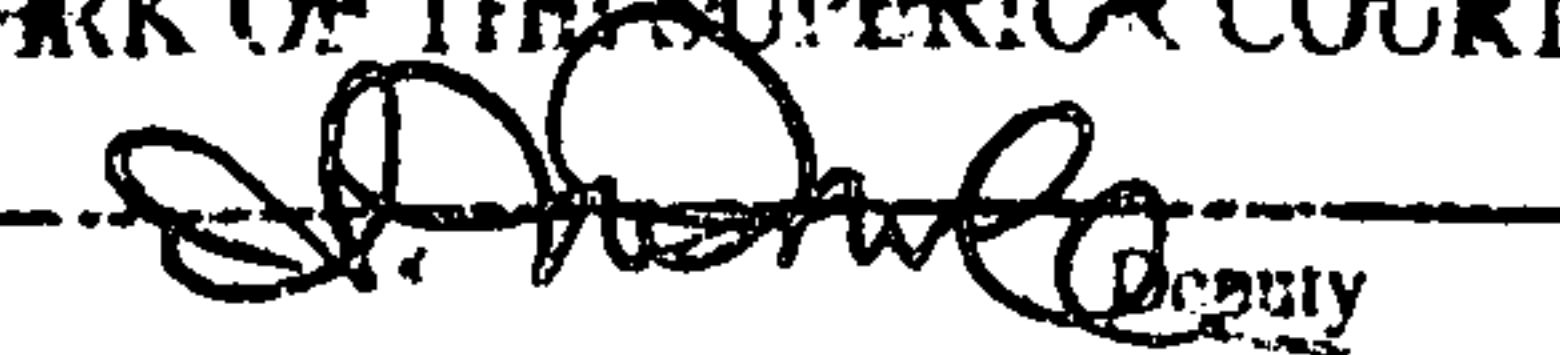




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 9 WENDY GALLIMORE, on behalf of herself
 10 and all others similarly situated

FILED
ALAMEDA COUNTY
 FEB 07 2012
 CLERK OF THE SUPERIOR COURT
 By  Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF ALAMEDA

12 WENDY GALLIMORE, on behalf of herself)
 13 and all others similarly situated,)
 14 Plaintiff,)
 15 v.)
 16 KAISER FOUNDATION HEALTH PLAN,)
 17 INC.; and DOES 1 through 20, Inclusive)
 18 Defendants.)
 19)
 20)

CASE NO. : **RG 12616206**
CLASS ACTION COMPLAINT FOR:
1. VIOLATION OF BUSINESS &
PROFESSIONS CODE SECTION 17200
2. DECLARATORY RELIEF
AND DEMAND FOR JURY TRIAL

21 Plaintiff brings this action on behalf of herself and all others similarly situated, against
 22 Defendant and DOES 1 through 20 as follows:

GENERAL ALLEGATIONS

23
 24 1. The true names and capacities, whether individual, corporate, associate or
 25 otherwise, of Defendant Does 1 through 20, inclusive, are unknown to Plaintiff at this time, who
 26 therefore sues said Defendants by such fictitious names. Each of the fictitiously named Defendants
 27 is responsible in some manner for the conduct alleged herein and for the injuries suffered by the
 28 Plaintiff and the members of the Class.

1 2. Defendant Kaiser Foundation Health Plan, Inc. ("Kaiser") is a "health care service
2 plan" licensed by the Department of Managed Health Care ("DMHC") and subject to the relevant
3 provisions of the Health & Safety Code. Under this regime, a contract is called an evidence of
4 coverage ("EOC"), the person purchasing the coverage (or eligible for it through employment) is
5 called the "subscriber" or "member," and the entity providing the coverage is the "plan." Health &
6 Safety Code section 1345.
7

8 3. Kaiser is a prepaid health plan. That is, it maintains facilities through which
9 members may obtain medical services (e.g., doctor visits, hospital stays, etc). To access these
10 services, a member must make an appointment at a Kaiser facility in the specified area and follow
11 the diagnosis and course of treatment prescribed by the primary care physician. If a member
12 desires a specialist, a referral is required from the primary care physician.
13

14 4. In 1998, the Legislature enacted Health & Safety Code section 1367.63 ("section
15 1367.63"). That law provides in pertinent part:

16 a) Every health care service plan. . . shall cover reconstructive
17 surgery, as defined in subdivision (c), that is necessary to achieve
18 the purposes specified in paragraphs (1) or (2) of subdivision (c).
Nothing in this section shall be construed to require a plan to
provide coverage for cosmetic surgery, as defined in subdivision (d).

19 . . .

20 (c) "Reconstructive surgery" means surgery performed to correct or
21 repair abnormal structures of the body caused by congenital defects,
22 developmental abnormalities, trauma, infection, tumors, or disease
to do either of the following:

23 (1) To improve function.

24 (2) To create a normal appearance, to the extent possible.

