OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

MARA W. ELLIOTT
CITY ATTORNEY

CIVIL LITIGATION DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

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Re: Request for Publication Pursuant to California Rules of Court, rule 8.1120(a)
Futterman et al. v. Kaiser Foundation Health Plan, Inc.
First District Court of Appeal, Division 4, Case No. A162323
Alameda County Superior Court No. RG13697775

As the City Attorney of San Diego, I respectfully request that this Court consider certifying for publication its recent decision in *Futterman v. Kaiser Foundation Health Plan* (A162323, filed April 25, 2023). The *Futterman* decision meets several of the criteria for publication as outlined in California Rules of Court, rule 8.1105(c).

The Court's opinion holds in part that plaintiffs' Unfair Competition Law (UCL) class action, which relies upon the Mental Health Parity Act (a portion of the Knox-Keene Act) as a predicate, does not interfere with the Legislature's regulation of health care delivery systems under the Knox-Keene Act and is therefore distinguishable from cases in which trial courts abstained from hearing UCL cases. More specifically, the opinion finds that unlike the published decisions in *Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, and *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, "a finding here that the Plan violated the Parity Act would not interfere with the DMHC's regulatory authority." (A162323 at p. 17.) The opinion distinguishes these cases by noting that evaluation of "whether the [health care] plan is actually providing coverage for the treatment of severe mental illness in the same manner that it provides coverage for physical illness" does *not* require the trial court to interfere with or supplant the regulatory authority of the Department of Managed Health Care. (*Id.*)

The opinion is particularly well suited to publication because it applies California's existing framework for abstention as applied to UCL/Knox-Keene cases to a set of facts significantly different from those stated in existing published opinions. (CRC, Rule 8.1105(c)(2).) The *Futterman* decision also meets the criteria for publication because it explains an existing rule of law. (CRC, Rule 8.1105(c)(3).)

Existing published authority that examines the abstention doctrine as applied to UCL cases based on violations of the Knox-Keene Act is split. Some decisions uphold the application of judicial abstention to dismiss UCL claims based on highly technical and specialized Knox-Keene Act provisions, holding that it would be inappropriate for a court to determine things like (1) "what criteria to use in defining a de facto health care service plan" (A162323 at p. 16, citing *Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 133); (2) "minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities," (*Alvarado v. Selma Convalescent Hosp.* (2007) 153 Cal. App. 4th 1292, 1304); or (3)

to "determine the appropriate levels of capitation and oversight" required when transferring risk to an intermediary. (*Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal. App. 4th 781, 796.)

Other decisions have found the application of abstention inappropriate where, for example, the plaintiff is enforcing the Knox-Keene Act's (1) prohibition on post-claims underwriting (*Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal. App. 4th 1237, 1258 ; see also *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.* (2008) 160 Cal. App. 4th 528); (2) requirement to reimburse noncontracting providers for emergency medical service (*Bell v. Blue Cross of Cal.* (2005) 131 Cal. App. 4th 211); or (3) the Mental Health Parity Act, even where the trial court might be required to determine "what treatments were 'medically necessary.'" (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 499, cited in A162323 at p. 9.) This latter line of cases, like this Court's decision in *Futterman*, emphasizes that the courts' normal role in interpreting statutes and applying those statutes to facts related to health insurance coverage does not improperly invade the role of the DMHC. (A162323 at p. 16-17.)

In particular, the *Futterman* decision greatly clarifies the dividing line between cases where abstention is permissible and cases where trial courts should not abstain. In rejecting Kaiser's argument that abstention should apply to bar plaintiffs from enforcing the mental health parity requirement in the Knox-Keene Act, the Court states that abstention or similar doctrines do not apply in situations where plaintiffs do not seek to disrupt the ability of health insurance plans to "contract with providers and manage care for [their members]," but instead "simply assert that [health insurance plans] cannot do so in a manner that undermines" statutory mandates, including those that require parity for mental health treatment. (A162323 at p. 16-17.) This common-sense distinction between the hyper-specific and operational statutory predicates disallowed in *Hambrick* and its brethren and the broader and more easily parsed requirements at issue in *Futterman*, *Arce*, and related cases has heretofore been missing from cases evaluating the interaction of abstention doctrine, Knox-Keene, and the UCL. As both public entity and private individuals increasingly attempt to hold health insurers accountable for violations of clear mandates of the Knox-Keene Act, the *Futterman* decision provides much-needed guidance for trial and appellate courts.

The opinion is also particularly well suited to publication because it addresses an area of high public interest. (CRC, Rule 8.1105(c)(6).)

The publication of the *Futterman* decision is appropriate, as it is situated in an area of immense public interest—consumer protection in the near-universally used area of health insurance. Indeed, even a cursory inquiry as to press coverage of Kaiser's alleged violations of the mental health parity laws—let alone insurance coverage of mental health care more broadly—reveals dozens of recent articles that indicate public interest in the topic (and in this case in particular).

In short, publication of the *Futterman* decision would add great clarity to the application of abstention doctrine to the growing number of UCL cases brought with Knox-Keene Act predicates, and would also satisfy the public interest in cases related to the enforcement of mental health care parity laws.

Accordingly, I respectfully request that this Court publish its opinion in this matter.

Sincerely yours,

MARA W. ELLIOTT, City Attorney

By

Mara W. Elliott
City Attorney