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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  
19 all 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-2095363

) **NOTICE OF MOTION AND MOTION**  
) **FOR PRELIMINARY APPROVAL OF**  
) **CLASS-ACTION SETTLEMENT**

) Date: August 23, 2019  
) Time: 11:00 a.m.  
) Place: Department 21

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

2 PLEASE TAKE NOTICE that on August 23, 2019 at 11:00 a.m., or as soon thereafter  
3 as the matter may be heard, before the Honorable Winifred Y. Smith, presiding in Department  
4 21 of the Superior Court of California for the County of Alameda, located at the 1221 Oak  
5 Street, Oakland, California 94612, Plaintiff Charles Dion (“Dion”), and his guardian *ad litem*,  
6 Gina Rieger (collectively referred to as the “Plaintiff”), on behalf of Dion and the Settlement  
7 Class, will move the Court for preliminary approval of the proposed settlement of this certified  
8 class action lawsuit against Defendant Kaiser Foundation Health Plan, Inc. (“KFHP”) and for  
9 related orders pertinent thereto, all as set forth in the settlement and proposed preliminary  
10 settlement approval order, served and submitted herewith.

11 Specifically, Plaintiff and the Class will move the Court for:

- 12 1. An order conditionally certifying the Class.
- 13 2. An order granting preliminary approval of the settlement of this action on the  
14 terms and conditions set forth in the Settlement Agreement and Exhibits (“Settlement”)  
15 attached as Exhibit A to the Declaration of Joshua S. Davis, filed herewith;
- 16 3. An order setting a Final Approval Hearing, to consider final approval of the  
17 Settlement, entry of a final order pursuant to the Settlement, Class Counsel’s application for an  
18 award of attorneys’ fees, administration and litigation expenses, and Class Representatives’  
19 application for incentive awards; and all other related issues which the Court deems necessary  
20 and proper;
- 21 4. An order approving the proposed form, content and manner of dissemination of  
22 the proposed notice of this class settlement (“Notice”), attached as Exhibit 4 to the Settlement;
- 23 5. An order establishing the procedures and deadlines for objecting to the  
24 Settlement, appearing at the final fairness hearing, and presenting evidence at the final fairness  
25 hearing, all as set forth in the Settlement;
- 26 6. An order retaining continuing jurisdiction over the Settlement, the settlement  
27 proceedings and settlement administration; and

1           7.       Such related orders and findings as are set forth in the Preliminary Approval  
2 Order, served and submitted herewith.

3           This motion is made pursuant to the Settlement Agreement, on the grounds that the  
4 proposed Settlement reached by the parties is an adequate and reasonable settlement of the  
5 claims in this case and falls within the range of possible final approval such that dissemination  
6 of the Notice is appropriate.

7           This motion is based on this Notice of Motion, the Memorandum of Points and  
8 Authorities, the supporting Declaration of Joshua S. Davis and the Exhibits thereto (including  
9 the proposed Settlement and Notice), the complete records in this action, and such further oral  
10 and documentary evidence as may be presented at the hearing of this Motion.

11 DATED: August 12, 2019

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

12  
13  
14 By: \_\_\_\_\_

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17 ADRIAN J. BARRIO  
18 Attorneys for Plaintiff, Charles Dion  
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## I. INTRODUCTION

After more than five years of litigation, multiple mediations, extensive discovery and investigation and numerous court battles, Plaintiff Charles Dion (“Dion”), his guardian *ad litem*, Gina Rieger (“Rieger”) (collectively referred to herein as “Class Representatives”), and defendant Kaiser Foundation Health Plan, Inc. (“KFHP”) have agreed to settle this class action for injunctive and declaratory relief case on the terms set forth in the Settlement Agreement attached as Exhibit A to the Declaration of Joshua S. Davis (“Davis Decl.”), filed herewith. Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement.

In Plaintiff's operative Fourth Amended Complaint, Plaintiff alleged that KFHP wrongfully did not cover medically necessary residential treatment for members with severe mental illness in violation of the California Mental Health Parity Act (MHPA), except in those instances where the patient is unable to maintain the safety of self or others without 24-hour therapeutic structure and support (crisis-residential). In November 2018, as modified on January 4, 2019, this Court granted certification of the following class:

All California members of the Kaiser Foundation Health Plan, Inc., as of the date of judgment in this case who have one or more of the severe mental illnesses itemized in the MHPA or a serious emotional disturbance of a child as defined in the MHPA. Excluded from this definition are members covered under federal plans, such as ERISA, FEHBA, or Medicare, and Medi-Cal plans.

(Jan 4, 2019 Order at p. 3.) The Court further certified the following common questions: (1) Does KFHP have written policies and procedures to ensure that residential treatment decisions are consistent with “criteria or guidelines that are supported by clinical principles and processes” as required by Section 1367.01, and if so, (2) do the criteria and guidelines comply with the substantive requirements of Sections 1367.01(b) and 1363.5.<sup>1</sup> (January 4, 2018 Order at pp. 3-4.)

