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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

MICHAEL D. MYERS, M.D.  
Petitioner,

vs.

STATE BOARD OF EQUALIZATION; DAVE  
JONES, INSURANCE COMMISSIONER OF  
THE STATE OF CALIFORNIA; BETTY T. YEE,  
CONTROLLER OF THE STATE OF  
CALIFORNIA; DOES 1 through 10, Inclusive,  
Respondents.

KAISER FOUNDATION HEALTH PLAN, INC.,  
Real-Party-in-Interest.

Petitioner, MICHAEL D. MYERS, M.D. ("Myers" or "Petitioner"), an individual  
taxpayer, resident and citizen of the State of California, brings this taxpayer lawsuit to compel  
the Respondents State Board of Equalization ("SBE"), the Commissioner of the California

FILED  
Superior Court of California  
County of Los Angeles

SEP 28 2015

Sherri R. Carter, Executive Officer/Clerk  
By M. Soto, Deputy  
Moses Soto

D-82

ROBERT O'BRIEN

CASE NO. ~~BC596085~~

BS157999

STATUTORY AND COMMON LAW  
TAXPAYER VERIFIED PETITION  
FOR WRIT OF MANDAMUS AND  
DECLARATORY RELIEF

CIT/CASE: BS157999  
LEA/DEF#: 880096  
RECEIPT #: CCHS2880096  
DATE PAID: 09/28/15 3:05 PM  
PAYMENT: \$435.00  
RECEIVED:  
CHECK: \$35.00  
CASH: \$0.00  
CHANGE: \$0.00  
CRD: \$0.00

STATUTORY AND COMMON LAW TAXPAYER VERIFIED PETITION FOR WRIT OF MANDAMUS  
AND DECLARATORY RELIEF

1. Department of Insurance, Dave Jones ("Commissioner"), and the Controller of the State of  
 2. California, Betty T. Yee ("Controller"), to perform their respective ministerial duties mandated  
 3. by the California Constitution and Revenue and Taxation Code; as set forth herein, regarding the  
 4. determination, assessment, and collection of the gross premium tax ("GPT") as regards Real-  
 5. Party-in-Interest, Kaiser Foundation Health Plan, Inc. ("Kaiser").

6. Myers, individually and in a representative capacity on behalf of citizens and taxpayers of  
 7. the State of California, alleges as follows:

### 8. PARTIES

10. 1. Myers is an individual taxpaying resident and citizen of the State of California  
 11. acting individually and in a representative capacity on behalf of other taxpaying residents and  
 12. citizens of California who brings this action, as specifically alleged below, to compel the  
 13. performance of public duties that California law specifically mandates.

14. 2. The SBE is an agency of the State of California that assesses and collects various  
 15. taxes, including the gross premium tax.

16. 3. Dave Jones ("Jones" or "Commissioner") is the Commissioner of the California  
 17. Department of Insurance.

18. 4. Betty T. Yee ("Yee" or "Controller") is the Controller of the State of California  
 19. and in that capacity is also a board member of the State Board of Equalization.

20. 5. Kaiser is the largest health care plan in the State of California. Kaiser collects  
 21. over \$38,000,000,000 in annual premiums to provide health care coverage to over 7,000,000  
 22. individuals. Although it is currently deemed a 501(c)(3) charitable organization, as of June 2015  
 23. Kaiser has accumulated well over \$21,000,000,000 more in assets than it is required to keep as  
 24. reserves. Yet, Kaiser pays no California state income tax or federal income tax. Kaiser is  
 25. incorporated as a California nonprofit, public benefit corporation, licensed as a Knox-Keene  
 26. health care service plan under the regulatory authority of the Department of Managed Health Care  
 27. ("DMHC"), and is a federally qualified Health Maintenance Organization ("HMO"). In reality,  
 28. Kaiser offers hospital and physician health care programs through a modified HMO structure.

1 Kaiser's compensation arrangements with the hospitals and physician practices that provide the  
2 medical care to Kaiser members include indemnity (insurance) and capitation (direct service)  
3 payments. Although Kaiser designates its health care service products as HMOs, the vast  
4 majority of Kaiser's claim payments are traditional insurance indemnity payments for medical  
5 charges incurred by its members.

