

JACQUELYN FINNEY
Encinitas, CA

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NORTH COUNTY DIVISION
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**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

JACQUELYN FINNEY

Petitioner and Plaintiff

v.

CALIFORNIA DEPARTMENT OF
MANAGED HEALTH CARE;
DANIEL ZINGALE, DIRECTOR;
ANDREW GEORGE, SENIOR STAFF
COUNSEL, HMO HELP CENTER;
DOES 1 – 100

Respondent and Defendants

Case No: GIN024734

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
DEMURRER TO PETITION FOR
WRIT OF MANDATE**

Date: January 30, 2003

Time: 3:00 p.m.

Dept: 30

Judge: Hon. Thomas P. Nugent

[Telephonic Ruling (760) 806-6050]

I. INTRODUCTION

Plaintiff Jacquelyn Finney filed her Petition for Writ of Mandate and Complaint for Declaratory Relief and Mandatory Injunction (hereinafter "Petition") to compel defendants California Department of Managed Health Care (hereinafter "DMHC"), Daniel Zingale, Director and Andrew George, Senior Legal Counsel, HMO Help Center to perform their duties in compliance with the nondiscretionary mandates of the U.S. and California Constitutions, California Public Policy, common law Doctrine of Informed Consent, the

intent of the California Legislature and California statutes, all of which set forth plaintiff's clear legal rights and the basis of their strict enforcement to avoid harm and injury to plaintiff and the public health and safety at present and in the future.

Defendants deny that plaintiff and all managed health care patients have any explicit legal rights that are protected by the U.S. and California Constitutions, California Public Policy, the common law Doctrine of Informed Consent and California statutes that are defendants' mandated ministerial duty to enforce, not recklessly or intentionally breach. Rather, defendants now claim that plaintiff's rights are illusory, i.e., that she has somehow invented "purported rights," which defendants do not recognize (Defendants' Memo of Points and Authorities [hereinafter "DPA"] p.1, line 24).

Presumption of Reliance on Defendants' & Kaiser's Express Representations

Plaintiff prepared her Request for Assistance (hereinafter "RFA") and three Addenda, based on her presumption of reliance upon her "Health Care Rights and Remedies" as stated in the California Patients' Guide (hereinafter "Guide") and on other statements of rights by DMHC and Kaiser. The Guide is prioritized for public access on the home page of DMHC's website. (Exhibit No. 1, page 1) Plaintiff requested and received the hard copy of the Guide prior to filing her RFA. The Guide states (Exhibit No. 1, page 2, references highlighted in yellow):

"This guide is intended to inform you of your rights to receive quality health care and what steps you can take if you encounter problems. It has been assembled by medical, legal, and consumer experts... including state laws signed by Governor Davis to be effective January 1, 2001." (emphasis supplied)

This Guide contains no disclaimer, warning, or notice of any kind that informs patients of defendant Zingale's alleged "discretion" to determine that all rights referenced in the Guide are to be enforced, in full or in part, or ignored, in full or in part or violated, in full or in part at his whim, as defendants claim. (DPA, page 9, lines 17 – 22)

Defendants' Guide contains no reference whatsoever to "purported rights." Indeed, plaintiff and all managed health care patients could never have any presumption of reliance on "purported rights," if such disclosure had been explicitly made and clearly stated. Neither Governor Davis nor defendant Zingale has ever stated, in reference to these patient rights laws, that the laws enacted "purported rights." (Exhibit No. 1 at pp. 2 & 22) The

Legislature did not intend that the Public Policy of the State of California be based upon declarations of "purported rights." (Exhibit No. 1 at pp. 1 & 14)

DMHC's website states that "DMHC is a new agency with...new mandates... including new prevention rights." (Exhibit No. 1, page 26) DMHC's website expressly sets forth to managed health care patients "Your Health Care Rights." (Exhibit No. 1, page pp. 24-25)

Plaintiff had a presumption of reliance that her RFA was a routine request and that DMHC would order Kaiser and its physicians to discuss her rights without conditions or coerced agreement to waive her rights, in full or in part, as a requirement to obtain medically necessary health care benefits, as stated in the Guide, prior to entering into and during the course of her physician-patient relationships.

