on October 2, 2013, and amended the complaint for the first time on October 16, 2013. Defendant Kaiser Foundation Health Plan, Inc. ("KFHP" or "Kaiser") removed the case to federal court on November 13, 2013, and it was remanded on April 1, 2014. On July 31, 2014, Plaintiffs filed their Second Amended Complaint, and on October 30, 2014, the parties submitted a stipulation for filing Plaintiffs' Third Amended Complaint. Although the stipulation was approved on October 31, 2014, and the parties thereafter treated the Third Amended Complaint ("TAC") as the operative pleading, it was not separately filed until February 19, 2015. On February 19, 2015, the court issued a detailed order sustaining Kaiser's demurrers to the TAC with leave to amend ("2/19 Order"). Plaintiffs filed their Fourth Amended Complaint on March 16, 2015 ("Complaint").

The Complaint added a named plaintiff, Maria Spivey (Susan Futterman, Acianita Lucero and Maria Spivey, collectively "Plaintiffs"), and contains two causes of action ("c/a") for alleged violations of Business and Professions Code sections 17200, et seq. ("UCL") and one c/a for alleged violations of the Unruh Civil Rights Act, Civil Code ("CC") sections 51, et seq. ("Unruh"). Plaintiffs seek relief on behalf of three separately defined classes, one for each of the three c/a.

The first class is defined as "all current and former California Kaiser members who have sought mental health services from Kaiser from October 2, 2009 to the present and who have not been provided with timely appointments for mental health services in the timeframes required by law, as specified in California Code of Regulations, title 28, section 1300.67.2.2 and/or who have been provided with unlawful, misleading, and/or

false information by Kaiser regarding the availability of mental health services." Although not specified in the class definition itself, the "unlawful, misleading, and/or false information" portion is based on alleged violations of California Code of Regulations, title 28 ("28 CCR"), section 1300.67(f)(8). Plaintiffs call this class the "Knox-Keene Class."[1]

The second class is defined as "all current and former Kaiser members who have been diagnosed with one or more of the nine enumerated Sever Mental Health Illnesses defined in California's Mental Health Parity Act or with a serious emotional disturbance of a child as defined in California's Mental Health Parity Act and who have sought mental health treatment services from Kaiser from October 2, 2009 to the present and who have been denied, dissuaded, or deterred from obtaining one-on-one mental health therapy without an individualized determination as to the medical necessity of one-to-one mental health therapy; and/or who have been referred to 'group' therapy, without making individualized determinations as to the medical necessity or suitability of group therapy; and/or who have been referred to group therapy without an individualized determination of what type of group therapy is appropriate and medically necessary for the individual member; and/or who have been forced to wait longer for mental health appointments than for physical health appointments." Plaintiffs call this class the "Mental Health Parity Class."[2]

The third class is defined as "all current and former Kaiser members who have a

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[1] The Knox-Keene Health Care Services Act of 1975 is codified in California Health and Safety Code sections 1340, et. seq.

[2] California' Mental Health Parity Act is part of the Knox-Keene Act, codified in California Health and Safety Code section 1374.72, and is also codified in the California Insurance Code at section 10144.5.

mental health 'disability' or a mental health 'medical condition,' as those terms are defined in California's Unruh Civil Rights Act and who sought mental health services from Kaiser from October 2, 2010 to the present and who have been discriminated against by Defendant by being denied, dissuaded, or deterred from obtaining one-on-one mental health therapy without an individualized determination as to the medical necessity of one-to-one mental health therapy; and/or who have been referred to 'group' therapy, without making individualized determinations as to the medical necessity of suitability of group therapy; and/or who have been referred to group therapy without an individualized determination of what type of group therapy is appropriate and medically necessary for the individual member; and/or who have been forced to wait longer for mental health appointments than for physical health appointments." Plaintiffs call this class the "Unruh Class."