KFHP has agreed to effectuate systemic reforms addressing these issues. Specifically, as

<sup>1</sup> Section 1363.5 requires that the guidelines be “consistent with sound clinical principles and processes.”

1 a condition of settlement, KFHP will approve, and its exclusive medical groups in Northern  
2 California, The Permanente Medical Group (TPMG) will adopt, revised versions of their  
3 guidelines for admissions to, and continued care in, residential treatment, such that those  
4 guidelines could no longer be used to effectively exclude non-crisis residential treatment.  
5 KFHP's exclusive medical group in Southern California, the Southern California Permanente  
6 Medical Group (SCPMG) will utilize the IUS guidelines for admissions to residential treatment.  
7 KFHP will also provide additional directives and instructions to its clinicians and utilization  
8 management team at SCPMG regarding the use of Interqual guidelines for decisions on  
9 continued care in residential treatment. KFHP removed its previous exclusion for non-crisis  
10 residential treatment during the litigation.

11 Plaintiff here also seeks to expand the previously certified class definition to include  
12 members in Federal plans, including ERISA. The proposed settlement class is otherwise  
13 unchanged. The Class is estimated to include more than 105,201 members per the data provided  
14 by KFHP in September of 2016. (Davis Decl. ¶ 42.)

15 At the preliminary approval stage, the Court makes only a preliminary determination of  
16 the settlement's fairness, reasonableness, and adequacy so that notice of the settlement may be  
17 given to the class and a fairness hearing may be scheduled to make a final determination about  
18 the settlement's fairness. In so doing, the Court simply reviews the settlement to determine that it  
19 is not collusive and, taken as a whole, is fair, reasonable, and adequate to all concerned.

20 The proposed Settlement easily meets this standard. It is the product of extensive, arm's-  
21 length negotiations between the parties, was assisted by an experienced, well-respected mediator,  
22 and will fairly resolve this case. Indeed, the settlement achieves practically all of the injunctive  
23 relief sought in the operative pleading.

24 Plaintiff therefore respectfully requests that the Court enter the [Proposed] Order  
25 Granting Motion for Preliminary Approval of Class Action Settlement, direct issuance of Notice  
26 of Proposed Settlement of Class Action and Final Approval Hearing to the Identified Class  
27 Members, and set a Final Approval Hearing to consider whether to grant final approval of the  
28 Settlement, and the motion by Plaintiff and Class Counsel for an award of attorneys' fees and

1 expenses and incentive awards for the Class Representatives.

## 2 **II. SUMMARY OF THE LITIGATION**

### 3 **A. Litigation in the case before the settlement.**

#### 4 **1. The causes of action alleged and their factual and legal basis.**

5 This case arises from allegations that KFHP engaged in practices that violate the MHPA,  
6 as well as sections 1367.01(b) and 1363.5. The MHPA requires that health plans cover all  
7 medical necessary treatments for members of any age with a severe mental illness, as well as  
8 children with a serious emotional disturbance. The MHPA defines “Severe mental illness” to  
9 include nine enumerated illnesses: (1) Schizophrenia; (2) Schizoaffective disorder; (3) Bipolar  
10 disorder (manic-depressive illness); (4) Major depressive disorders; (5) Panic disorder.; (6)  
11 Obsessive-compulsive disorder; (7) Pervasive developmental disorder or autism; (8) Anorexia  
12 nervosa; and (9) Bulimia nervosa.

13 The operative Fourth Amended Complaint names Charles Dion as putative class  
14 representatives and asserts class claims for violation of the Unfair Competition Law (Bus. &  
15 Prof. Code section 17200) and declaratory relief. Plaintiff alleges that KFHP, in violation of  
16 the MHPA, does not cover medically necessary residential treatment, except in those instances  
17 where the patient is unable to maintain the safety of self or others without 24-hour therapeutic  
18 structure and support (crisis-residential). Plaintiff alleges that KFHP does this through an  
19 explicit exclusion for residential treatment, except for crisis residential, and through written  
20 guidelines. Plaintiff requested injunctive and declaratory relief that would require KFHP to  
21 stop violating the MHPA.

#### 22 **2. Key court rulings; investigation and discovery.**

23 After over five years of litigation, the docket amply reflects that this case has been hard  
24 fought from the outset, both in law and motion and discovery, and thoroughly investigated.  
25 Class Counsel’s declaration confirms this. (Davis Dec., ¶¶ 7-30.)

26 Plaintiff’s original Complaint was filed on March 25, 2014. KFHP subsequently filed a  
27 series of pleading challenges to this case. Eventually, Plaintiff filed the operative pleading, the  
28 Fourth Amended Complaint, on September 14, 2015. KFHP filed an Answer on November 30,



1 2015. On December 11, 2015, the Court entered an Order consolidating the *Dion* case with a  
2 related case, *Futterman v. Kaiser Foundation Health Plan, Inc.*, Case No. RG 1369775  
3 (*Futterman* Action) for purposes of discovery and class certification. (Davis Dec., ¶ 8.)