The Guide states that defendants DMHC and Zingale were consulted and acknowledged their help in the preparation of the Guide. (Exhibit No. 1, page 22) Plaintiff took responsibility (as required by DMHC and Kaiser) to assure quality health care and to avoid after-the-fact accusations of contributory negligence for harm caused by Kaiser physicians Boiko and White whose conduct did not comport with their fiduciary duty to enforce her rights. (PPA, Exhibit No. 2, Enclosure 6; Finney Memo to Boiko 8/11/2000 at p. 116; and Finney Memo to White 10/20/2000, p. 7 at p. 127)

Plaintiff is not surprised that defendants have misconstrued facts and conclusions in Plaintiff's Petition and Points and Authorities. Plaintiff's Petition and PPA/Exhibits reiterate that, over a two year period, Kaiser never responded to any of plaintiff's complaints, grievance and appeals. Evidently, Kaiser responded to DMHC which never provided its facts and conclusions to plaintiff prior to Defendants' Points and Authorities. (PPA, p.10, lines 13-15)

DMHC Nurse Consultant, Marcy Gallageher, stated to plaintiff and Dr. Finney on March 25, 2002 and March 28, 2002 that she had not read, would not agree to read pertinent parts of Plaintiff's RFA and did not intend to incorporate the RFA in its entirety into her investigation's findings and conclusions. (PPA, Exhibit No. 5, pp. 4-7 at pages 165-168, and Exhibit No. 3, Robert D. Finney Declaration)

Defendants had predetermined that the Nurse Consultant would conduct a bogus investigation, as Ms. Gallagher told plaintiff and Dr. Finney that she did not have possession of the RFA, i.e., that the RFA, in full or in part, was "with the lawyers," implying that they

were responsible for supplying and /or denying her access to the RFA. Dr. Finney advised her "to borrow it" from DMHC's attorneys, as she would not properly be able to investigate and prepare her findings without having read the RFA in its entirety. (Exhibit No. 3, Robert D. Finney Declaration) Defendants now have conspired with Kaiser to produce an after-the-fact and fraudulent statement of facts and conclusions, regarding their alleged "agreement."

DMHC's Guide (upon which plaintiff relied in preparing her RFA) explains to patients in detail all violations referenced in plaintiff's RFA, e.g.:

- The Doctrine of Informed Consent (Exhibit No. 1, pp. 16-19)
- The Right to Specialist Referrals (Exhibit No. 1, pp. 12-14)
- The Right of Patients to Terminate Physician-Patient Relationships (Exhibit No. 1, pp. 11-12)

Plaintiff also had a presumption of reliance on Kaiser's numerous express written representations, examples of which are highlighted in yellow. (Exhibit No. 2, pp. 27-29) Kaiser expressly states on its website in "Your Rights and Responsibilities as a Kaiser Permanente Member" (Exhibit No. 2, page 27) that:

- "This section details your rights and responsibilities as a Kaiser Permanente member... **As an adult member, you exercise your rights yourself** [emphasis supplied]..." (Exhibit No. 2, at page 27)
- "You have the right to participate in a candid discussion of all available treatment options... You should be satisfied with the answers to your questions before consenting to any treatment. You may refuse any recommended treatment if you do not agree with it." (Exhibit No. 2 at pp. 27-28)
- "Medical care will not be affected if a member chooses to file a complaint or grievance.." (Exhibit No. 2 at page 29)

Both DMHC's and Kaiser's written representations expressly state that patients have rights, including but not limited to, the right to accept or reject treatment. However, they refuse to recognize that plaintiff's decisions to reject dishonest diagnosis and treatment from two dishonest dermatologists constitute the exercise of her absolute rights. Rather DMHC and Kaiser blame plaintiff for exercising her rights by setting forth a smoke screen Doctrine of Avoidable Consequences defense that "...her difficulty in obtaining this test is of her own

creating. Moreover, Mrs. Finney points to nothing in the record to indicate that the test should have been prescribed earlier or that it was denied her." (DPA, page 4, lines 2-4).

The documented record contradicts defendants' attempt to further victimize plaintiff. Plaintiff's RFA states that Dr. Schatz, Kaiser's Allergy Department Chief, told plaintiff and Dr. Finney in September, 2000 that Dr. Boiko per the Dermatology Department's mandate, should have performed diagnostic patch tests in 1999. (PPA, Exhibit 2, Enclosure 6, Memo from J. Finney to G. White, October 20, 2000, pages 5-6 at pp. 125-126 and Memo from J. Finney to G. White, December 18, 2000, pp. 13-14, ¶ 4 at pp. 77-78, and Exhibit No. 3).