II. DEMURRER and MOTION TO STRIKE:

The court has before it Kaiser' challenges to the current Complaint, by way demurrers to each of the three causes of action under Code of Civil Procedure ("CCP") sections 430.10(e) and 430.10(f), as well as arguments in favor of judicial abstention, and a motion to strike all of the requests for injunctive relief (Complaint, Request for Relief subparagraph (i)), all class action allegations, and three references to "declaratory relief." The court notes that Plaintiffs do not oppose striking the three references to declaratory relief.

A. SUMMARY OF KAISER'S ARGUMENTS:

1) Knox-Keene - 1st c/a -

Plaintiffs' 1st c/a is based on alleged violations of two regulations, 28 CCR 1300.67.2.2 ("Timely Access Regulation") and 28 CCR 1300.67(f)(8) ("Information Regulation"). Kaiser argues that no claim is stated under either.

The Information Regulation requires plans to provide, as part of basic health care services, "preventative health services ... which shall include ... effective health education services, including information regarding personal health behavior and health care, and recommendations regarding the optimal use of health care services provided by the plan or health care organizations affiliated with the plan." Plaintiffs allege in paragraph 86 of the Complaint that "information provided to Defendant's members must be in accord with Defendant's legal obligations, accurate and not misleading." Since the regulation itself does not include this language, Kaiser asserts that Plaintiffs are mischaracterizing the regulation.

Kaiser further asserts that the factual allegations are insufficient to state any violations of the Information Regulation in any event, since Lucero alleges only that she "received educational materials from Kaiser that encourage and promote group therapy and 'classes' over individual psychotherapy" (Complaint, ¶43) and Futterman alleges only that she and her late husband were informed that "Kaiser" does not "provide" one-on-one therapy. In Kaiser's view, these allegations do not constitute a failure by Kaiser to provide "recommendations regarding optimal use of health care services provided by the plan" or its affiliates.

Since the 2/19 Order sustained Kaiser's demurrer to Plaintiffs' claim in the TAC under 28 CCR 1300.67.2.2(d), which governs Quality Assurance processes for monitoring timely access, Plaintiffs now focus on 28 CCR 1300.67.2.2(c)(5) which

requires "each plan [to] ensure that its contracted provider network has adequate capacity and availability of licensed health care providers to offer enrollees appointments" within specified timeframes. Kaiser argues that Plaintiffs have misread the regulation to require Kaiser to "schedule" or "provide" appointments rather than to simply "offer" them, and that Plaintiffs have not accounted for the fact that the timeframes are subject to exceptions set forth in subsections (G) and (H) of 28 CCR 1300.67.2.2(c).

Kaiser further argues that Plaintiffs continue to fail to tie the relief they seek on behalf of the putative classes to their own experiences, in that they cannot alleged that individualized determinations of medical necessity were not made in connection with scheduling their appointments.

Kaiser also asserts that if the court concludes that a cause of action is stated, the court should abstain (*Alvarado* v. *Selma Convalescent Hosp.* (2007) 153 Cal.App.4th 1292, 1298 ("*Alvarado*"). In connection with this argument, Kaiser request that the court take judicial notice of a Cease and Desist Order directed to Kaiser by the Department of Mental Health Care ("DMHC") on June 24, 2013.

2) Parity Act - 2nd c/a -

Paragraph 103 of the Complaint enumerates the various ways in which Plaintiffs allege that Kaiser violated the Parity Act. Kaiser argues that none actually states a claim since the Parity Act does not require medical providers to "offer" a menu of alternative treatment options and does not endorse certain treatments over others.

Kaiser asserts that Plaintiffs do not allege that Kaiser failed to "cover" medically necessary treatment for Parity Act conditions on the same terms and conditions as other health conditions. There are no allegations in the Complaint that "one-to-one mental

health therapy" was medically necessary, or that group therapy and medication were not appropriate for Plaintiffs. All that is alleged is that particular types of therapy were "recommended" or "encouraged," which is not analogous to a categorical denial of coverage.

Kaiser further asserts that the Parity Act does not concern timely access and does not address information provided to members.

Kaiser also argues that the court should abstain from adjudicating the Parity Act claims.