4 During and subsequent to the pleading challenges, Plaintiff served KFHP with multiple  
5 sets of production requests, form interrogatories, special interrogatories and requests for  
6 admissions. (Davis Dec., ¶ 9.) Plaintiff also subpoenaed documents from both TPMG and  
7 SCPMG. KFHP, TPMG and SCPMG produced about 97,216 pages of documents prior to  
8 certification. (Id.) These documents included, among other things, the written guidelines used  
9 by both SCPMG and TPMG to make residential treatment decisions for members with mental  
10 illness, and extensive emails and other documents relating to KFHP's practices in regards to  
11 residential treatment, grievance files and internal data on residential treatment. (Id.)

12 In addition to serving written discovery, Plaintiff took the depositions of KFHP and  
13 medical group personnel regarding their guidelines, procedures, and practices for providing  
14 residential treatment for members with mental illness. (Davis Dec., ¶ 10.) These included: (1)  
15 Anita Holloway-Hammond, KFHP's Senior Manager for Benefit Interpretation and  
16 Consulting, whom KFHP designated as its person most qualified (PMQ) on its guidelines,  
17 practices, and procedures for covering residential treatment; (2) Dr. Stuart Buttlair, the  
18 Chairman of the Integrated Urgent Services, a joint KFHP/TPMG committee that among other  
19 things, promulgates written guidelines for KFHP Northern California for when patients should  
20 be placed in different levels of care, including residential treatment; (3) Dr. Judith Waxman,  
21 SCPMG's regional director of psychiatry utilization, who was in charge of revising SCPMG  
22 guidelines and procedures for residential treatment from mid 2015 onward; (4) Dr. James  
23 Guadet, SCPMG's Chief of Service for the Department of Psychiatry and Addiction Medicine  
24 in the San Diego service area, (5) Dr. Donald Mordecai, the Chief of Psychiatry for TPMG, (6)  
25 Dr. Nolan Herman Thompson, Regional Chief for Psychiatry for SCPMG; (7) Dr. Mason  
26 Spain Turner, TPMG's director of Outpatient Mental Health and Addiction Medicine for the  
27 Regional Mental Health Administration; (8) Aja Bryant, a residential care case manager for  
28 SCPMG, whose testified regarding how the Interqual guidelines for residential treatment were

1 used at SCPMG; and (9) Dr. Peter Cohen, M.D., Charles Dion's treating psychiatrist at TPMG.  
2 (Id.) Numerous other KFHP personnel were deposed. (Id.)

3 The discovery showed that from 2009 through July 2015, KFHP's EOCs expressly  
4 excluded from coverage medically necessary residential treatment, except for short-term crisis  
5 stabilization, which KFHP and its exclusive medical groups conceded was typically two weeks  
6 or less. (Davis Dec., ¶ 11.) On or about that time, the exclusion was removed the EOCs. (Id.)

7 The discovery, however, also showed that various written guidelines for when to provide  
8 covered residential treatment had not been revised to reflect changes in the EOCs, and that the  
9 guidelines and/or processes were not within general standards of care for determining non-crisis  
10 residential treatment. (Davis Dec., ¶ 12.) For instance, the two pertinent IUS guidelines for  
11 Northern California entitled the "IUS Admission and Continuing Care Guideline" and the  
12 "Admission Guidelines for Residential Treatment" required the patient be "unable to exhibit  
13 adequate behavioral control" **and** "unable to maintain safety of self or others" to be admitted to,  
14 and for continued stay in, residential treatment. KFHP testified in deposition that the criteria in  
15 these guidelines were appropriate for short-term crisis residential only. (Id.)

16 With respect to SCPMG, in October 2015 it centralized and began to use the Interqual  
17 guidelines, which are promulgated by a third-party vendor, for continuing care residential  
18 treatment reviews. (Davis Dec., ¶ 13.) SCPMG did not adopt any guidelines for initial admission  
19 determinations. (Id.)

20 On June 15, 2018, Dion filed a motion for class certification. Dion sought to certify his  
21 claim that KFHP violated and continues to violate the MHPA by failing to cover residential  
22 treatment for mental illness, except for short-term-term crisis residential treatment. Dion  
23 submitted an expert declaration regarding the various guidelines used by KFHP, TPMG and  
24 SCPMG for residential treatment. (Davis Dec., ¶ 14.)