6 6. The true names and capacities, whether individual, corporate, associate, or  
7 otherwise of Respondents Does 1 through 10, inclusive; are unknown to Petitioner at this time,  
8 and Petitioner therefore sues said Respondents by such fictitious names. Petitioner will ask leave  
9 of the Court to amend the complaint to allege their true names and capacities when ascertained.  
10 Said DOE Respondents are sued as principals and all of the acts performed by them as agents,  
11 servants, and employees were performed within the course and scope of their authority and  
12 employment. Said Respondents are responsible, in whole or in part, for the conduct alleged  
13 herein to the detriment of Petitioner and similarly-situated California taxpayers, as alleged  
14 herein.

#### 15 16 **STANDING**

17 7. Myers brings this taxpayer mandamus action under both common law and  
18 pursuant to California Code of Civil Procedure section 526a. Myers seeks to measure the  
19 performance of the SBE, the Commissioner, and the Controller in the identification, assessment,  
20 and collection of the GPT as it relates to Kaiser, measured against legal standards contained  
21 within the California Constitution and various California Revenue and Taxation statutes. Myers  
22 has a beneficial and justiciable interest as a California resident and taxpayer in uncollected tax  
23 monies belonging to the State of California.

24 8. The issue of Kaiser's liability as an "insurer" of medical care whose interests  
25 would be affected by any consequent application of the constitutionally mandated GPT renders  
26 Kaiser an indispensable party to these proceedings under section 389 of the California Code of  
27 Civil Procedure.

28 ///

## JUSTICIABILITY

9. The authority for the GPT is found in the California Constitution, Article XIII, Section 28(c) that states in part:

In the case of an insurer not transacting title insurance in this state, the "basis of the annual tax" is, in respect to each year, the amount of gross premiums, less return premiums, received in such year by such insurer upon its business done in this state, other than premiums received for reinsurance and for ocean marine insurance.

10. Subsection (f) of that Constitutional provision states: "The tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property" with certain limited exceptions, including real estate taxes.

11. Subsection (d) of that Constitutional provision states: "The rate of the tax to be applied to the basis of the annual tax in respect to each year is 2.35 percent."

12. Subsection (h) of that Constitutional provision states: "The taxes provided for by this section shall be assessed by the State Board of Equalization."

13. The GPT is designed to approximate the volume of business done in the state, and thus the extent to which insurers have availed themselves of the privilege of doing business in California. There is no constitutional provision providing for any exemption, charitable or otherwise, from payment of the GPT.

14. Article I, Section 26 of the California Constitution states in part: "The provisions of this Constitution are mandatory and prohibitory" and, as such, are deemed to be self-executing. Under that Constitutional provision all branches of government are required to comply with constitutional directives, including those within the GPT constitutional provision.

15. California taxpayers have a justiciable interest in money belonging to the state, "whether the money is in the treasury ... or whether the money is in the hands of a third person but belongs to the state." (*Farley v. Cory* (1978) 78 Cal.App.3d 583, 589.) Furthermore, premium tax liability mandated by the California Constitution is not prejudiced by economic scare tactics, politics, or lobbying efforts of those subject to the tax. Rather, it is a function of the nature of the products that Kaiser sells. "State courts are the principal expositors of state

1 law.” (*Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 620.)

2 16. This taxpayer action seeks to enforce the government’s duty to collect funds due  
3 the State under the GPT provisions of the California Constitution and various statutes. Petitioner  
4 specifically does not seek in this action to prevent or enjoin the collection of any tax paid, or  
5 payable, to any government entity by Kaiser. The California Constitution, Article XIII, Section  
6 32 and the California Revenue and Taxation Code provide the mechanisms for the continued  
7 collection of taxes during litigation and for any refunds of illegal taxes Kaiser might seek for any  
8 corporate (non-GPT) tax previously paid.