Since Dr. Boiko dishonestly denied the test, plaintiff reasonably concluded that she would dishonestly interpret the test's results, as patch test positive and negative results are visually interpreted by the examining physician without laboratory corroboration.

Moreover, plaintiff's Primary Care Physician recommended on three (3) occasions that she not return to Dr. White. (PPA, Exhibit No. 2, Encl. 7E at p.1; Encl. 7F at p. 3; Encl. G at p. 4 at p. 151, and Exhibit No. 3) Plaintiff's RFA states that the Dermatology Department Chief, Dr. White, refused to order the patch test in September, 2001. (PPA, Exhibit No.2, Enclosure 7B, page 4, bullets 6 & 7 at pp. 136-137) Nurse Consultant Gallagher stated that she had not and would not read RFA, Enclosure No. 7 insuring defendants' willful blindness to these facts.

Both DMHC and Kaiser expressly state in Exhibits Nos. 1 and 2 that the Doctrine of Informed Consent is the patient's right to exercise at will. However, DMHC and Kaiser have conspired to intentionally obstruct a DMHC law enforcement order mandating that Kaiser cease and desist its violation of plaintiff's rights. Their conspiracy has now evolved into a cover-up of their obstruction.

Indeed, defendants demurrer fails to state any mandatory duties imposed by law that define any limitations to their discretion. Defendants' demurrer is baseless both in fact and in law and demonstrates an invincible malignity which, if sustained in full or in part, will continue DMHC's unconscionable and intentional violation of law and abuse of discretion that is and will continue to be injurious to plaintiff and the public health and safety.

II. FACTUAL BACKGROUND

Defendants' statements in their "FACTUAL BACKGROUND" section (DPA, pp. 2-4) fail to address the central proposition of plaintiff's Petition, i.e.,

If managed care patients are coerced into waiving their right to speak what they think about their legal rights and are retaliated against for enforcing their rights, managed care patients have no rights.

Cover-Up Commences with "Little Lie" Defenses

Defendants raise red herrings to distract the Court from the Petition's central proposition, falsely claiming that plaintiff's "contentions are difficult to discern" (DPA, page 2, line 9) and then intentionally misstating the contentions by selecting facts, misinterpreting these facts and forming outrageous conclusions to cover up their obstruction of the DMHC nurse's law enforcement order.

Defendants have produced no evidence or statements under oath that confirm facts stated by their three attorneys that Kaiser acceded to a DMHC request to discuss her "purported" rights and that "the HMO Help Center obtained an agreement from Kaiser to the discussion of contractual promises Mrs. Finney desired prior to treatment and a referral to a third dermatologist." (DPA, page 4, lines 16-18.)

If such documentation exists, it would have been produced as proof. Rather, DMHC's reference to Kaiser's acceding to plaintiff's request is a tacit admission of Nurse Gallagher's faxed order, heretofore unacknowledged, the enforcement of which was obstructed.

If the Court initiates the investigation requested in plaintiff's Prayer for Relief, the Court would be able to authenticate the referenced agreement, if any, between defendants and Kaiser addressing critical questions such as:

- Who negotiated the agreement?
- Who were the parties to the agreement?
- What were the terms and conditions of the agreement?
- On what date was the agreement made?
- Who transmitted the agreement to plaintiff and her primary care physician (PCP) and on what dates did this occur?

- What facts indicate that plaintiff refused to consider and implement the agreement?
- What facts, witnesses and documents exist to verify and authenticate defendants' responses to these questions?

Defendants' reference to "purported," i.e., illusory rights, causes plaintiff to restate her Petition's central proposition in the conditional and in two parts, i.e.:

- Do patients have the explicit "rights" that DMHC states they have in its Guide?
- If yes, then if managed care patients are coerced into waiving their right to speak what they think about their legal rights and are retaliated against for enforcing their rights, managed care patients have no rights.