25 KFHP vigorously opposed class certification, challenging virtually all of the class  
26 elements in its opposition. Specifically, KFHP argued that the putative class was not  
27 ascertainable, common questions did not predominate, the class action was not superior, Dion's  
28 expert lacked any foundation for his opinions, Dion was not typical and adequate, and that the  
Court should abstain from the deciding the issues raised in the lawsuit because they were the

1 subject of a DMHC administrative enforcement action. (Davis Dec., ¶ 15.)

2 The Court held a hearing on Plaintiff' motion for class certification on October 12, 2018.  
3 On November 16, 2018, the Court entered an order conditionally granting Dion's motion for  
4 class certification, finding the class sufficiently numerous and ascertainable. (See Order re Class  
5 Certification dated 11/16/18.) The Court further held that common issues of fact and law  
6 predominated. The Court also rejected the abstention argument on the grounds there was no  
7 indication the DMHC was pursuing oversight as to the residential treatment guidelines. Finally,  
8 the Court found that while Dion was typical, he was inadequate acting alone, and that his  
9 appointment as class representation was on the condition that his mother, Gina Rieger, apply for  
10 and be appointed his guardian *ad litem*, to serve together with him as class representative. The  
11 Court requested additional briefing on the class definition, scope of class claims, and class  
12 notice.<sup>2</sup> (Davis Dec., ¶ 16.)

13 The Court subsequently appointed Ms. Rieger as guardian *ad litem* on November 29,  
14 2018. KFHP objected to the appointment. The Court issued a supplemental order overruling  
15 objections on December 4, 2018.

16 On December 10, 2018, the Court held that no class noticed was required because the  
17 action sought only injunctive and declaratory relief. (See Court Order dated 12/10/18.) On  
18 January 4, 2019, the Court issued a further Order regarding the class and claim definitions. (See  
19 Court Order dated January 4, 2019.) The Court also issued an Order severing the *Dion* case  
20 from the *Futterman* case. (Id.)

21 Following the grant of class certification, the parties proceeded with additional merits  
22 discovery and motions. Plaintiff served additional inspection demands, requests for admission  
23 and form interrogatories. KFHP produced more than 8,000 pages of additional documents.  
24 (Davis Dec., ¶ 23.)

25 KFHP also filed a motion for summary judgment on November 21, 2018, which  
26 asserted, among other things, that Dion could not seek the requested injunctive and declaratory

27  
28 <sup>2</sup> The Court denied class certification as to the *Futterman* Action, which sought to certify  
claims that KFHP violated the MHPA by failing to provide individual therapy.

1 relief because he was not subjected to the guidelines, lacked standing, and that the abstention  
2 doctrine barred the case because the DMHC in fact reviewed the residential treatment  
3 guidelines as part of a DMHC focused survey in 2018. (Davis Dec., ¶ 25.) In response, Plaintiff  
4 conducted additional discovery, including deposing Deborah Espinal, KFHP's Executive  
5 Director for Medical Policy and its designated PMQ on the DHMC's review of KFHP's  
6 residential treatment guidelines during the focused survey in 2018. (Id.) Plaintiff also obtained  
7 a declaration from a DMHC representative that the DMHC did not address whether KFHP's  
8 guidelines were within generally accepted standard of care as part of the 2018 focused survey.  
9 (Id.) Plaintiff also deposed the former Chief of psychiatry for East Bay Kaiser, Drs. Robert  
10 Fusco and his sub-chief, Dr. David Atkins, who supervised Dion's treating psychiatrist, Dr.  
11 Cohen. (Id.)

12 On February 2, 2019, KFHP filed a motion to decertify the class on the ground that the  
13 Court should abstain for the additional reason that the DMHC would address the guidelines in a  
14 future routine survey to take place in April 2019. (Davis Dec., ¶ 26.)

15 On February 8, 2019, oral argument took place on the motion for summary judgment.  
16 On February 19, 2019, the Court denied KFHP's motion for summary judgment. The Court held  
17 that the ruling did not pre-judge how it would rule on the motion to decertify. (Davis Dec., ¶  
18 27.)

19 The hearing on the motion to decertify was originally scheduled for March 1, 2019. The  
20 trial was originally set for March 11, 2019. (Davis Dec., ¶ 28.)

21 On February 11, 2019, the parties filed a stipulation which provided they were  
22 discussing the possibility of a class-wide settlement with the assistance of a mediator, and  
23 requested the trial date and hearing on the motion to decertify be continued. The Court  
24 subsequently continued the trial date to August 12, 2019, and the motion to decertify to July 12,  
25 2019. (Davis Dec., ¶ 29.)

26 On July 8, 2019, the parties filed a notice of settlement stating that they had reached a  
27 settlement subject to Court approval, and a stipulation to further continue the trial date. The  
28 trial date was subsequently continued to January 12, 2020 and the hearing on the motion to

1 decertify to December 12, 2019. (Davis Dec., ¶ 30.)