### 10 GENERAL ALLEGATIONS

#### 11 A. THE CRITERIA OF AN “INSURER” FOR PURPOSES OF THE GROSS 12 PREMIUM TAX.

13 17. Tax liability, including premium tax liability, is based on an “incidence of tax”  
14 analysis, not regulatory status. (*Flynn v. San Francisco* (1941) 18 Cal.2d 210, 214 [“The  
15 character of a tax must be determined by its incidents and from the natural and legal effect of the  
16 language employed in the act.”]) Here, the GPT is an excise tax. The “incidence” of an excise  
17 tax is the particular activity that is subject to the tax. In this case, that activity is Kaiser’s receipt  
18 of gross premiums from its members in exchange for providing indemnity for future contingent  
19 medical costs attributable to those members.

20 18. California’s GPT applies to “insurers.” The GPT constitutional provision defines  
21 an “insurer” as “includ(ing) insurance companies or associations...” and defines “companies” to  
22 “include persons, partnerships, joint stock associations, companies and corporations” (Cal.  
23 Const., Art. XIII, §28(a).)

24 19. The California Supreme Court has turned to the California Insurance Code  
25 definition of “insurance” (“...a contract whereby one undertakes to indemnify another against  
26 loss, damage, or liability arising from a contingent or unknown event” Ins. Code §22) to  
27 determine the applicability of the GPT on health care transactions. (*See Metropolitan Life Ins.*  
28 *Co. v. State Board of Equalization* (1982) 32 Cal.3d 649, 654.)

20. Under California law, "insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event" (Ins. Code §22); "the person who undertakes to indemnify another by insurance is the insurer, and the person indemnified is the insured." (Ins. Code §23.)

21. The test applied by the California Supreme Court in determining whether an entity is acting as an "insurer" is to consider "the context of the plan as a whole" and "where indemnity is a significant financial proportion of the business, the organization must be classified as an 'insurer'." (*The People ex rel. Richard S.L. Roddis, as Ins. Commr. v. California Mutual Association* (1968) 68 Cal.2d 677, 683.) "We conclude *Roddis* provides the appropriate standard for determining whether an entity should be regarded as an 'insurer' for purposes of assessing the gross premium tax under Article XIII, section 28 of the Constitution." (*Myers v. State Board of Equalization et al. v. California Physicians' Service et al.* (Sept. 25, 2015, B255445) \_\_\_ Cal.App.4th \_\_\_ [finding taxpayer complaint sufficiently alleged that Blue Cross of California and Blue Shield of California, both of which are health care service plans regulated by the DMHC, are "insurers" for purposes of the GPT.]

22. The *Roddis* definition of "insurer" is not tied to whether the entity is regulated by the Department of Insurance, or like Kaiser, a health care service plan regulated by the DMHC and recognized as a federally qualified HMO. To that point, courts have recognized that the Knox-Keene Act governing Kaiser applies to insurers as well as health care service plans (*Palmer v. Superior Court*, 103 Cal.App.4th 953, 969) and that an entity may be "partly an insurer and partly a health care service plan..." (*Credit Managers Ass'n of So. Cal. v. Kennesaw Life & Acc. Ins. Co.* (9th Cir. 1987) 809 F.2d 617, 622.) The very definition of a "health care service plan" under Health & Safety Code section 1345(f) is recognized as being so broad that it "encompasses ordinary insurance as well as prepaid health care plans." (*Credit Managers, supra*, 809 F.2d at 621.) In other words, whether a company is an "insurer" for purposes of the gross premium tax is determined by what the company does, not what it calls itself or which government entity regulates it. Notably, the United States Supreme Court is in complete agreement that an HMO "provides health care, and it does so as an insurer" since "it would

1 ignore the whole purpose of the HMO-style of organization to conceive of HMOs ... without  
2 their insurance element.” (*Rush Prudential HMO, Inc. v. Moran* (2002) 536 U.S. 355, 367.)

3 23. The incidence of tax “is a familiar method of analysis in the field of taxation” and  
4 “it is the method *Metropolitan (supra)* requires us to employ” to determine premium tax liability.  
5 (*General Motors Corp. v. California State Board of Equalization* (9th Cir. 1987) 815 F.2d 1305,  
6 1310.) The incidence of tax methodology embodies the *Roddis* test and is the starting point of the  
7 premium tax analysis.

