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15 and all others similarly situated

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 FOR THE COUNTY OF ALAMEDA

18 CHARLES DION, on behalf of himself and all)
19 others similarly situated,)

20 Plaintiffs,)

21 v.)

22 KAISER FOUNDATION HEALTH PLAN,)
23 INC.; and DOES 1 through 20, Inclusive,)

24 Defendants.)

CASE NO.: RG14718903

Assigned to Hon. Winifred Y. Smith, D 21

Reservation No.: R-2123278

**PLAINTIFF CHARLES DION'S NOTICE
OF MOTION AND MOTION FOR FINAL
APPROVAL OF CLASS-ACTION
SETTLEMENT**

Date: January 17, 2020

Time: 11:00 a.m.

Dept.: 21

[Filed Concurrently with Declarations of
Joshua S. Davis, Erinn Zentz, and Ginella
Rivkin]

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TO THE COURT, ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 17, 2020 at 11:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Winifred Smith, presiding in Department 21 of this Court, located at 1221 Oak Street, Oakland, California 94612, Plaintiff Charles Dion (“Dion”) and his guardian ad litem, Gina Rieger (collectively referred to as the “Plaintiff”), on behalf of Dion and the Settlement Class, will move the Court for final approval of the proposed settlement of this certified class action lawsuit against Defendant Kaiser Foundation Health Plan, Inc.

This motion is based on this Notice of Motion; the Memorandum of Points and Authorities; the supporting Declaration of Joshua S. Davis, Erinn Zentz, and Ginella Rivkin; the complete records in this action; and such further oral and documentary evidence as may be presented at the hearing of this Motion.

DATED: January 2, 2020

GIANELLI & MORRIS, A Law Corporation
LAW OFFICES OF SCOTT C. GLOVSKY, APC

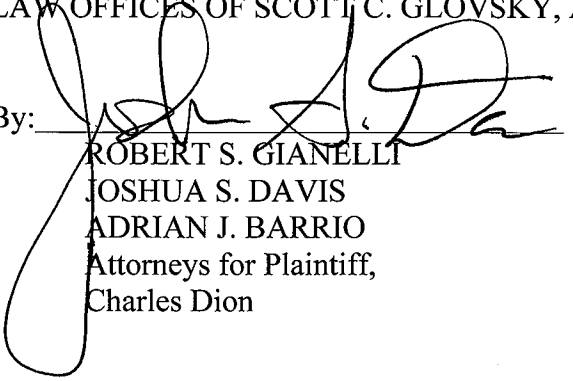
By: 
ROBERT S. GIANELLI
JOSHUA S. DAVIS
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TABLE OF CONTENTS

Pages

MEMORANDUM OF POINTS AND AUTHORITIES.....1

I. INTRODUCTION.....1

II. NOTICE WAS ADEQUATE AND EFFECTIVE AND NO OBJECTIONS
HAVE BEEN MADE..... 3

III. THE SETTLEMENT IS FAIR AND REASONABLE..... 4

 A. Strength of plaintiffs’ case and the risks of litigation..... 7

 B. The expense and duration of further litigation.....8

 C. The relief provided.....8

 D. The equitable distribution of settlement benefits.....8

 E. The extent of discovery and proceedings completed.....8

 F. Absence of “obvious defects” or indicia of unfairness.....9

 G. Experience and views of counsel.....9

 H. Reaction of the Class Members.....9

III. THE MOTION FOR ATTORNEYS’ FEES, LITIGATION EXPENSES,
AND CLASS REPRESENTATIVE INCENTIVE AWARDS SHOULD
BE GRANTED..... 9

IV. THE COURT SHOULD SET A HEARING ON KFHP’S IMPLEMENTATION
OF THE SETTLEMENT 60–90 DAYS AFTER ENTRY OF JUDGMENT.....10

V. CONCLUSION.....11

TABLE OF AUTHORITIES

| | <i>Pages</i> |
|---|--------------|
| <i>7-Eleven Owners for Fair Franchising v. Southland Corp</i> | 4, 5 |
| (2000) 85 Cal.App.4th 1135 | |
| <i>Carter v. City of Los Angeles</i> | 8 |
| (2014) 224 Cal.App.4th 808 | |
| <i>Class Plaintiffs v. City of Seattle</i> | 4 |
| (9th Cir. 1992) 955 F.2d 1268 | |