2 **B. Mediation and negotiation of the settlement.**

3 The parties attended an intensive mediation session before an experienced and well-  
4 respected mediator, Edwin Oster, Esq. of Judicate West on June 7, 2018. (Davis Dec., ¶ 39.)  
5 Following class certification and the denial of KFHP's motion for summary judgment, the  
6 parties re-started intensive settlement negotiations, which took place over many months, and  
7 involved intense, arm's-length negotiation via telephone and email, and included the assistance  
8 of Mr. Oster. (Id.)

9 Prior to the first mediation, and then through the six months of continued negotiations,  
10 Class Counsel conducted an investigation and evaluation of the relevant law and facts necessary  
11 to assess the strengths and weaknesses of the case. (Davis Decl. at ¶ 40.) Class Counsel's  
12 evaluation was enabled by the extensive information obtained during discovery and the  
13 experience and expertise Class Counsel developed in handling other class actions, including  
14 class actions involving behavioral health issues such as *Arce v. Kaiser Foundation Health Plan,*  
15 *Inc.*, Los Angeles County Sup. Ct., JCCP Case No. 4585, and *Gallimore v. Kaiser Foundation*  
16 *Health Plan, Inc.*, Alameda County Sup. Ct. Case No. RG 12616206, a class action that was  
17 tried in 2015 and resulted in a judgment mandating extensive changes to KFHP's excess skin  
18 surgery practices. (Id.) Class Counsel also consulted with experts on residential treatment for  
19 adults and children with mental illness. (Davis Dec., ¶ 41.) These consulted experts have  
20 advised that the agreed-upon changes to KFHP's written IUS guidelines, and the additional  
21 guidance in the SCPMG Notice regarding the utilization of the Interqual guidelines will mean  
22 that KFHP has adopted guidelines and processes that fall within generally accepted standards  
23 for determining whether to provide residential treatment to adults and children with mental  
24 illnesses. (Id.)

25 The informed view of experienced Class Counsel is that the proposed settlement is fair,  
26 reasonable, and adequate, and meets the criteria for preliminary approval. (Davis Decl., ¶¶ 31-  
27 47.)

28 **III. THE SETTLEMENT**

1           **A.       Settlement terms.**

2           The Settlement provides comprehensive injunctive relief to the class, requiring KFHP to  
3       effectuate systemic reforms of its processes for deciding member claims for residential  
4       treatment. (Davis Decl. at ¶ 33.) As a condition of settlement, KFHP has agreed to approve, and  
5       its exclusive medical groups, TPMG and SCPMG, will adopt revised residential treatment  
6       guidelines and processes. TPMG will adopt revised IUS Admission and Continuing Care  
7       Guidelines and IUS Admission Guidelines for Residential Treatment (collectively “Revised IUS  
8       Guidelines”), true and correct copies of which are attached as Exhibits 1 and 2 to Settlement  
9       Agreement. SCPMG will adopt and send out to all its psychiatry chiefs and clinicians and non-  
10      clinical staff in the Utilization Management Group, the SCPMG Notice attached as Exhibit 3 to  
11      the Settlement Agreement, which provides Exhibits 1 and 2 for use in admissions in Southern  
12      California, and provides further directives and instructions regarding how Interqual guidelines  
13      can be used for continued care reviews. The IUS Guidelines and SCPMG Notice are  
14      collectively referred to herein as the “Revised Residential Treatment Guidelines.”

15          The changes to KFHP’s IUS guidelines includes removing the previous crisis-residential  
16      requirement that the member be “unable to exhibit adequate behavioral control” and “unable to  
17      maintain safety of self or others” to be admitted to, and for continued stay in, residential  
18      treatment. The guidelines will now provide for covered residential treatment to any members  
19      when a treating psychiatrist determines that a 24-hour structured environment is medically  
20      necessary and a patient has a “significant dysfunction in activities of daily living due to a  
21      psychiatric disorder.” (Exs. 1 and 2 to the Settlement Agreement.)

22          The SCPMG Notice provides the revised IUS guidelines to treating psychiatrist for use  
23      in admission decisions. The SCPMG Notice provides that SCPMG can continue to use Interqual  
24      guidelines for continued care decisions with the following provisos: (1) they should be used as  
25      guidelines only and not applied as rigid criteria when evaluating the medical necessity of  
26      continued stay; (2) any doubts about the appropriate level of care, should be resolved in favor of  
27      the higher level of care; (3) patients should not be removed to a lower level of care simply  
28      because admitting symptoms are improved, unless the symptom severity has improved to the

1 point that the patient can be successfully treated in a lower level of care; (4) “Symptom” for  
2 continued stay is not only the “symptom” that qualified the patient for admission. It includes  
3 any “symptom” that would qualify the patient for admission; and (5) Medication management is  
4 not a requirement for continued stay. (Ex. 3 to the Settlement Agreement.)