25 (d) "Cosmetic surgery" means surgery that is performed to alter or
26 reshape normal structures of the body in order to improve
27 appearance.

28 (e) In interpreting the definition of reconstructive surgery, a health
care service plan may utilize prior authorization and utilization
review that may include, but need not be limited to, any of the
following:

 (1) Denial of the proposed surgery if there is another more
appropriate surgical procedure that will be approved for the enrollee.

 (2) Denial of the proposed surgery or surgeries if the procedure or
procedures, in accordance with the standard of care as practiced by

1 physicians specializing in reconstructive surgery, offer only a
2 minimal improvement in the appearance of the enrollee.

3 5. Section 1367.63 was enacted because health plans were denying requests for
4 reconstructive surgery on the basis that it was only medically necessary to restore or improve a
5 bodily function. Health plans were denying requests for reconstructive surgery of a physical
6 abnormality caused by trauma, disease, congenital defects, etc. when the surgery would restore a
7 normal appearance, such as a case where a child was born without an ear but still had the ability to
8 hear. Health plans denied these surgeries on the basis that they were “cosmetic.”

9 6. To remedy this problem, section 1367.63 made clear that health plans were to cover
10 surgeries to correct abnormal structures of the body caused by disease when the surgery would
11 improve function or create a normal appearance to the extent possible. Section 1367.63(c)
12 subsections (1)-(2).

13 7. As required by law, Kaiser incorporated the substance of section 1367.63 into its
14 EOCs.

15 8. Despite Kaiser’s obligation to follow section 1367.63, and the language placed in
16 its EOCs distributed to members, Kaiser has a pattern and practice of systematically violating the
17 statute by refusing to cover reconstructive surgery to correct or repair abnormal structures of the
18 body to create a normal appearance to the extent possible.

19 9. Additionally, Kaiser has a pattern and practice of systematically denying requests
20 for reconstructive surgery for excess skin following bariatric surgery for morbid obesity. Kaiser
21 systematically ignores both the functional impairment standard and the “normal appearance”
22 prongs of section 1367.63(c) and, in doing so, systematically violates the statute. Kaiser never gets
23 to the question of whether reconstructive surgery to remove excess skin is required to improve
24 function or to create a normal appearance to the extent possible because it systematically denies
25 any request for reconstructive surgery to remove excess skin on the basis that the services are not
26 covered because they are cosmetic.
27
28

1 10. Indeed, rather than provide coverage for reconstructive surgery for excess skin as
2 required by section 1367.63, Kaiser directs affected members to its for profit cosmetic surgery
3 centers where Kaiser charges them on a fee-for-service basis for treatment that is required to be
4 covered under section 1367.63 and its EOCs.

5 11. Plaintiff became covered under the terms of an EOC issued by Kaiser to the Twin
6 Rivers Unified School District. The terms of the EOC are governed by the Knox-Keene Act as
7 found in the Health & Safety Code.

8 12. Plaintiff underwent bariatric surgery for treatment of morbid obesity and
9 subsequently experienced massive weight loss. She was left, however, with large amounts of
10 excess skin resulting from the treatment of her disease.

11 13. Plaintiff requested that Kaiser authorize reconstructive surgery for the large
12 amounts of excess skin she experienced following her massive weight loss. Plaintiff's condition
13 satisfied the requirements of the statute because her proposed surgery was for repair of "abnormal
14 structures of the body caused by . . . disease." Moreover, there was no "more appropriate surgical
15 procedure" for Plaintiff's condition and the surgery would provide far more than a "minimal
16 improvement."

17 14. Kaiser refused to authorize the reconstructive surgery on the basis that removal of
18 excess skin was cosmetic. In doing so, and pursuant to its pattern and practice, Kaiser did not
19 consider whether the surgery would improve function or create a normal appearance, to the extent
20 possible under section 1367.63(c) subsections (1)-(2). According to Kaiser, it never covers the
21 surgical removal of excess skin following surgery for morbid obesity because it considers those
22 procedures cosmetic – and directs its members to its for profit cosmetic surgery centers – in
23 violation of section 1367.63.

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CLASS ACTION ALLEGATIONS

15. Pursuant to California Code of Civil Procedure section 382 and California Rules of Court, Rule 3.760 et seq., Plaintiff seeks class certification of the following Class and Subclass:

All California residents covered under Kaiser Foundation Health Plan, Inc.'s non-ERISA Evidences of Coverage whose requests for reconstructive surgery to correct or repair abnormal structures of the body to create a normal appearance to the extent possible have been rejected at any time during the four years before the filing of this complaint to the date of the mailing of the class notice in this action.

All California residents covered under Kaiser Foundation Health Plan, Inc.'s non-ERISA Evidences of Coverage whose requests for reconstructive surgery of excess skin following weight loss due to bariatric surgery for morbid obesity have been rejected at any time during the four years before the filing of this complaint to the date of the mailing of the class notice in this action.