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On September 27, 2019, this Court granted preliminary approval of the class action
4 settlement (hereafter, "Settlement") of this matter entered into by the parties. In granting the
5 preliminary approval motion, this Court found that the Settlement falls within the range of
6 reasonable settlements for possible final judicial approval. In connection therewith, the Court
7 directed that notice of the Settlement be provided to Class Members through Defendant Kaiser
8 Foundation Health Plan's (KFHP) website kp.org and Kaiser Permanente Southern California's
9 and Northern California's local service area (LSA) monthly emails.

10 On October 10, 2019, the website notice of the Settlement went active on kp.org,
11 including hyperlinks to the website www.residentialtreatmentguidelinesettlement.com. On
12 November 7, 2019, the Kaiser Permanente Southern California LSA emails providing notice of
13 the Settlement and active hyperlinks to the settlement website were distributed to Southern
14 California KFHP members. On November 11, 2019, the Kaiser Permanente Northern California
15 LSA emails providing notice of the Settlement and active hyperlinks to the settlement website
16 were distributed to Northern California KFHP members. No class member has submitted an
17 objection to the Settlement.

18 There is a presumption that a settlement is fair, reasonable, and adequate when it is
19 reached through arms-length bargaining, investigation and discovery are sufficient to allow
20 counsel and the court to act intelligently, counsel is experienced in similar litigation, and the
21 percentage of objectors is small. All of these elements, except for class members' reaction, were
22 established on preliminary approval. The absence of objections to the Settlement, shown here on
23 final approval, demonstrates that the settlement is presumptively fair, adequate, and reasonable.

24 Independent of the foregoing, the showing made by the Plaintiff on preliminary approval
25 demonstrates that the Settlement satisfies the final approval test. After more than five years of
26 hard-fought litigation, the parties reached a settlement that provides substantially all of the relief
27 requested in the operative Fourth Amended Complaint (FAC). KFHP has agreed to effectuate
28 systemic reforms of its processes and guidelines for deciding when to provide covered residential

1 treatment for its members with severe mental illness, such that those processes and guidelines can
2 no longer be used to effectively exclude non-crisis residential treatment. The changes will take
3 place no later than 30 days after the date that judgment is entered in this case.

4 **II. NOTICE WAS ADEQUATE AND EFFECTIVE AND NO OBJECTIONS HAVE**
5 **BEEN MADE.**

6 As set forth in the concurrently filed Declarations of Erinn Zents and Ginella Rivkin,
7 notice has been provided to Class Members through LSA emails and kp.org in the manner ordered
8 by this Court. (See Orders Granting Preliminary Approval dated 9/27/19 and 10/6/19.)

9 On October 10, 2019, KFHP posted information regarding the Settlement on the kp.org
10 webpages for Kaiser Permanente Northern California and Southern California. (Zentz Dec., ¶ 3.)
11 On the main kp.org webpages, <https://healthy.kaiserpermanente.org/northern-california> and
12 <https://healthy.kaiserpermanente.org/southern-california>, KFHP posted an “[i]mportant legal
13 notice of settlement on residential treatment guidelines in California” under the heading
14 “Important notices.” (*Id.*, ¶ 4.) This language, was followed by an active hyperlink that read
15 “Learn more” and which took the recipient to a separate kp.org webpage that contained the
16 following language:

17 “If you are a Kaiser Foundation Health Plan, Inc. member residing in California
18 and, as of January 4, 2019, have a diagnosis of one or more severe mental
19 illnesses or a serious emotional disturbance of a child as defined by the California
20 Mental Health Parity Act, or you are a parent or legal guardian of a minor who
fits this description, you may be affected by a class action settlement. Click here
for details, including the full notice approved by the court.” (*Id.*)

21 The phrase “Click here” contained an active hyperlink that took recipients to the
22 settlement website: www.residentialtreatmentguidelinessettlement.com. (*Id.*) The settlement
23 website contains active hyperlinks to the Class Notice approved by the Court, the full Settlement
24 Agreement, the Motion for Preliminary Approval and Declaration of Joshua S. Davis filed in
25 support, the Fourth Amended Complaint, and the Order granting the Motion for Preliminary
26 Approval. (Exs. 1 and 2 to Davis Declaration.)