8 24. It is well-settled that health care service plans like Kaiser are engaged in the  
9 “business of insurance.” (*Smith v. PacifiCare* (2001) 93 Cal.App.4th 139, 158 [“We have no  
10 trouble also concluding that PacifiCare, as a health care service plan (or HMO), is engaged in the  
11 business of insurance.”]; California Civil Code section 3428, Note, Section 2, [“The Legislature  
12 finds and declares as follows: (1) Based on the fundamental nature of the relationships involved,  
13 a health care service plan and all other managed care entities regulated under the Health and  
14 Safety Code are engaged in the business of insurance in this state...”]. Furthermore, in  
15 analyzing the presence of the McCarran-Ferguson factors to determine whether an entity is “in  
16 the business of insurance,” the U.S. Supreme Court looks at the conduct of the party, not the  
17 state law regulating that party. (“What is more, the McCarran-Ferguson factors were developed  
18 in cases that characterized *conduct* by private actors, not state laws” and “the McCarran-  
19 Ferguson inquiry [is based on the] *conduct regulated* by the state law, rather than the state law  
20 itself.” (*Kentucky Assoc. of Health Plans, Inc. v. Miller* (2003) 538 U.S. 329, 340-341; emphasis  
21 in original.)

22 25. The United States Supreme Court recognized in *Rush, supra*, 536 U.S. at 370 that  
23 HMO-style plans include both capitation (direct service) and indemnification (insurance)  
24 elements and, as such, one “cannot checkmate common sense by trying to submerge HMO’s  
25 insurance features beneath an exclusive characterization of HMOs as providers of health care.”  
26 Rather, the Supreme Court found “that an HMO is both: it provides health care, and it does so as  
27 an insurer” (*Id.*, 536 U.S. at 367), a fact the Court found was recognized by Congress when it  
28 enacted the legislation creating HMOs, the Health Maintenance Organization Act of 1973 (*Id.*,

1 536 U.S. at 367-368). The California Supreme Court likewise observed "health care service  
2 plans were given special legislative treatment because of the direct service feature" and "only so  
3 long as the plans pursue and achieve that objective is the public assured that the protection of the  
4 Insurance Code is not necessary." (*Roddis, supra*, 68 Cal.2d at 683.) As alleged below, Kaiser is  
5 an "insurer" issuing HMO plans that contain both indemnity and modified capitation features,  
6 each of which is independently recognized by both state and federal courts as "insurance."

7 **B. KAISER IS AN "INSURER" SUBJECT TO THE GPT.**

8 26. Kaiser was established in the 1930's as a group health care plan for Kaiser Steel  
9 workers in California. In 1945, Kaiser allowed persons not employed by Kaiser Steel to join the  
10 Kaiser Health Plan. Kaiser evolved into a community health plan and received a charitable  
11 exemption from paying California income taxes in the early 1950's. Kaiser became licensed as a  
12 Knox-Keene health care service plan in November 1977 and is currently regulated by the  
13 DMHC.

14 27. Kaiser's primary operation is providing medical care coverage to over 7,000,000  
15 members in California. Kaiser charges its members monthly premiums and assumes the risk of  
16 payment for its members' medical care. Kaiser charges its members premiums greater than the  
17 actual cost of providing such health care coverage. Kaiser contracts with affiliated, but  
18 ostensibly independent, corporations that actually provide the majority of the hospital and  
19 professional medical care and services to its members. Kaiser members only contract with  
20 Kaiser itself, not any affiliated hospital or physician practice, for their medical care coverage.

21 28. Kaiser files annual financial statements with the DMHC that set forth, among  
22 other financial items, the dollar amount of payments Kaiser makes each year for the medical  
23 treatment of its members. Those claim payments are delineated by Kaiser as either "non-  
24 capitated" or "capitated" payments. The "non-capitated" payments are insurance/indemnity  
25 payments made by Kaiser for medical care rendered to its subscribers/members. Kaiser remains  
26 at all times "on the risk" for payment of its members' contingent future medical care costs,  
27 whether those costs are capitated or non-capitated, and distributes that risk amongst all of its  
28 members. As such, Kaiser is an "insurer" for GPT purposes.