16. Excluded from the Class is any officer, director or employee of Kaiser.

17. There is a well-defined community of interest among the members of the Class.

The claims of the Plaintiff are typical of the claims of the Class she seeks to represent. The factual bases of the actions of Kaiser are common to all Class members.

18. There are numerous questions of law and fact common to Plaintiff and the members of the Class she seeks to represent. Those questions predominate over any questions that may affect individual Class members. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

**FIRST CAUSE OF ACTION
(Violation of the Unfair Competition Law)**

19. Plaintiff and the Class hereby repeat and reallege all preceding paragraphs and incorporate same as though fully set forth herein.

20. Business and Professions Code section 17200 et seq., the Unfair Competition Law ("UCL"), prohibits acts of "unfair competition," including any "unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." The acts of

1 Kaiser, as alleged herein, constitute an unlawful business practice by virtue of its violation of
2 section 1367.63.

3 21. Kaiser has violated the UCL by systematically refusing to comply with section
4 1367.63. Kaiser has a pattern and practice of systematically refusing to cover reconstructive
5 surgery to correct or repair abnormal structures of the body to create a normal appearance to the
6 extent possible. Kaiser also has a pattern and practice of systematically denying requests for
7 reconstructive surgery for excess skin following bariatric surgery for morbid obesity and
8 systematically ignores both the functional impairment standard and the “normal appearance”
9 prongs of section 1367.63(c).
10

11 22. As a result of Kaiser’s violation of section 1367.63, Plaintiff has suffered injury in
12 fact and has lost money or property as Kaiser has failed to provide the benefits due as required by
13 statute.
14

15 23. On behalf of themselves and on behalf of the general public, Plaintiff and the Class
16 request that the Court enjoin Kaiser from systematically violating section 1367.63 through its
17 refusal to follow the mandates set forth in the statute. Plaintiff and the Class further request that
18 the Court require Kaiser to re-review each request for service previously refused and re-evaluate
19 those requests and provide benefits, where required, pursuant to the terms of the statute as
20 properly construed.

21 24. Plaintiff and the Class request attorneys' fees under Code of Civil Procedure section
22 1021.5 and/or under a common fund theory.
23

24 **SECOND CAUSE OF ACTION**
25 **(Declaratory Relief)**

26 25. Plaintiff and the Class hereby repeat and re-allege all preceding paragraphs and
27 incorporate the same as though fully set forth herein.
28

1 26. As alleged herein, Kaiser has a pattern and practice of systematically refusing to
2 provide coverage for reconstructive surgery to correct or repair abnormal structures of the body to
3 create a normal appearance to the extent possible. Plaintiff contends that this systematic refusal is
4 in violation of section 1367.63.

5 27. As further alleged herein, Kaiser systematically refuses to provide coverage for
6 reconstructive surgery of excess skin following weight loss due to bariatric surgery for morbid
7 obesity on the basis that it is cosmetic regardless of whether the request for reconstructive surgery
8 is made to improve function or restore a normal appearance, to the extent possible. Plaintiff
9 contends that this systematic refusal is in violation of section 1367.63.

10 28. An actual controversy now exists between the parties regarding their rights and
11 liabilities under the Kaiser EOCs. Plaintiff and the Class request a declaration that under section
12 1367.63(c) subsections (1)-(2) Kaiser must cover reconstructive surgery to create a normal
13 appearance, to the extent possible. Plaintiff and the Class request a declaration that Kaiser must
14 review each request for service according to the terms of the statute as properly construed.

15 29. An actual controversy now exists between the parties regarding their rights and
16 liabilities under the Kaiser EOCs. Plaintiff and the Class request a declaration that under section
17 1367.63(c) subsections (1)-(2) Kaiser must cover reconstructive surgery to remove excess skin
18 resulting from bariatric surgery for morbid obesity to improve function or create a normal
19 appearance, to the extent possible. Plaintiff and the Class request a declaration that Kaiser must
20 review each request for service according to the terms of the statute as properly construed.

21 30. Plaintiff and the Class request attorneys' fees under Code of Civil Procedure
22 section 1021.5 and/or under a common fund theory.

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WHEREFORE, Plaintiff and the Class pray for judgment against Kaiser as follows:

1. A preliminary and permanent injunction restraining Kaiser from further unfair practices and to require Kaiser to re-examine and re-process its prior refusals to cover reconstructive surgery under the correct standards;
2. A declaration of the rights and liabilities of the parties under Kaiser's EOCs;
3. Reasonable attorneys fees;
4. Costs of suit incurred herein; and
5. For such other and further relief as the Court deems just and proper.

DATED: February 6, 2012

GIANELLI & MORRIS

By: 
ROBERT S. GIANELLI
LOTTE COLBERT
Attorneys for Plaintiff and the Class