27 Every month, LSAs are sent to all KFHP members updating them on issues that may
28 affect them. On November 7, 2019, the LSAs for the Southern California Kaiser Permanente

1 region provided notice of the Settlement. (Rivkin Dec., ¶ 4.) On November 11, 2019, the LSAs
2 for the Southern California Kaiser Permanente region provided notice of the Settlement. (*Id.*, ¶ 5.)
3 The notice included an active hyperlink that took recipients to the kp.org class notice webpage
4 discussed above that included the hyperlink to
5 www.ResidentialTreatmentGuidelinesSettlement.com. A true and correct copy of a sample LSA
6 outreach email is attached as Exhibit A to the Declaration of Ginella Rivkin concurrently filed
7 with this Motion.

8 Class Counsel has received no objections to the Settlement or to the requested award of
9 attorneys' fees and litigation expenses. (Concurrently filed Davis Declaration in Support of
10 Motion for Final Approval, ¶ 2.)

11 **III. THE SETTLEMENT IS FAIR AND REASONABLE**

12 The Court already determined, preliminarily, that the Settlement is fair, reasonable, and
13 adequate; is free of collusion or other indicia of unfairness; and falls within the range of possible
14 final judicial approval. The points and authorities, declarations, and documents submitted in
15 support of the preliminary approval and the Court's findings and conclusions remain equally
16 applicable at this final approval stage and are incorporated into this motion by reference.

17 As on preliminary approval, the inquiry now remains essentially the same—the Court's
18 final responsibility in reviewing a proposed class action settlement is to ensure that the settlement
19 is fair, adequate, and reasonable. If so, it should be approved. *7-Eleven Owners for Fair*
20 *Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145, quoting *Dunk v. Ford Motor*
21 *Co.* (1996) 48 Cal.App.4th 1794, 1801 (internal quotations and citations omitted). "Strong judicial
22 policy ... favors settlements, particularly where complex class litigation is concerned," so long as
23 there is no indicia of collusion or unfairness among the negotiating parties. *Class Plaintiffs v. City*
24 *of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276, *cert. den.*, (1992) 506 U.S. 953.

25 In making this determination, the Court should consider all relevant factors, but
26 particularly:

27 ///

28 ///

1 (1) the strength of plaintiffs' case, (2) the risk, expense, complexity, and likely
2 duration of further litigation, (3) the risk of maintaining class action status
3 through trial, (4) the amount offered in settlement, (5) the extent of discovery
completed and the stage of proceedings, (6) the experience and views of counsel,
and (7) the reaction of the class members to the proposed settlement.

4 *7-Eleven Owners, supra*, 85 Cal.App.4th at 1146, quoting *Dunk, supra*, 48 Cal.App.4th at 1801.

5 Where a good-faith settlement is reached through arm's-length bargaining, after qualified
6 opposing counsel have properly developed their claims and defenses, and the number of objectors
7 is small, there is a presumption of fairness.

8 [A] presumption of fairness exists where, (1) the settlement is reached through
9 arm's-length bargaining. (2) investigation and discovery are sufficient to allow
10 counsel and the court to act intelligently, (3) counsel is experienced in similar
litigation, and (4) the percentage of objectors is small.

11 *7-Eleven Owners, supra*, 85 Cal.App.4th at 1046, quoting *Dunk, supra*, 48 Cal.App.4th at 1802.

12 Nothing has occurred since preliminary approval that mandates any variance from the
13 Court's prior determinations that the Settlement was reached through arm's-length negotiation,
14 without collusion or other indicia of unfairness to the class, after extensive discovery and
15 litigation. Nor does any subsequent event affect the Court's preliminary assessments that the
16 strength of the claims at issue; the risk, complexity, and likely duration of continued litigation;
17 and Class Counsel's experience and views of the settlement all support settlement approval.