The Truth

Defendants' facts regarding Kaiser's dermatology care to plaintiff are false. Defendants' facts were never revealed to her prior to their submission of their Memorandum of Points and Authorities dated December 20, 2002 in support of their demurrer. Had their facts any veracity, defendants and Kaiser would have stated them to plaintiff as reasons for denial of her RFA request in their case closure documents dated April 5, 2002 and April 30, 2002. (PPA, Exhibit No. 7 and Exhibit No. 8)

These documents set forth only defendants' "understanding." DMHC's "little lies" are a feeble attempt, in conspiracy with Kaiser, to cover up their obstruction of the written DMHC law enforcement order demanding that Kaiser physicians communicate with plaintiff regarding her rights prior to and during the course of her physician-patient relationships without coercion and retaliation.

The Big Lie

DMHC states that "even though the applicable statutes and regulations do not support Ms. Finney's demand for a meeting to discuss her legal rights and interpretations of contracts and policies, prior to a clinical appointment, DMHC's Help Center made such a request on Mrs. Finney's behalf. Kaiser acceded to it, agreeing to meet with Mrs. Finney to discuss her concerns and to make an appointment for her with a third dermatologist. Rather than proceed, Mr. Finney brought suit; she does not say why this resolution of her complaint is unsatisfactory." (DPA, page 3, lines 17 – 23)

The Big Truth

Documented facts contradict defendants' "Big Lie," i.e.:

- Marcy Gallagher's April 5, 2002 case closure e-mail to plaintiff (PPA, Exhibit No. 7) does not state that Kaiser acceded to plaintiff's "demand for a meeting to discuss her legal rights and interpretations of contract policies, prior to a clinical appointment with a third dermatologist." (DPA, page 3, lines 18-22) To the contrary, Ms. Gallagher does not mention plaintiff's "legal rights."
- Andrew George's April 30, 2002 case closure letter to plaintiff (PPA, Exhibit No. 8) does not state that Kaiser acceded to plaintiff's demand. To the contrary, plaintiff's "legal rights" are not mentioned. His letter's only reference to an agreement of any kind states:

"It is our understanding that Kaiser has agreed to meet with you to discuss your concerns involving timely access to dermatology care." (PPA Exhibit No. 8, ¶ 3)
- Indeed, Attorney George's closure letter advises plaintiff (PPA, Exhibit No. 8, ¶ 4) as follows:

"As our review of your individual complaint is complete, your file will be closed. The fact that you have submitted a complaint for review does not prevent you from pursuing, nor is it a substitute for, any other formal or informal legal proceeding or remedies that may be available to you. In order to determine the other remedies available to you, you may wish to consult an attorney for more information."
- Plaintiff took Attorney George's advice seriously and filed her Petition. Defendants now dishonestly pose themselves as bewildered as to plaintiff's reasons for filing her Petition.
- No agent of DMHC or Kaiser has ever contacted plaintiff in any manner and stated that Kaiser acceded to plaintiff's demands as stated in DPA, page 3, lines 17-23.

Public Policy Enforcement (Business & Professions Code § 2056)

On December 6, 2002, plaintiff and Dr. Finney attended joint medical appointments with Dr. Golden, their primary care physician (hereinafter "PCP") whose advocacy had been obstructed by Kaiser (PPA, Exhibit No. 2, Enclosure No. 7A at p. 132, Enclosures Nos. 7E, 7F and 7G at pages 143-152).

Dr. Golden initiated inquiry regarding plaintiff's and Dr. Finney's "dermatology status." Dr. Golden, who had coordinated the prior interactions among DMHC, Kaiser and plaintiff has no knowledge whatsoever of Kaiser's agreement allegedly acceding to plaintiff's demands as stated in Defendants' DPA.

Plaintiff and Dr. Finney responded to Dr. Golden's inquiry by disclosing and discussing plaintiff's Petition in detail and at length. They mutually concluded and agreed that unless the Court granted the relief requested, he would be unable to perform his fiduciary duty to advocate for plaintiff and Dr. Finney. Kaiser has not and will not permit him to refer them to a dermatologist who would and will agree to discuss their rights prior to entering into and during the course of the physician-patient relationships. (Exhibit No. 3, Robert D. Finney Declaration).