29. The scope of Kaiser's traditional indemnity payments of its members' health insurance bills is evidenced by its annual financial filings with the DMHC. The relevant pages from Kaiser's annual financial statements from 2005 – 2014 depicting those insurance payments for medical care as compared to capitated payments are attached hereto as **Exhibit 1**. The chart below is a consolidation of Kaiser's annual non-capitated (insurance) and capitated medical claim payments during that 2005 – 2014 time period. The chart demonstrates that over the last ten years, Kaiser's insurance payments for its subscribers' medical care were generally more than double its capitated payments. Kaiser's predominant insurance payments under its HMO plans emphasize the fact that Kaiser is an "insurer" under the *Roddis* standard and subject to the GPT. As in *Myers, supra*, \_\_\_ Cal.App.4th \_\_\_ Kaiser receives "a substantial portion of [its] premiums each year in exchange for agreeing to indemnify [its] enrollees against a risk of loss occasioned by contingent medical expenses . . ." and therefore Kaiser is an insurer for purposes of the GPT.

<b>KAISER FOUNDATION HEALTH PLAN, INC.</b> <i>Insurance v. Capitated Medical Payments</i> <b>2005 – 2014</b>			
<b>YEAR</b>	<b>Insurance/Non-Capitated Medical Payments</b>	<b>Capitated Medical Payments</b>	<b>Total Medical Payments</b>
2014	\$ 34,245,291,000	\$ 16,312,950,000	\$ 50,558,241,000
2013	\$ 32,995,377,000	\$ 16,095,560,000	\$ 49,090,937,000
2012	\$ 31,131,310,000	\$ 15,704,212,000	\$ 46,835,522,000
2011	\$ 30,272,572,000	\$ 14,018,638,000	\$ 44,291,210,000
2010	\$ 28,326,344,000	\$ 12,887,374,000	\$ 41,213,718,000
2009	\$ 26,480,750,000	\$ 12,386,690,000	\$ 38,867,440,000
2008	\$ 25,504,946,000	\$ 11,771,574,000	\$ 37,276,520,000
2007	\$ 23,740,644,000	\$ 11,018,127,000	\$ 34,758,771,000
2006	\$ 22,651,010,000	\$ 9,575,788,000	\$ 32,226,798,000
2005	\$ 19,585,328,000	\$ 9,628,541,000	\$ 29,213,869,000

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30. Kaiser emphasizes its indemnity-based health care coverage within its modified HMO products by delineating sections within its Evidence of Coverage and subscriber contracts entitled "Benefits, Copayments, and *Coinsurance*." Kaiser also recognizes what it terms "Patient Services Revenue" consisting of traditional indemnity-based, health insurance concepts of patient "copayments, deductibles, fees, and other revenue" in its statement of operations. Patient Services Revenue is identified in the combined Statements of Operation of Kaiser and Kaiser Foundation Hospitals as the third largest revenue source. In 2013 the Patient Services Revenue to Kaiser was over \$3,800,000,000; in 2012, that revenue was over \$3,700,000,000. These copays, deductibles, and fees - hallmarks of indemnity health insurance plans - thus provide Kaiser with billions of dollars each year in additional revenue not otherwise available in a traditional HMO pure capitation plan.

31. Kaiser's indemnity features in its HMO contracts were also brought about by the Joint Marketing and Administration Agreement it had with its subsidiary, Kaiser Permanente Insurance Company ("KPIC"). Pursuant to that agreement, KPIC and Kaiser jointly offered KPIC's Exclusive Provider Organization indemnity health insurance product in conjunction with Kaiser's HMO products. The integration of traditional indemnity health insurance features by Kaiser into its HMO products was purposeful.

32. To ensure continuing coverage for enrollees in the event of insolvency, the DMHC requires a Tangible Net Equity ("TNE") calculation to be made by health care service plans within their annual financial statements filed with the DMHC. TNE is a mandatory reserve the DMHC requires health care service plans to maintain for payment of contingent future medical claims and aged, pending claims. The TNE requirement underscores the fact that there is a transfer of risk to health care service plans, including Kaiser, by their subscribers/members for the payment of future medical care. In fact, Kaiser's TNE is based upon a percentage of the non-capitated health care expenditures it makes annually, significant here since TNE is imposed by the DMHC based upon the largest dollar amount of various TNE calculation methodologies.