18 The single enumerated settlement approval factor that could not be conclusively known at
19 the time of preliminary approval—the class members' reaction to the Settlement—is now
20 established. After receiving full and effective notice, the class members have demonstrated their
21 support for the Settlement by raising no objections.

22 Independent of the foregoing, there can be no question that the Settlement is fair and
23 reasonable. The Settlement provides comprehensive injunctive relief to the class, requiring KFHP
24 to effectuate systemic reforms of its processes for deciding member claims for residential
25 treatment. As a condition of settlement, KFHP has agreed to approve, and its exclusive medical
26 groups, TPMG and SCPMG, will adopt, revised residential treatment guidelines and processes.
27 (See Declaration of Joshua S. Davis filed in support of motion for preliminary approval, ¶ 12
28

1 ["Prelim Approval Davis Dec."]).¹

2 TPMG will adopt revised Integrated Urgent Service ("IUS") Admission and Continuing
3 Care Guidelines and IUS Admission Guidelines for Residential Treatment. The changes to
4 KFHP's IUS guidelines include removing the previous crisis-residential requirement that the
5 member be "unable to exhibit adequate behavioral control" and "unable to maintain safety of self
6 or others" to be admitted to, and for continued stay in, residential treatment. The guidelines will
7 now provide for covered residential treatment to any members when a treating psychiatrist
8 determines that a 24-hour structured environment is medically necessary and a patient has a
9 "significant dysfunction in activities of daily living due to a psychiatric disorder". (Prelim
10 Approval Davis Dec., ¶ 13.)

11 SCPMG will adopt and send out to all its psychiatry chiefs and clinicians and nonclinical
12 staff in the Utilization Management Group an SCPMG Notice that provides the revised IUS
13 guidelines to treating psychiatrists for use in admission decisions. The SCPMG Notice also
14 provides that SCPMG can continue to use InterQual[®] guidelines for continued care decisions with
15 the following provisos: (1) they should be used as guidelines only and not applied as rigid criteria
16 when evaluating the medical necessity of continued stay; (2) any doubts about the appropriate
17 level of care should be resolved in favor of the higher level of care; (3) patients should not be
18 removed to a lower level of care simply because admitting symptoms are improved unless the
19 symptom severity has improved to the point that the patient can be successfully treated at a lower
20 level of care; (4) the "Symptom" for continued stay is not the only "symptom" that qualified the
21 patient for admission. It includes any "symptom" that would qualify the patient for admission;
22 and (5) medication management is not a requirement for continued stay. The SCPMG and revised
23 IUS guidelines are collectively referred to as the "Revised Residential Treatment Guidelines".
24 (Prelim Approval Davis Dec., ¶ 14.)

25 Future requests for residential treatment will be reviewed in accordance with the Revised
26 Residential Treatment Guidelines. Indeed, the Settlement explicitly provides that Class Members

27
28 ¹ The Settlement Agreement and the revised guidelines were submitted as Exhibit A to the Motion for Preliminary Approval.

1 who are current KFHP members and who still want residential treatment may submit a new
2 request for authorization to KFHP to be evaluated under the Revised Residential Treatment
3 Guidelines. (Prelim Approval Davis Dec., ¶ 15.)

4 Class Members who are no longer covered by KFHP or who previously had residential
5 treatment while covered by KFHP and paid for it themselves do not release any individual
6 damage actions they wish to bring. Class Members in ERISA plans do not release any claims for
7 denial of benefits, including any relief that a court may order if remanding a member's claims to
8 the administrator in an ERISA case. (Prelim Approval Davis Dec., ¶ 16.)

9 As a further indication of the fairness of the Settlement, Plaintiff has provided an estimate
10 of the value of the injunctive relief in connection with Class Counsel's fee application. As
11 detailed in the expert declaration of Frank Fox, Ph.D., it is conservatively estimated that the
12 injunctive relief obtained in this case will result in between \$5.7 million and \$11 million of
13 residential treatment benefits for Class Members per year, going forward many years into the
14 future. (Declaration of Frank Fox in support of Plaintiffs' Motion for Attorneys' Fees, ¶ 12.)