At that visit, Dr. Golden assumed a dermatologist's duties, performing a "punch biopsy" of a suspect growth on Dr. Finney's neck, which Dr. Finney, himself, had discovered. Dr. Golden also treated one of plaintiff's chronic dermatology conditions, which plaintiff describes in her Petition. However, Dr. Golden stated that their other conditions required treatment by a dermatologist to whom he was unable to refer plaintiff and Dr. Finney, if they continued to insist on a discussion of their legal rights as a condition of establishing and maintaining the physician-patient relationship with the specialist of their choice pursuant to Health & Safety Code § 1383.15(f). (Exhibit No. 1 at p. 13; ¶ 2-3 at line 14; ¶¶ 2-3)

Plaintiff and Dr. Finney attended a follow-up appointment with Dr. Golden on December 13, 2002. Dr. Golden stated that the pathology report on Dr. Finney's biopsy had diagnosed an advanced actinic keratosis, which he stated would have been expected to evolve into a squamous cell carcinoma that can spread (metastasize) to distant parts of the body and can be fatal.

Plaintiff, Dr. Finney and Dr. Golden again discussed and understood Dr. Golden's inability to advocate for their health care, given Kaiser's pattern of retaliation against both patients and physicians who enforce their rights as stated in Exhibit No. 1. Plaintiff, Dr.

Finney and Dr. Golden discussed and understood that such physician advocacy is a "CEM" i.e., career-ending move, at Kaiser. They agreed that, absent the Court's intervention, Kaiser would be legally and bureaucratically empowered by DMHC to continue to wrongfully interfere in the physician-patient relationship, preventing advocacy, and harming individual patients and public health and safety. (Exhibit No. 3, Robert D. Finney Declaration)

Judge Kozinsky's Bottom Line

Plaintiff refers again to U.S. Court of Appeals Judge Alex Kozinsky's unique phrasing, on another issue, that she applies to her presumption of reliance on DMHC's Patient Rights Guide and Kaiser's "Member Rights and Responsibilities:"

"Having them available for a source of wisdom is simply a fraud."

The New York Times (National Edition) December 25, 2002, p. A13

III. ARGUMENT

1. Defendants Bear a Heavy Burden on a General Demurrer

A demurrer can be used only to challenge defects that appear on the face of a complaint. For the purpose of testing the sufficiency of the pleading on demurrer, the court must accept as true all material facts properly pleaded. *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1040 (1986) (citation omitted); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 558 (1998). All facts are to be construed in the light least favorable to defendant. *Perdue v. Crocker Nat'l bank*, 38 Cal. 3d 913, 922 (1985). Whether the plaintiff will be able to prove the pleaded facts is irrelevant to ruling upon the demurrer. *Stevens v. Superior Court*, 180 Cal. App. 3d 605, 609-10 (1986). It is error to sustain a demurrer if it appears that the plaintiff is entitled to any relief under the circumstances pleaded. *Dubins v. Regents of Univ. of Cal.*, 25 Cal. App. 4th 77, 82 (1994); *Jack Heskett Lincoln-Mercury, Inc. v. Metcalf*, 158 Cal. App. 3d 38, 41 (1984). If there is a reasonable possibility that a pleading defect can be cured, leave to amend must be granted. *Platt v. Coldwell Banker Residential Real Estate Servs.*, 217 Cal. App. 3d 1439, 1444 (1990); *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Defendants' demurrer cannot be granted under these standards.

2. Plaintiff has sufficiently pleaded claims for refusal to order a health care service plan to cease and desist from interference in and destruction of the relationship of trust and

confidence between patient and professional in violation of Health and Safety Code § 1342 et seq.

In construing a statute, the Court is required to give independent meaning and significance to each word, phrase, and sentence in a statute and to avoid an interpretation that makes any part of a statute meaningless. *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1386-1387).

A right is something that can be exercised. Actual reliance occurs when a misrepresentation is "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," and when, absent such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." *Spinks v. Clark* (1905) 147 Cal. 439, 444 [82 P.45]; see also 5 *Witkin, Summary of Cal. Law* (9th ed. 1988) Torts, § 711 at p. 810.) "It is not... necessary that [a plaintiff's] reliance upon the truth of the [15 Cal.4th 977] fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." (Rest.2d Torts, § 546, com. b, p. 103.)

Moreover, a presumption, or at least an inference of reliance, arises wherever there is a showing that a misrepresentation was material. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 [94 Cal.Rptr. 796, 484 P.2d 964, 53 A.L.R.3d 513]; see also 12 Williston on Contracts (3d ed. 1970) § 1515, p. 480; Rest.2d, Contracts, § 167.) A misrepresentation is judged to be "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" (Rest.2d Torts, § 538, subd. (2)(a); see also *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 188, fn. 5 [183 Cal.Rptr. 881], and as such materiality is generally a question of fact unless the "fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." (Rest.2d Torts, § 538, com. e, p. 82.)