3) Unruh - 3rd c/a -

Kaiser argues that the Unruh Act claims fail for the same reasons that the Parity Act claims fail. In addition, Kaiser asserts that Unruh Act claims require allegations of intentional discrimination, and there are no allegations in the Complaint connecting Plaintiffs' mental disabilities to Kaiser's alleged actions or sufficient facts from which intentional discrimination could be inferred.

4) Uncertainty -

Kaiser argues that the fact that Plaintiffs continue to conflate "the Plan" with the contracted medical groups and individual medical providers renders the entire Complaint fatally uncertain.

B. SUMMARY OF PLAINTIFFS' OPPOSITION ARGUMENTS:

1) 1st c/a -

Plaintiffs argue in opposition that the distribution by Kaiser of "false, misleading and unlawful health information to members about its services" is certainly a violation of the requirement to provide "effective health education services" under the Information

Regulation. As examples of such false information, Plaintiffs point to paragraphs 25, 26 & 28 ["she [Futterman] was told that one-on-one therapy was not available"], and 43 ["...Lucero received educational materials from Kaiser that encourage and promote group therapy and 'classes' over individual psychotherapy [and]... state ..."...We do not offer long-term individual psychotherapy at Kaiser" [and that] ... there is a cap on mental health treatment...]

As to the Timely Access Regulation, Plaintiffs point to their general allegations of Kaiser's "pattern and practice" of failing to provide members appointments that are timely under the regulation, and to examples found in paragraphs 31-36 [Futterman seeking appointments for her late husband] and 40-44 [Lucero]. Plaintiffs argue that these alleged experiences tie directly to request for relief (i)(1) in the Complaint, "require[] Defendant to ensure that mental health care patients are provided with timely medical health care services that are based on individualized determinations of medical necessity..."

2) 2nd c/a -

Plaintiffs assert that paragraph 103 of the Complaint describes seven ways that Kaiser has violated the Parity Act's requirement that it make individualized determinations of the medical necessity of mental health services for members with qualifying conditions. Four have to do with "one-on-one" as opposed to "group" therapy. Plaintiffs argue that this is not an attack on the "subjective quality of medical care" as argued by Kaiser, but rather an allegation that Kaiser has a policy and practice of refusing to make individualized determinations as to whether one-on-one therapy is medically necessary and subsequently denies such care.

Plaintiffs also point to paragraph 77 of the Complaint, the paragraph within the "Class Action Allegations" section of the Complaint in which the purported "common questions of law and fact" are enumerated. Two have to do with timely access and long wait times, allegations which Plaintiffs argue constitute Parity Act violations because medical need is not considered when scheduling appointments, and one has to do with distribution of allegedly false information, the factual support for which is the information alleged to have been distributed to Lucero.

3) 3rd c/a -

As to the Unruh Act claims, Plaintiffs argue that the Complaint contains several facts regarding Kaiser's "willful, affirmative misconduct" from which intentional discrimination against those with mental health disabilities may be inferred (citing *Koebke* v. *Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853, for the Unruh standard).

4) Abstention -

Plaintiffs argue that the court should not abstain from adjudicating the 1st c/a because there is no evidence in the record that the DMHC is doing anything to enforce its 2013 Cease and Desist Order, and there is no other basis to abstain. In support of this argument Plaintiffs also request that the court take judicial notice of the June 24, 2013 Cease and Desist Order, as well as a later letter request from the DMHC to dismiss the hearing on Kaiser's appeal of an assessed penalty.

As to the 2nd c/a, Plaintiffs argue that no administrative action has ever been taken by the DMHC, and the requested injunctive relief would not require the court to "assume the role of a medical provider" as Kaiser argues.

5) Uncertainty -

Plaintiffs argue that the allegations in paragraphs 4-11 of the Complaint are sufficient to show that Kaiser exerts control over the practices and procedures that the medical provider entities are charged with following when they provide treatment through the regional medical groups, as well as the information provided to members.