33. The chart below is a distillation of Kaiser's Actual TNE as compared to its Required TNE for the years 2005 – June 30, 2015 (the latest data available) based upon data

from Kaiser's Annual Statements it filed with the DMHC. Attached hereto as **Exhibit 2** are the relevant TNE pages from those Annual Statements from which the chart was derived. The difference between Actual TNE and Required TNE is what the DMHC itself terms "Excess" TNE. Kaiser's Excess TNE is also set forth in the chart below.

<b>KAISER FOUNDATION HEALTH PLAN, INC.</b> <b>TNE: Actual, Required, &amp; Excess Tangible Net Equity</b> <b>2005 – 2014</b>			
<b>YEAR</b>	<b>Actual Tangible Net Equity</b>	<b>Required Tangible Net Equity</b>	<b>Excess Tangible Net Equity</b>
2015*	\$ 23,328,802,000	\$ 1,469,603,000	\$ 21,830,700,000
2014	\$ 20,796,970,000	\$ 1,375,811,000	\$ 19,421,159,000
2013	\$ 23,015,647,000	\$ 1,325,815,000	\$ 21,689,832,000
2012	\$ 14,227,814,000	\$ 1,251,253,000	\$ 12,976,561,000
2011	\$ 12,444,619,000	\$ 1,216,903,000	\$ 11,227,716,000
2010	\$ 12,846,185,000	\$ 1,139,054,000	\$ 11,707,131,000
2009	\$ 11,787,011,000	\$ 1,065,230,000	\$ 10,721,781,000
2008	\$ 11,387,757,000	\$ 1,026,198,000	\$ 10,361,559,000
2007	\$ 13,577,305,000	\$ 955,626,000	\$ 12,621,679,000
2006	\$ 10,268,663,000	\$ 912,041,000	\$ 9,356,622,000
2005	\$ 10,778,743,000	\$ 789,413,000	\$ 9,989,330,000

34. Kaiser has been able to accumulate the extraordinary excess TNE—nearly \$22,000,000,000—depicted above as a result of unlawfully avoiding the GPT. Kaiser's excess TNE is 1485% more than DMHC requires. Furthermore, Kaiser has received "charitable" status exemptions from state and federal income taxes. However, instead of providing premium discounts to its members/subscribers or decreasing its income-generating coinsurance, fees, and deductible charges imposed on its members, Kaiser instead continues to accumulate and hoard

\* As of June 30, 2015 (the latest data available).

1 unreasonable excess TNE amounts. Furthermore, Kaiser bestows a largess on its high level  
 2 executives with non-compliant pension plans and even funds a non-compliant pension plan for  
 3 physicians employed by the medical groups contracted with Kaiser to treat Kaiser members.  
 4 Those physicians are not employees of Kaiser and the medical groups are ostensibly  
 5 independent, for-profit corporations whose only relationship with Kaiser is contractual.  
 6 Nevertheless, Kaiser currently has a \$6,000,000,000 pension liability for those purportedly  
 7 independent physicians. If that is not enough, Kaiser contractually indemnifies those medical  
 8 groups and Kaiser Foundation Hospitals, another purportedly independent charitable corporation,  
 9 with respect to their respective professional liability. Kaiser maintains the above-described  
 10 professional liability insurance, its general liability insurance, and other executive perquisites  
 11 mostly through self-insurance and two subsidiary captive insurers it caused to be domiciled in  
 12 Bermuda, outside of regulatory jurisdiction of the DMHC. The excessive reserves, lavish  
 13 executive salaries, generous pension funds, and provision of liability insurance to the  
 14 independent physicians and hospitals that provide care to Kaisers members is evidence of the  
 15 tremendous economic benefit Kaiser has received as a result of unlawfully avoiding the GPT.

#### 17 FIRST CAUSE OF ACTION

18 (Against the State Board of Equalization, Dave Jones in his capacity as Insurance  
 19 Commissioner of the State of California, Betty T. Yee in her capacity as Controller of the  
 20 State of California, and DOES 1 through 10 for Writ of Mandamus Pursuant to Both  
 C.C.P. §§ 526a and 1085, and Common Law Taxpayer Action for Adherence to Provisions  
 Within the California Constitution, Government Code, and Revenue & Taxation Code)

21 35. Petitioner incorporates by this reference the above-stated allegations contained  
 22 within Paragraphs 1 through 34, inclusive, as though fully set forth herein.