DMHC's Patient Guide and Kaiser's representations were, at the very least, commitments to exercise good faith and reasonable diligence to enforce plaintiff's legal rights. This good faith duty is underscored by Kaiser's contractual assumption of the duty to administer the health service plan as a fiduciary. Here there are facts to support plaintiff's

allegation that DMHC and Kaiser entered into contracts with plaintiff with knowledge that they would not comply with their own contractual representations, or with at least a reckless indifference as to whether their agents would use reasonable diligence and good faith to comply with them.

It is a reasonable inference from the documentary record before the Court that both DMHC's and Kaiser's representations were made with knowledge of their likely falsity, and in fact concealed an illegal policy or practice of conspiring to prevent managed health care patients from exercising their rights to obtain medically necessary health care benefits.

3. Plaintiff has sufficiently pleaded claims for conspiracy with a health care service plan to coerce and retaliate against physicians who "advocate for medically appropriate health care for his or her patients" in violation of §§ 510 and 2056 of the Business and Professions Code and in violation of Health and Safety Code § 1368 (e).

Plaintiff has been denied both the legislatively intended benefit of medical advocacy by her primary care physician and the benefit of medical care mandates in retaliation for refusing to be coerced by Kaiser and defendants to waive her right to unabridged speech with her physicians in the context of the traditional physician-patient relationship as guaranteed by the U.S. and California Constitutions, the California Legislature and the common law Doctrine of Informed Consent.

In *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 530 [206 Cal.Rptr. 164], the court noted that the United States Supreme Court decision in *F.T.C. v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 244 [92 S.Ct. 898, 31 L.Ed.2d 170, 179], sanctioned guidelines for construing parallel language in the Federal Trade Commission Act that stress the potential relevance of public policy. Among other things, these guidelines call for an inquiry into "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness..." [Citation]" (*People v Casa Blanca Convalescent Homes, Inc., supra*, at p. 530.) The *Casa Blanca* court concluded: "an 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*Ibid.*)

4. Plaintiff has sufficiently pleaded claims for intentional obstruction of a state law enforcement order in conspiracy with KFHP/SCPMG and Does 1 – 100 in violation of Health and Safety Code § 1386(b)(6).

Plaintiff was fraudulently induced to submit her RFA to defendants based upon the Guide's statements regarding the illegality of Kaiser's violation of her legal rights. Defendants' Guide made express promises to remedy Kaiser's violations of her legal rights which was, in essence, promissory fraud. Promissory fraud is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. "An action for promissory fraud may lie [15 Cal.4th 974] where a defendant fraudulently induces the plaintiff to enter into a contract." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [49 Cal.Rptr.2d 377, 909 P.2d 981] The elements of fraud that will give rise to a tort action for deceit are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."

Evidence of misrepresentation is plain. "[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." (*Yellow Creek Logging Corp. v Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629]) A fraudulent state of mind includes not only knowledge of falsity of the misrepresentation but also an "intent to... induce reliance" on it. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638) It can be reasonably inferred in the present case that defendants, Kaiser and the PBGH RICO Enterprise obstructed the DMHC Nurse Consultant's law enforcement order and subsequently conspired to cover-up their obstruction, after plaintiff filed her Petition.

5. Plaintiff has sufficiently pleaded claims for conspiracy with KFHP/SCPMG and Does 1 – 100 to intentionally reduce and limit health care benefits that renders the benefits illusory in violation of Health and Safety Code § 1386(b)(6) and CCR §1300.67.4(a)(3)(A).

42 U.S.C. § 1983, confers a cause of action for violations of the Constitution and federal laws. E.g. *Wright v. Roanoke Housing Authority*, 479 U.S. 418 (1987); *Maine v. Thiboutot*,

448 U.S. 1 (1980) (discussing Social Security Act). The Supreme Court has stressed that a plaintiff is required to assert a violation of a "right" not merely a violation of federal law. *Blessing v. Freestone*, 520 U.S. 329, 340 (1977) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)). To determine whether a federal law is enforceable pursuant to § 1983, the Supreme Court asks: (1) whether the statute creates an enforceable right, and (2) whether Congress has foreclosed enforcement of the statute in the enactment itself. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 508 (1990). To determine whether there is an enforceable right, the Court requires application of a three-step test:

- Was the provision in question intended to benefit the plaintiff?
- Does the provision in question contain sufficient mandatory language to create a binding obligation on the state, or does it merely express a Congressional preference?
- Is the statute's language specific enough to create an enforceable right, or is it too vague and amorphous?