C. DISCUSSION:

1) 1st c/a -

Although the focus of Plaintiffs' claims in this case is on the Parity Act and the Unruh Act, their 1st c/a is not so limited. As made clear by Plaintiffs' proposed definition of the "Knox-Keene Class," Plaintiffs do not intend to limit the scope of the claims based on alleged violations of the widely divergent Timely Access Regulation and Information Regulation, neither of which applies exclusively to mental health conditions, to the impact of those alleged violations on persons to whom the Parity Act ("severe mental illnesses ... [or] serious emotional disturbances of children") or the Unruh Act (mental health "disability" or mental health "medical condition") apply. Rather, Plaintiffs seek to represent "all current and former California Kaiser members who have sought mental health services" who have not been provided with timely appointments or who have been provided with false information about what mental health services are available.

Important to an understanding the true scope of the 1st cause of action is an examination of the related portions of the prayer for relief. As noted above, subparagraph (i) of the Prayer in the Complaint purports to enumerate 7 forms of injunctive relief, three of which apply to the 1st c/a:

> (1) that requires [Kaiser] to ensure that mental health care patients are provided with timely mental health care services that are based on individualized

> determinations of medical necessity...;
>
> (2) that enjoins [Kaiser] from informing members that Kaiser does not provide one-on-one mental health treatment, long-term one-on-one mental treatment, or that Kaiser puts a cap on the number of one-on-one mental health treatment sessions available to them...; [and] ...
>
> (7) that requires [Kaiser] to inform all members that coverage and service decisions for mental health care treatment will be based on individualized determinations of what mental health services are medically necessary for the individual member...

All three of these forms of injunctive relief also purport to remedy the violations alleged in the 2nd c/a, and numbers 1 and 7 purport to remedy the violations alleged in the 3rd c/a as well.

As discussed in the 2/19 Order, direct enforcement of the Timely Access Regulation raises the very real specter of crossing the line between matters appropriate for judicial determination and those best left to the DMHC. Judicial abstention is less a concern with respect to the Information Regulation. Recognizing the prospect that the court would find the judicial abstention argument more compelling as applied to timely access, Kaiser suggests that the court may treat the 1st c/a as two separate causes of action, consistent with *Lillienthal & Fowler* v. *Sup.Ct.* (1993) 12 Cal.App.4th 1848. The court seriously considered adopting this approach, notwithstanding that *Lillienthal & Fowler* arose in the context of a motion pursuant to Code of Civil Procedure section 437c, but ultimately has decided that such parsing of the 1st c/a is unnecessary.

The court concludes that Plaintiffs' claims that are founded on allegations of violations of the Timely Access Regulation are appropriate for treatment under the doctrine of judicial abstention. Although the court hereby GRANTS the parties' respective Requests for Judicial Notice of the DMHC's June 24, 2013 Cease and Desist Order and the DMHC's letter request to dismiss the hearing on Kaiser's appeal of an

assessed penalty, the court's conclusions in this regard are not dependent on the current status of any specific DMHC enforcement matter. Rather, the court's decision to abstain is based on the nature of the injunctive relief sought by Plaintiffs.

As indicated in the 2/19 Order, the court will defer to the DMHC on all issues having to do with whether Kaiser's QA program is sufficient, which applies to both 28 CCR § 1300.70 and 28 CCR 1300.67.2.2(d). In that order, the court did not preclude the possibility that some form of injunctive relief based on alleged violations of the Timely Access Regulation could escape abstention, but it now finds that that there is no way to separate the standards for timely access to care (subsection (c)) from the quality assurance processes (subsection (d)) for purposes of injunctive relief. In other words, the court could not enforce subsection (i)(1) of the Request for Relief in the Complaint, which is broadly framed in terms of timely medical health care services, without crossing the line between standards and quality assurance. The stated purpose of the Timely Access Regulation is that it "confirms requirements for plans to provide or arrange for the provision of access to health care services in a timely manner, and establishes addition metrics for measuring and monitoring the adequacy of a plan's contracted provider network to provide enrollees with timely access to needed health care services." (28 CCR 1300.67.2.2(a)(4).) As Kaiser argued in its papers, and emphasized at the hearing, compliance with the Timely Access Regulation involves balancing ever changing appointment needs with appropriate staffing levels at various locations. A court is ill equipped to delve into this regulatory arena.