15 **A. Strength of plaintiffs' case and the risks of litigation.**

16 As indicated on preliminary approval, Plaintiff believes the class claims are legally
17 meritorious and present a reasonable probability of a favorable determination on behalf of the
18 class, as is amply borne out by the agreed-upon, comprehensive systemic changes KFHP will
19 make. At the same time, a significant litigation risk—both in the trial and the appellate courts—is
20 undeniably avoided by the proposed settlement. No appellate court in this state has interpreted
21 and/or addressed the meaning of Health & Safety Code sections 1367.01 and 1363.5, which
22 require that health plans adopt written guidelines/criteria for medical necessity decisions that are
23 “consistent with sound clinical principles and processes.” KFHP has argued, and will argue, that it
24 has been in full compliance with the statute. Thus, there is a risk that Plaintiff may not sustain his
25 burden of proof on all claims at trial or on appeal.

26 KFHP has also filed a motion for decertification. Although Plaintiff believes he would
27 have prevailed on KFHP's decertification motion, there was a risk that the motions could have
28 been decided in KFHP's favor.

1 **B. The expense and duration of further litigation.**

2 Plaintiff faces further time and expense in pursuing this case through trial and appeal. The
3 case has been litigated already for more than five years, and further litigation through trial and
4 appeal would consume several more years with no guarantee of success.

5 **C. The relief provided.**

6 A settlement for injunctive relief is judged by the same standards as any other settlement
7 and will be deemed to fall within “the range of plaintiffs’ potential recovery at trial” if that relief
8 is “fair[] to plaintiffs” and addresses the class members’ “immediate and pressing concerns.”
9 *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 819-822.

10 The proposed injunctive relief easily meets this test. The object of the case has been to put
11 an end to KFHP’s practice of systematically excluding from coverage non-crisis residential
12 treatment. That has been accomplished, as explained above. After the lawsuit was filed, KFHP
13 removed the blanket exclusion for residential treatment from its EOCs. The removal of the
14 exclusion combined with the systemic reforms in the Settlement, including the reformation of
15 KFHP’s coverage guidelines, means that the proposed settlement provides substantially all of the
16 relief requested in the FAC. Importantly, KFHP can no longer limit coverage to non-crisis
17 residential treatment.

18 **D. The equitable distribution of settlement benefits.**

19 The proposed Settlement provides for an equitable distribution of benefits among the
20 Settlement Class members. There is no unduly preferential treatment for any particular segment
21 of the Settlement Class. All Settlement Class members will benefit from the changes KFHP will
22 make to its practices regarding residential treatment.

23 **E. The extent of discovery and proceedings completed.**

24 As summarized in the motion for preliminary approval, this case has been actively
25 litigated for more than five years. Among many other litigation activities, there have been 19
26 depositions, and more than 106,000 pages of documents have been produced and reviewed. A
27 class was certified after extensive class certification briefing.

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1 **F. Absence of “obvious defects” or indicia of unfairness.**

2 The litigation in this case was fully adversarial, with counsel for each side vigorously
3 advocating their clients’ respective positions, as reflected in the Court’s docket. The assistance of
4 a highly respected mediator, Edwin Oster, guiding negotiations over several sessions of
5 mediation, has ensured the absence of collusion among the parties. The named Plaintiff, Charles
6 Dion, receives the same injunctive relief as the other class members. He has also requested
7 incentive awards for himself and his guardian ad litem for their time and effort in the case as class
8 representatives.

9 **G. Experience and views of counsel.**

10 Gianelli & Morris is experienced in prosecuting insurance class actions, including class
11 actions against health plans over the denial of health benefits. Class Counsel are well -suited to
12 realistically assess the fair and reasonable value of the claims at issue. Class Counsel believe the
13 Settlement represents a fair and reasonable resolution to this matter in light of the various risks
14 and costs to the respective parties of continued litigation.