23 36. Petitioner seeks judicial intervention to measure the conduct of each of the  
 24 respondents, State Board of Equalization, Dave Jones in his capacity as Insurance Commissioner  
 25 of the State of California, Betty T. Yee in her capacity as Controller of the State of California  
 26 and DOES 1-10, against the legal standards required of those respondents, and each of them, for  
 27 the ascertainment, assessment and collection of the GPT as set forth within Article XIII, Section  
 28 28 of the California Constitution, Section 12418 of the Government Code, and Part 7 of Division

1 2 of the Revenue & Taxation Code, and to require Respondents to act in conformity with those  
2 legal requirements.

3 37. Such writ of mandate is required since Respondents have failed to ascertain,  
4 assess, and collect the GPT owed by Kaiser from the gross premiums it collected within  
5 California for health insurance products issued in this state. Such failure to assess and collect the  
6 GPT from Real Party in Interest, Kaiser, constitutes a waste of tax monies owed to the state  
7 warranting mandamus against Respondents. Since Kaiser has never filed the required GPT tax  
8 returns, it is liable for 8 years of past-due GPT payments, interest, and penalties pursuant to  
9 Sections 12432, 6591, 12258, 12633, and 12635 of the Revenue & Taxation Code.

10 38. The Commissioner is responsible for furnishing blank forms for GPT returns to  
11 insurers, but insurers are not relieved of their GPT liability if no GPT form is provided to them.  
12 (Rev. & Tax. §12304.) When an insurer fails to file a GPT return with the Commissioner, the  
13 Commissioner must either demand the insurer file such return or make an estimate of the amount  
14 of tax due for the calendar year or years in respect to which the insurer failed to file the return  
15 and propose a written deficiency assessment to the Board of Equalization setting forth the  
16 Commissioner's basis for the estimate and the details of the compilation of the tax. (Rev. & Tax.  
17 §12423.)

18 39. Kaiser has not filed any GPT return with the Commissioner within the last 8 years  
19 prior to the filing of this Petition/Complaint and during that time the Commissioner has not  
20 demanded that such GPT returns be filed or provided to the Board of Equalization with written  
21 GPT deficiency assessments for Respondents.

22 40. The Controller shall direct and superintend the collection of all money due the  
23 State, and institute suits in its name for all official delinquencies in relation to the assessment,  
24 collection, and payment of the revenue and against all debtors of the State (Cal. Gov. Code  
25 §12418), including the GPT. (Rev. & Tax. §12676.) Annually, between December 10th and 15th  
26 the Controller shall transmit to the Commissioner a statement showing the names of all insurers  
27 that failed to pay the whole or any portion of the tax that became delinquent in the preceding  
28 June. The statement shall show the amount of the tax, interest, and penalties due from each

insurer. (Rev. & Tax. §12801.)

41. During the last eight years, the Controller has not directed the collection of the overdue GPT owed by Real Party in Interest, nor instituted suit against it for the collection of the GPT, interest, and penalties owed to the state. The Controller has not transmitted to the Commissioner any statement identifying Kaiser as having failed to pay its respective GPT, penalties, and interest owed to the state during the last eight years.

42. Under the California Constitution, the GPT "shall be assessed by the State Board of Equalization." (Cal. Const., Art. XIII, §28[h].)

43. The SBE has failed to assess any GPT against Kaiser during the last eight years.

44. Petitioner seeks mandamus requiring Respondents to assess and collect such back GPT payments, plus interest and penalties, consistent with California law (*Illinois Commercial Men's Assoc. v. State Board of Equalization* (1983) 34 Cal.3d 839; Rev. & Tax. §§12432 and 12631) and determining that Respondents are not estopped from such assessment and collection of past-due GPT payments, including penalties and interest, under California law, including *United States Fidelity and Guaranty Co. v. State Board of Equalization* (1956) 47 Cal.2d 384.