Although the court rejects Kaiser's argument that the factual allegations in the Complaint do not amount to violations of the Information Regulation, and can readily

envision forms of prohibitory injunctive relief that would not raise abstention concerns, it notes that all of the specific allegations in the Complaint of misinformation regarding the scope of coverage depend on the Parity Act for their definition. In other words, it is the Parity Act that states that coverage must be provided "for the diagnosis and medically necessary treatment of severe mental illnesses...", and the alleged violations of the Information Regulation all involve Kaiser misleading its members as to what treatments the Parity Act requires Kaiser to cover. Furthermore, the forms of injunctive relief that relate to the "information" issue, i.e., Complaint, Request for Relief (i)(2) & (7), purport to remedy both the 1st and the 2nd c/a.

The court concludes that the allegations of the Complaint are not sufficient to state a UCL cause of action on behalf of all Kaiser members who have sought mental health services. To the extent the 1st c/a is based on alleged violations of the Timely Access Regulation, the court abstains from such adjudication, and to the extent it is based on alleged violations of the Information Regulation the factual allegations do not support its overly broad reach. That is to say, it does not state facts sufficient to constitute a cause of action.

2) 2nd c/a -

The Parity Act c/a incorporates by reference all of the preceding factual allegations (Complaint, ¶ 96) and the list of alleged Parity Act violations included in paragraph 103 of the Complaint correlate fairly closely with section (i) of the Request for Relief. As further discussed below, the court agrees with Kaiser that the 2nd cause of action, as assessed in connection with the Request for Relief in the Complaint, remains overbroad in some respects, and the court continues to have difficulty with some aspects

of Plaintiffs' theories of liability under the Parity Act. It does not agree, however, that no cause of action is stated. The question then is whether further amendment is necessary to address Kaiser's legitimate concerns regarding the scope of discovery. The court concludes that the answer to that question is "no." Further amendment is unlikely to be useful in terms of circumscribing discovery. The court is prepared, however, to closely manage the discovery process and sets forth some of the parameters of that process below.

Apart from section (i)(1) of the Request for Relief, which will be stricken on the basis of abstention, the other forms of injunctive relief that Plaintiffs seek in connection with the 2nd c/a are as follows:

> (2) that enjoins [Kaiser] from informing members that Kaiser does not provide one-on-one mental health treatment, long-term one-on-one mental treatment, or that Kaiser puts a cap on the number of one-on-one mental health treatment sessions available to them...;
>
> (3) that enjoins [Kaiser] from denying, dissuading, and deterring members from seeking one-on-one mental health care treatment without an individualized determination of the medical necessity of such treatment...;
>
> (4) that enjoins [Kaiser] from requiring, recommending, and/or encouraging 'group' therapy without making individualized determinations as to the medical necessity or suitability of group therapy and without individualized determinations as to type of group therapy appropriate and medically necessary for the individual member...;
>
> (5) that enjoins [Kaiser] from referring mental health patients in need of intensive outpatient therapy to group-based outpatient programs without a determination of the medical necessity or appropriateness of the program for the individual patient...;
>
> (6) that requires [Kaiser] to ensure timely and individualized assessments of members' needs for individualized and/or group mental health treatment...; [and]
>
> (7) that requires [Kaiser] to inform all members that coverage and service decisions for mental health care treatment will be based on individualized determinations of what mental health services are medically necessary for the individual member...

(2) and (7) clearly relate to allegations regarding misrepresentations of coverage. Having

ruled that a separate UCL c/a expressly based on the Information Regulation on behalf of all Kaiser members who have sought mental health services (1st c/a) is not viable does not necessary mean that all issues that involve information are no longer in the case.