5 The Revised Residential Treatment Guidelines are the guidelines that that will be made  
6 available to providers and reviewers for determining the medical necessity of residential  
7 treatment. (Ex. A at ¶ 12.) Indeed, the Settlement explicitly provides that Class Members who  
8 are current KFHP members and who still want residential treatment may submit a new request  
9 for authorization to KFHP to be evaluated under the Revised Residential Treatment Guidelines.  
10 (Id.)

11 Class Members who are no longer covered by KFHP or who previously had residential  
12 treatment while covered by KFHP and paid for it themselves, do not release any claims for  
13 damage or for denial of benefits under ERISA, including any relief that a court may order if  
14 remanding a plaintiff’s claim to the administrator in an ERISA case. (Ex. A at ¶ ¶ 9(n); 15-17.)

15 **B. Notice and the right to object.**

16 The parties agree that no later than 65 days after entry of the Preliminary Approval  
17 Order, the KFHP will give notice of the proposed Settlement to Class Members. KFHP will  
18 provide notice both through its website, kp.org, and through its regular monthly local area  
19 service email to all Kaiser members in California. The website and email will contain links to a  
20 website maintained by a third-party administrator that will contain the official Notice, attached  
21 as Exhibit 4.

22 The Notice includes a brief explanation of the case and clearly explains the procedures  
23 for objecting to the Settlement. The Notice provides that any Class Member who wishes to  
24 object to the fairness, reasonableness, or adequacy of the proposed Settlement must intervene in  
25 the Litigation and deliver to Class Counsel and to KFHP’s Counsel, and file with the Court, no  
26 later than thirty (30) calendar days from the date E-Mailed Notice was sent to the Class  
27 Members or as the Court otherwise may direct, a written statement of the objections, as well as  
28 the specific reason(s), if any, for each objection, including any legal support the Class Member

1 wishes to bring to the Court's attention and any evidence or other information the Class  
2 Member wishes to introduce in support of the objections. (Ex. A at ¶ 25.)

3 The Notice further advises that any Class Member who so objects may attend the Final  
4 Approval Hearing, either in person or through counsel hired at the Class Member's expense, so  
5 long as notice of the intention to appear is delivered to Class Counsel and/or KFHP's counsel  
6 and filed with the Court no later than thirty (30) calendar days from the date Mailed Notice was  
7 sent to the Class Members or as the Court may otherwise direct. (Ex. A at ¶ 26.)

8 Thus, the detailed Notice satisfies the requirements of California Rule of Court 3.766.

9 **C. Scope of release.**

10 The release extends only to claims that seek declaratory or injunctive relief with respect  
11 to the Residential Treatment Guidelines or Revised Residential Treatment Guidelines. Released  
12 claims for not include claims for damages or for denial of benefits under ERISA, including any  
13 relief that a court may order if remanding a plaintiff's claim to the administrator in an ERISA  
14 case. Thus, if a Class Member, whose claims are subject to State law seeks reimbursement of a  
15 prior residential treatment, or seeks coverage for new request for residential treatment, and  
16 KFHP denies the request, the Class Member is free to bring an individual damages claim. (Ex.  
17 A at ¶¶ 9(0) and 15-17.) An ERISA Class Member may bring an individual claim for denial of  
18 benefits.

19 **D. Attorneys' fees, litigation expenses and incentive award.**

20 KFHP has agreed to pay an award of total attorneys' fees and costs, subject to the  
21 Court's approval, in an amount not to exceed \$1,850,000.00, which includes any fees and costs  
22 incurred through Final Approval. (Ex. A at ¶¶ 18, 19.) In addition, KFHP has agreed to the  
23 payment of an incentive award, again subject to the Court's approval, of \$17,500.00 each to  
24 Class Representatives Charles Dion and Gina Rieger (Id.)

25 The fees and costs awarded by the Court pursuant to this agreement will represent Class  
26 Counsel's sole compensation. Plaintiff and the Class will not be required to pay Class Counsel  
27 any amount for fees or expenses. (Ex. A at ¶¶ 18-21.)

28 As to the unopposed incentive award, it falls well within the parameters of such awards



1 in other comparable cases. Dion and Ms. Rieger assisted counsel in responding to and reviewing  
2 discovery, were deposed by KFHP and showed constant interest in the case, and stayed in touch  
3 with Class Counsel at regular intervals. In addition to the work done by Dion and Ms. Rieger  
4 during discovery and the course of this action, Dion and Ms. Rieger were willing, ready and  
5 able to attend trial and testify and would have done so had the Parties not agreed to the proposed  
6 Settlement. Finally, Dion and Ms. Rieger have been dedicated to the prosecution of the case on  
7 behalf of the Class.

#### 8 **IV. CERTIFICATION OF THE SETTLEMENT CLASS**

##### 9 **A. The Proposed Settlement Class**

10 The parties have agreed to seek conditional certification of the following Class, for  
11 settlement purposes only:

12 All persons who are California members of the Kaiser Foundation Health Plan,  
13 Inc., and who, as of the January 4, 2019, have a diagnosis of one or more of the  
14 severe mental illnesses itemized in the MHPA or a serious emotional disturbance  
of a child as defined in the MHPA.