15 **H. Reaction of the Class Members.**

16 As stated above, no objections have been made to the Settlement.

17 **III. THE MOTION FOR ATTORNEYS’ FEES, LITIGATION EXPENSES, AND**
18 **CLASS REPRESENTATIVE INCENTIVE AWARDS SHOULD BE GRANTED.**

19 Plaintiff filed a motion for attorneys’ fees, litigation expenses, and class representative
20 incentive awards on October 21, 2019 that is being heard concurrently with this motion for final
21 approval.

22 With respect to attorneys’ fees, Plaintiff has established a right to them under the private
23 attorney general doctrine. This case has resulted in the enforcement of important rights affecting
24 the public interest under statutes, specifically Health & Safety Code section 1374.72 (the
25 California Mental Health Parity Act [MHPA]), and Sections 1367.01 and 1363.5. This is a
26 significant benefit bestowed on a large class of persons because it bears on claims that can be
27 submitted by all of KFHP’s covered members, and to members with ERISA plans as well. The
28 hourly rates of Class Counsel have been substantiated by the declarations of counsel, and by the

1 rulings of courts in other cases. The hours expended by Class Counsel in the case has also been
2 substantiated by declarations and is evident from the work performed in the case. The amount of
3 the requested fees, \$1,673,869.44, is approximately \$569,024.06 less than Class Counsel's
4 loadstar of \$2,242,893.50.

5 The amount of the costs requested has been substantiated by declaration as well. The costs
6 requested, \$176,130.56, as set forth in the Motion for Fees, were necessary to the tasks
7 performed.

8 With respect to incentive awards for Charles Dion and Gina Rieger, their declarations
9 adequately support incentive awards of \$17,500 each. Mr. Dion and Ms. Rieger dutifully
10 represented the class for over five years.

11 **IV. THE COURT SHOULD SET A HEARING ON KFHP'S IMPLEMENTATION**
12 **OF THE SETTLEMENT 60-90 DAYS AFTER ENTRY OF JUDGMENT.**

13 The Settlement in this case requires that KFHP implement the Revised Residential
14 Treatment Guidelines no later than 30 days after final approval.

15 In the Order granting the Motion for Preliminary Approval dated September 27, 2019, the
16 Court indicated that it would require that 10% of any fee award be kept in Class Counsel's client
17 trust account until one year after final settlement. The Order further provided that the Court would
18 release the funds after the parties submit a joint report that shows the Settlement has been fully
19 implemented.

20 Given the nature of the injunctive relief in this case, this Order should be modified so that
21 a joint report on implementation of the settlement and status conference on KFHP's
22 implementation takes place within 60-90 days to ensure that KFHP has promptly met its
23 obligations within 30 days, as required by the Settlement. Upon proof that the Settlement has been
24 fully implemented, the Court should then issue an Order releasing the remaining 10% of the fee
25 award.

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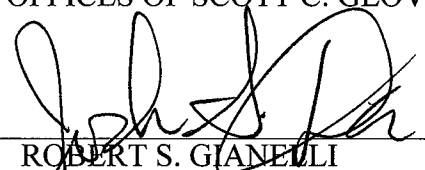
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V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue an order granting final approval of the Settlement.

DATED: January 2, 2020

GIANELLI & MORRIS, A Law Corporation
LAW OFFICES OF SCOTT C. GLOVSKY, APC

By: 
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Charles Dion

PROOF OF SERVICE

Charles Dion v. Kaiser Foundation Health Plan, Inc. / RG14718903

**STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 550 South Hope Street, Suite 1645, Los Angeles, CA 90071.

On January 3, 2020, I served the foregoing document described as **PLAINTIFF CHARLES DION'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS-ACTION SETTLEMENT** on the interested parties in this action by placing a true copy of the original thereof enclosed in a sealed envelope addressed as follows:

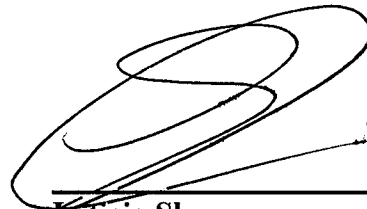
SEE ATTACHED

(By Mail) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(By Courtesy Email) I served the above-entitled document(s) by email and .pdf attachment through the office email service for Gianelli & Morris.

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

Executed on January 3, 2020 at Los Angeles, California.



Leticia Shaw

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