In the court's view, an answer to the question of whether Plaintiffs' allegations on this topic constitute a violation of the Information Regulation is unnecessary in this context since Plaintiffs' UCL c/a on behalf of the Mental Health Parity Class is framed in terms of both "unlawful" and "unfair" conduct. In other words, even if Kaiser were successful in establishing that the Information Regulation does not create an affirmative duty that it accurately disclose its legal obligations under the Parity Act, its alleged misrepresentations of those duties is sufficient to state a UCL claim under the unfair prong. Accordingly, Kaiser's motion to strike Request for Relief (i)(2) & (7) is DENIED. This ruling does not mean that the court would necessarily issue the proposed injunctions verbatim upon an appropriate showing. It means only that injunctive relief of this general nature is within the realm of possibility. Nothing more is needed at the pleading stage.

The discussion of the 2nd c/a could end right there, since a demurrer does not lie to a portion of a cause of action. (*Kong* v. *City of Hawaiian Gardens Redevelop. Agency* (2003) 108 Cal.App.4th 1028, 1046.) The court recognized, however, the importance of further analysis to the circumscription of discovery.

(i)(3), (4), (5) and (6) all implicate "one-on-one" as opposed to "group" therapy in some fashion. Kaiser's attacks on this aspect of the 2nd c/a are largely based on the distinction it seeks to draw between "coverage" and "treatment." To the extent this argument is based on its assertion that it cannot be held to account for the "treatment" duties of its contracted medical providers, framed by Kaiser in terms of "uncertainty," it

is not well taken. The court concludes that the allegations contained in paragraphs 8-11 of the Complaint are adequate to permit Plaintiffs to pursue their claims against Kaiser Foundation Health Plan, Inc., notwithstanding that covered medical services are provided to its members by entities that maintain separate corporate identities. In other words, the allegation of "an integrated healthcare coverage, administration, and delivery system" will suffice, for pleading purposes.

The "coverage" versus "treatment" argument, however, also extends to issues of "medical necessity." In Kaiser's view, unless the Plaintiffs are able to allege that any of the treatments that were not provided to them were "medically necessary," they cannot state a cause of action for violation of the Parity Act. The court disagrees. While it is accurate to say that this case does not fit the *Arce* mold exactly because Plaintiffs have not alleged, and presumably cannot allege, that one-on-one therapy is "categorically" denied to persons covered by the Parity Act in all circumstances, unlike the categorical denial of coverage of Applied Behavior Analysis therapy and speech therapy for autism in *Arce* v. *Kaiser Foundation Health Plan* (2010) 181 Cal.App.4th 471, 493 (*Arce*), Plaintiffs' allegations share the important characteristic of having treatment decisions made without considering the issue of medical necessity (*id*, at 494). In other words, the essence of Plaintiff's claims, as demonstrated in (i)(3)-(6) of the Request for Relief, is that the treatment needs of Plaintiffs and the putative class members were not based on a proper determination of medical necessity. This is sufficient for pleading purposes.

The court has concerns, however, with the manner in which the allegations regarding the timing of appointments will play out in connection with the 2nd c/a and the putative Mental Health Parity Class. Having ruled that a separate UCL c/a expressly

based on the Timely Access Regulation on behalf of all Kaiser members who have sought mental health services (1st c/a) is not viable does not necessarily mean that all issues that involve timing are no longer in the case. The striking of section (i)(1) of the Request for Relief was based on the finding that enforcement of the detailed regulatory scheme set forth in the Timely Access Regulation is clearly more properly in the domain of the DMHC. This ruling, however, does not directly address the issue of whether the Parity Act implicates "timeliness" at all, and subsection (i)(6) of the Request for Relief includes a "timeliness" component.

The court rejects Kaiser's argument that all aspects of "timeliness" implicate only "treatment" issues rather than "coverage issues." That is to say, a full evaluation of Kaiser's compliance with the Parity Act with respect to its members who fall within its reach may well involve some inquiry into the timing of acts determined to be required thereunder, and discovery into the policies and procedures that govern the manner in which "medical necessity" determinations are made for qualified mental health patients cannot entirely ignore questions of timing.