15 The proposed settlement Class encompasses every member of the certified class plus adds  
16 KFHP members who are covered under ERISA plans. The Certified common questions remain  
17 unchanged.

##### 18 **B. Certification of the Settlement Class is Appropriate.**

19 A class must satisfy Code of Civil Procedure section 382's requirements—it must be  
20 ascertainable and there must be a well-defined community of interest. *Sav-On Drug Stores, Inc.*  
21 *v. Superior Court* (2004) 34 Cal.4th 319, 326; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429,  
22 435. The community-of-interest requirement embodies three elements: (1) common questions of  
23 law or fact; (2) a class representative with claims or defenses typical of the class; and (3) a class  
24 representative who can adequately represent the class. *Linder, supra*, 23 Cal.4th 435. In a  
25 settlement context, these same standards apply. In fact, a lesser standard of scrutiny applies to  
26 certification of settlement classes. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807,  
27 fn. 19.

28 Here, the Court previously held that all the elements of class certification were met

1 when it granted the motion to certify in November 2018. The only change here is inclusion of  
2 the addition of KFHP members covered under ERISA plans, previously excluded from the  
3 certified class. All other issues remain the same. Accordingly, certification of the settlement  
4 Class is appropriate

5 In an apparent clerical oversight, the 2018 Class Certification Order omitted any  
6 reference to Plaintiff's counsel, the Law Offices of Scott Glovsky. Plaintiff requests that the  
7 Court clarify that both Gianelli & Morris and the Law Offices of Scott Glovsky are appointed  
8 Class Counsel for the Settlement Class.

#### 9 **IV. STANDARD FOR SETTLEMENT APPROVAL**

10 California courts strongly favor settlement. *Stambaugh v. Superior Court* (1976) 62  
11 Cal.App.3d 321, 326. Likewise, in the federal courts, "[s]trong judicial policy ... favors  
12 settlements, particularly where complex class litigation is concerned," so long as there is no  
13 indicia of collusion or unfairness among the negotiating parties." *Class Plaintiffs v. City of*  
14 *Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276, *cert. den.*, (1992) 506 U.S. 953.

15 The Court has broad powers to determine whether a proposed class action settlement is  
16 fair under the circumstances of the case. Generally, the Court should grant preliminary  
17 approval, and direct that notice of the settlement and fairness hearing be disseminated, wherever  
18 the proposed settlement falls within the range of possible final approval and does not suffer  
19 from any obvious deficiency or reason to doubt its fairness (e.g., unjustifiable preferential  
20 treatment of class representatives or some segment of the defined class, excessive compensation  
21 for attorneys at the expense of class member, etc.). *See, e.g., Newberg & Conte, Newberg on*  
22 *Class Actions* (5th ed. 2017) § 13:13 at pp. 310-315 (*citing Manual for Complex Litigation, 3d*  
23 *(1997) § 30.41*).<sup>3</sup>

24 The Court's *final* approval responsibility in reviewing a proposed class action settlement

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25  
26 <sup>3</sup> *See also Acosta v. TransUnion, LLC* (C.D. Cal. 2007) 243 F.R.D. 377, 386 ("To determine whether preliminary  
27 approval is appropriate, the settlement need only be *potentially* fair, as the Court will make a final determination of  
28 its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt  
out") (emphasis in original); *Satchell v. Federal Express Corp.* (N.D. Cal. 2007) 2007 WL 1114010 at \*4 (granting  
preliminary approval because proposed settlement was the result of arm's length negotiation, non-collusive, free of  
"obvious defects," and "within the range of possible settlement approval").

1 is to ensure that the settlement is “fair, reasonable and adequate” and, if so, a proposed  
2 settlement should be approved. As one California court has explained,

3 Due regard ... should be given to what is otherwise a private consensual  
4 agreement between the parties. The inquiry must be limited to the extent  
5 necessary to reach a reasoned judgment that the agreement is not the product of  
6 fraud or overreaching by, or collusion between, the negotiating parties, and that  
7 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

8 *7-Eleven Owners v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145 (*quoting Dunk v. Ford*  
9 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (internal quotations and citations omitted). In  
10 making this determination, the Court should consider all relevant factors, but particularly,

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

16 *Id.* at 1146 (*quoting Dunk, supra*, 48 Cal.App.4th at 1801). Except for considerations particular  
17 to the class nature of the litigation, proper evaluation of the fairness of a class action settlement  
18 is similar to the process applied by the courts to evaluate good faith settlement under Code of  
19 Civil Procedure section 877.6. *See Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.* (1985) 38  
20 Cal.3d 488, 499-500.

21 In considering the fairness of a class action settlement, however, the Court should not  
22 attempt to reach any ultimate conclusions on disputed questions of law or fact.