45. Petitioner brings this taxpayer action since this action affects significant public interest in the enforcement of the GPT by state authorities to collect monies owed to the state. Prior to the filing of this lawsuit, Petitioner's attorneys notified the Respondents of the substance of this Petition, including facts showing that Real Party in Interest was an "insurer" for GPT purposes but that Real Party had never been assessed such taxes, in an attempt to have Respondents take action without the necessity of filing this action. Despite such notice and following a reasonable amount of time since such notification, Respondents have not taken any of the requested action, thereby prompting the filing of this lawsuit. As a result, Petitioner is entitled to an award of attorneys' fees and costs for undertaking this action as provided under all applicable California statutory and common law.

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**SECOND CAUSE OF ACTION**

**(Declaratory Relief against All Respondents)**

46. Petitioner incorporates by this reference the above-stated allegations contained within Paragraphs 1 through 45, inclusive, as though fully set forth herein.

47. An actual controversy has arisen and exists between Petitioner and Respondents, in that, as more fully set forth above, Petitioner contends that Real Party in Interest is an "insurer" for purposes of the GPT triggering the above-described constitutional and statutory duties of Respondents to assess and collect such tax from the Real Party in Interest.

48. Petitioner is informed and believes and on that basis alleges that Respondents dispute the contentions of Petitioner as described and alleged herein.

49. Petitioner seeks a judicial determination of the respective rights and duties with respect to the determination that Real Party is an "insurer" for GPT purposes requiring Respondents to perform their constitutional and statutory duties to assess and collect monies owed to the state by Real Party in Interest under the GPT.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner demands entry of judgment and relief as follows:

1. For a declaration that Real Party in Interest is an "insurer" for purposes of the GPT;

2. For a writ of mandate ordering that Respondents, and each of them, be compelled to perform their constitutional and statutory duties, as detailed above, in order to assess and collect all past-due GPT, plus interest and penalties, owed by Real Party to the State of California;

3. For Declaratory Relief as requested above;

4. For an award of attorneys' fees and costs pursuant to California law; and

5. For such other and further relief as this Court deems just.

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DATE: September 25, 2015

GIANELLI & MORRIS

By:

Timothy J. Morris  
TIMOTHY J. MORRIS

DATE: September \_\_, 2015

AJALAT, POLLEY, AYOOB & MATARESE

By:

RICHARD J. AYOOB

DATE: September \_\_, 2015

CONSUMER WATCHDOG

By:

JERRY FLANAGAN  
PAM PRESSLEY

*Attorneys for Petitioner*  
**MICHAEL D. MYERS, M.D.**



1 DATE: September 25, 2015

GIANELLI & MORRIS

2  
3 By: Timothy J. Morris  
TIMOTHY J. MORRIS

4  
5 DATE: September 28, 2015

AJALAT, POLLEY, AYOOB & MATARESE

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7 By: Richard J. Ayoub  
RICHARD J. AYOOB

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9 DATE: September \_\_, 2015

CONSUMER WATCHDOG

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11 By: \_\_\_\_\_  
JERRY FLANAGAN  
PAM PRESSLEY

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13 *Attorneys for Petitioner*  
MICHAEL D. MYERS, M.D.

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DATE: September \_\_, 2015

GIANELLI & MORRIS

By: \_\_\_\_\_  
TIMOTHY J. MORRIS

DATE: September \_\_, 2015

AJALAT, POLLEY, AYOOB & MATARESE

By: \_\_\_\_\_  
RICHARD J. AYOOB

DATE: September 25 2015

CONSUMER WATCHDOG

By: \_\_\_\_\_  
JERRY FLANAGAN  
PAM PRESSLEY

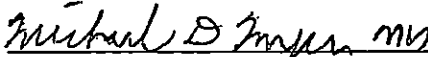
*Attorneys for Petitioner*  
MICHAEL D. MYERS, M.D.

## VERIFICATION

I, Michael D. Myers, M.D., am an individual taxpayer, resident and citizen of the State of California and the Petitioner in the above-entitled action. I have read the foregoing STATUTORY AND COMMON LAW TAXPAYER VERIFIED PETITION FOR WRIT OF MANDAMUS and know its contents. I declare that the same is true and correct of my own knowledge. As to the financial statements referenced in the Petition that Kaiser Foundation Health Plan, Inc. filed with the Department of Managed Healthcare, I am relying upon Kaiser accurately reporting such financial information.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on September 25, 2015, at Huntington Beach, California.



Michael D. Myers, M.D.  
Petitioner