Having said that, some of the colloquy with Plaintiffs' counsel at the hearing raises concerns about how Plaintiffs intend to prove their case, which in turn will affect the discovery process. Specifically, Plaintiffs' counsel used Futterman's experience as an example of a fact pattern that he considers to show both a Parity Act violation and an Unruh Act violation, i.e., "that Ms. Futterman called and told Kaiser that her husband appeared to her, as a layperson, to be having a major psychotic episode, that he was having a psychotic break; he was unresponsive; he was speaking irrationally. She thought he needed to be seen right away. And they responded by saying ... 'Sorry. His psychiatrist

is on vacation. He can come in in six weeks.'" (Reporter's Transcript ["RT"] 15:20-16:3.) This episode is also set forth in paragraphs 31-34 of the Complaint. Counsel argued "we think we can prove that if Ms. Futterman called and said, 'My husband has a 104 degree temperature, he's not speaking rationally, and I'm worried about him' ... they would say 'Get him in. We'll find a doctor and treat him.'" (RT 16:4-10.) In fact, not only would such a comparison not directly support a finding of a Parity Act violation, it is a good example of the importance of the distinction between "treatment" and "coverage" in this context.

The court notes that none of the named Plaintiffs allege that they or their family members presented at an emergency room and were turned away because they did not display any physical symptoms. Rather, all of the allegations specific to their own experiences regarding the scheduling of appointments involved telephone communications. Notwithstanding that the court does not intend to engage in any direct enforcement of the Timely Access Regulation in this case, the processes described therein provide some information that may be useful in guiding the case as it goes forward. For example, the terms "[t]riage or screening" are defined in CCR 1300.67.2.2(b)(5) as "the assessment of an enrollee's health concerns and symptoms via communication, with a physician, registered nurse, or other qualified health professional acting within his or her scope of practice and who is trained to screen or triage an enrollee who may need care, for the purpose of determining the urgency of the enrollee's need for care"; subsection (c)(8) requires "the provision, 24 hours per day, 7 days per week, of triage or screening services by telephone..."; and subsection (e) requires the provision of information about triage and screening services, effectively the "front lines"

of the appointment process. Plaintiffs do not directly allege that Kaiser fails to comply with subsections (c)(8) or (e). Nevertheless, an inference may certainly be drawn from Plaintiffs' allegations that the screening process failed in Mr. Paroutaud's case. Whether such a screening process failure can and should be considered a failure to properly assess "medical necessity," however, is for another day. More importantly, focusing on a discrete event in which the screening process failed, or even on a series of similar anecdotal incidents, will not get the Plaintiffs where they need to go with respect to class certification and class-wide injunctive relief.

As correctly argued by Kaiser, the nature of any illness, physical or mental, as assessed by a qualified medical professional, determines the appropriate treatment modality, and reliance on allegations that attempt to draw a direct comparison between how any particular physical illness is treated and how any particular mental illness is treated is misplaced. "Parity is an inherently elusive concept ... because treatments for mental and physical illnesses can vastly differ in their modality and scope." (*Rea* v. *Blue Shield Of California* (2014) 226 Cal.App.4th 1209, 1226 ["*Rea*"].) Plaintiff's counsel also argued at the hearing that the Parity Act includes "a prong that says that the treatment has to be comparable to people with physical ailments." This was not an accurate statement. The Parity Act is a "coverage" statute. And while "coverage" issues cannot be completely and cleanly divorced from "treatment" issues (see, e.g., *Rea* at 1238 ["residential treatment for eating disorders must be covered ..."]), the analysis of whether Kaiser is in compliance with the Parity Act will not depend on the kind of comparison that Plaintiffs' counsel made at the hearing, i.e., between someone with a fever and someone with a mental health issue. Plaintiffs should develop their discovery program

with these concepts clearly in mind.