Once a plaintiff satisfies the three prong test, there is a rebuttable presumption that the provision is enforceable under § 1983. *Blessing*, 520 U.S. 329 (1997). The burden then shifts to the defendant to show that Congress has foreclosed enforcement of the statute. To answer this question, the Court asks:

- Does the statute expressly foreclose enforcement through § 1983?
- Does the statute itself create a comprehensive remedial scheme that demonstrates Congress' intent to preclude the use of § 1983?

Individual defendants can be held liable if a jury could reasonably find that they "created a policy or custom under which unconstitutional practices occurred or [that they] allowed the continuance of such a policy or custom." *Colon v. Coughlin*, 58 F. 3d at 873. While liability may not be established against defendants simply because they were "policy makers" at the time unconstitutional acts were committed, see *Cuoco v. Morit Sugu*, 222 F. 3d 99 (2d Cir.2000), where unconstitutional acts are the result of a policy promulgated by defendants, a valid § 1983 may lie.

It is not in dispute that defendants Zingale and George are responsible for DMHC policy and enforcement. Their regulations, policies and procedures must yield to the law

and not provide protection of a lesser scope than the law requires, rendering plaintiff's rights and health care contract benefits illusory.

The Supreme Court of California issued an opinion regarding free speech rights to criticize government and government officials in *Stainstree v. Atkinson*, § 102722, Ct.App 2/6 B143501, Ventura County Super. Ct. No. 97C010156. The Court found at p.6 that:

"The right to criticize the government and governmental officials is among the quintessential rights Americans enjoy under the First Amendment to the United States Constitution and Californians enjoy under the California Constitution, Article I, Section 2. "Speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.)

The conspiracy to retaliate against plaintiff for protected speech by denying her legal rights and the benefit of laws intended to provide access to medically necessary health care benefits is plain on its face. Defendants have not denied the conspiracy's existence. The Business Roundtable Health Care Policy Principles oppose patient rights laws and the enforcement of those laws. (Plaintiff's Petition pp. 29-32) Defendants have invited PBGH (an appendage of the Business Roundtable) and Kaiser to wrongly influence and control DMHC's grievance and appeal process. (Plaintiff's Petition Exhibit Nos. 1 and 2 and PPA pages 8-9) Defendants' Points and Authorities page 1, line 24 state for the first time to plaintiff and the public that California managed health care patients have no legal rights whatsoever. The conspiracy has succeeded and will continue but for the Court's injunction. The RICO Enterprise's participants will be unjustly enriched.

Conclusion

Having DMHC audit Kaiser is like having Arthur Anderson audit Enron. Patients' investment in the exercise of their health care rights and the benefits those rights guarantee is worthless. DMHC states that patients have no rights. Since their rights are illusory, their health care benefits are rendered illusory.

Plaintiff's clear and beneficial interest in the recognition of and honest enforcement of her legal rights can only be obtained by granting her Petition. Plaintiff's health and safety and that of all California managed health care patients is dependent upon the Court's denial of defendants' demurrer and upon granting the relief requested in her Petition, i.e.: to declare plaintiff's legal rights, to enjoin defendants' illegal conduct, and to punish and prevent its likely repetition that evades review.

At present, dermatology care has been denied. It is reasonable to infer that all future medical care will be denied in retaliation, unless plaintiff submits to State sanctioned coercion to waive all her legal rights. If plaintiff consents to waive her rights and to be coerced to establish physician-patient relationships with dishonest doctors in violation of the Doctrine of Informed Consent, defendants will again blame the inevitable harm on plaintiff for consenting to their medical care practices that harmed her, albeit through unconscionable coercion and retaliation. Defendants and their co-conspirators have retaliated against plaintiff for the exercise of her right of Constitutionally protected speech and other legal rights that have exposed the ill preparedness and malignity of vital public health and safety institutions.

DATED: January 10, 2003

Jacquelyn Finney

In Pro Per

VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 10, 2003 in Encinitas, California.

Jacquelyn Finney _____

Declarant

Signature