3) Unruh - 3rd c/a -

In the 2/19 Order, the court articulated its conclusion that in determining whether a cause of action is stated under the Unruh Act, "the appropriate comparison to be made is not whether [Plaintiffs] were treated differently than individuals without mental disabilities who also sought mental health services, as posited by Kaiser, but whether they, as patients with mental health conditions, were treated differently than patients with physical health conditions in seeking treatment for their respective different conditions." In the current round of pleadings challenges Kaiser points out that the court's use of the term "medical health conditions" was incorrect in that context, since the Unruh Act only protects individuals with statutorily defined "disabilities" and "medical conditions." (CC § 51(b) & (e).) Kaiser also observes in a footnote that the term "mental health 'medical condition'", as used by Plaintiff in connection with their Unruh c/a, is uncertain, since it does not appear to fit within the definitions set forth in Government Code section 12926(i). While the court agrees with Kaiser on these points, it is otherwise unpersuaded by Kaiser's argument that the Complaint lacks factual allegations of intentional discrimination necessary for an Unruh claim.

The court reaffirms its conclusion in the 2/19 Order that facts that state a claim based on the Parity Act also sound in violation of Unruh. The court acknowledges that the defining characteristics for inclusion in the Mental Health Parity Class ("diagnosed with one or more of the nine enumerated Sever Mental Health Illnesses ... or with a serious emotional disturbance of a child...") and the Unruh Class ("mental health disability") are not identical, but further concludes that the manner in which these

differences may play out at the time of class certification needs not, indeed cannot, be determined at the pleading stage. For example, it may ultimately prove appropriate to certify an Unruh Class as a subclass of a Mental Health Parity Class.

D. CONCLUSION -

An inference to be drawn from all of Plaintiffs' allegations is that Kaiser simply does not allocate adequate resources to coverage, treatment and care of its members suffering from mental illnesses. All of Plaintiffs' claims, whether focused on long wait times or the predominance of group therapy as opposed to individual therapy, may well be accounted for by a shortage of providers. But even if Plaintiffs are ultimately able to prove that Kaiser cannot possibly meet its obligations under the Knox-Keene regulations and/or the Parity Act without ratcheting up the level of resources, it is not clear to the court what appropriate injunctive relief would look like. Would it look exactly like Request For Relief (i)(2)-(6)? Probably not. However, the court concludes that the allegations in the Complaint are sufficient to allow this case to move out of the pleading stage. It is not necessary to clearly define the parameters of appropriate injunctive relief at this time. (See, e.g., *Klein v. Chevron USA, Inc.* (2012) 202 Cal.App.4th 1342, 1367-1369).

III. RULING:

a) Kaiser's demurrer to the 1st c/a is SUSTAINED without leave to amend.

b) Kaiser's motion to strike section (i)(1) of the Request for Relief in the Complaint is GRANTED.

c) Kaiser's motion to strike allegations that refer to the Knox-Keene Class and the

definition of the Knox-Keene Class is GRANTED.

d) Kaiser's motion to strike references to declaratory relief is GRANTED as unopposed.

e) Kaiser's demurrers to the 2nd and 3rd c/a are OVERRULED.

f) Apart from the provisions of (b), (c) and (d) above, Kaiser's motion to strike is otherwise DENIED. This ruling does not mean that the court endorses the manner in which the Mental Health Parity Class or the Unruh Class are defined, or that the court anticipates a verbatim adoption of any of the proposed injunctive relief upon Plaintiffs' successful showing that class wide injunctive relief is warranted. It means only that both are within the realm of possibility, and therefore not amenable to resolution at the pleading stage.

Kaiser shall answer the remaining causes of action in the Complaint forthwith, and no later than September 14, 2015.

It is SO ORDERED.

8/31/2015
Date

Wynne S. Carvill
Judge of the Superior Court

Superior Court of California
Alameda County

Case # RG13 697775
Case Name: FUTTERMAN Et al. v. Kaiser Foundation Health Plan, Inc.
Document: Order On Demurrer To And Motion To Strike Portions of Fourth Amended Complaint

CLERK'S CERTIFICATE OF SERVICE

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Superior Court of California, County of Alameda. I am over the age of 18 years. My business address is 1221 Oak St. Oakland, California. I served this **Order** by:

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Date: August 31, 2015

Leah T. Wilson
Executive Officer/Clerk of the Superior Court

By _____
Marion Valino, Deputy Clerk