23 Neither the trial court nor this court is to reach any ultimate conclusions on the  
24 contested issues of fact and law which underlie the merits of the dispute, for it is  
25 the very uncertainty of outcome in litigation and avoidance of wasteful and  
26 expensive litigation that induce consensual settlements. In other words, the  
27 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial  
28 on the merits.

7-Eleven Owners, *supra*, 85 Cal.App.4th at 1145, 1146 (internal quotations and citations  
omitted); *see also Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250 (because  
“[c]ompromise is inherent and necessary in the settlement process,” “[a] settlement need not  
obtain 100 percent of the damages sought in order to be fair and reasonable”).

Finally, where a good faith settlement is reached through arm’s-length bargaining, after

1 qualified opposing counsel have properly developed their claims and defenses, there is a  
2 presumption of fairness.

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

7 *7-Eleven Owners, supra*, at 1146 (quoting *Dunk, supra*, 48 Cal.App.4th at 1802).

8 Under the foregoing standards, preliminary approval of the Settlement is appropriate  
9 here.

#### 10 **V. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

11 Under the preliminary-approval standards set forth above, the proposed Settlement is  
12 fair, reasonable, and adequate. There is no "obvious deficiency" or indicia of unfairness. Quite  
13 the contrary, the Settlement was reached only after discovery was completed, through arm's-  
14 length negotiations by counsel experienced in similar litigation and under the guidance of a  
15 highly respected mediator, Edwin Oster. All of this signals that the presumption of fairness  
16 under *Dunk, supra*, applies. And the broad systemic relief obtained for the class unquestionably  
17 falls within the range of possible final approval. As such, preliminary approval is properly  
18 granted and the Notice should be provided to the Class as set forth in the Agreement.

##### 19 **A. Strength of Plaintiff's case and the risks of litigation.**

20 Plaintiff believes the class claims are legally meritorious and present a reasonable  
21 probability of a favorable determination on behalf of the Class, as is amply borne out by the  
22 agreed-upon, comprehensive systemic changes KFHP will make. At the same time, a significant  
23 litigation risk—both in the trial and the appellate courts—is undeniably avoided by the  
24 proposed settlement.

25 KFHP vigorously contested class certification. Even following certification of the class,  
26 and indeed up until the settlement was reached, KFHP continued to try to derail the class action  
27 by seeking to decertify the class and filing a motion for summary judgment. While Plaintiff  
28 believes he would have prevailed on KFHP's decertification motion, there was a risk that the  
motions could have been decided in KFHP's favor. There was also risk that KFHP would have

1 prevailed at trial on the merits.

2 There is also the fact that no appellate court in this state has interpreted and/or addressed  
3 the meaning of Health & Safety Code sections 1367.01 and 1363.5, which require that health  
4 plans adopt written guidelines/criteria for medical necessity decisions that are “consistent with  
5 sound clinical principles and processes.” This factor adds an extra layer of risk as there is no  
6 published precedent to rely on in adjudicating the class claims. However, with all of this in  
7 mind, both parties agree that the terms of the Settlement set forth in the attached Agreement are  
8 the most efficient means of resolving this dispute, thereby avoiding the need for additional  
9 motions and the further expenditure of scarce judicial resources.

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

11 This complex case has been litigated fully and intensively by the parties for over five  
12 years. The firms involved are sophisticated litigators, who are well acquainted with appellate  
13 proceedings. The case involves important health care practices and statutory compliance issues.  
14 If the case were tried, it is a near certainty that post-trial appellate proceedings would ensue.  
15 Therefore, this Settlement is timely and appropriate.

16 **C. The relief provided.**

17 As noted, so long as the amount offered in settlement falls within the range of possible  
18 approval, preliminary approval and dissemination of notice are appropriate. *Newberg on Class*  
19 *Actions, supra*, § 13:13 at pp. 310-315. A settlement for injunctive relief is adjudged by the  
20 same standards as any other settlement, and will be deemed to fall within “the range of  
21 plaintiffs’ potential recovery at trial” if that relief is “fair[ ] to plaintiffs” and addresses the class  
22 members’ “immediate and pressing concerns.” *See, e.g., Carter v. City of Los Angeles* (2014)  
23 224 Cal.App.4th 808, 819-822.

24 Under the foregoing standards, the proposed injunctive relief is fair, reasonable and  
25 adequate. Obtaining a substantial monetary recovery was never the purpose of this litigation.  
26 The purpose, instead, was to institute class-wide, systemic reform with respect to KFHP’s  
27 handling of claims by of persons with severe mental illness for residential treatment.  
28 Specifically, this action was brought to put an end to KFHP’s practice of systematically

1 excluding from coverage non-crisis residential treatment.

2 After the lawsuit was filed, KFHP removed the exclusion from its EOCs. The removal  
3 of the exclusion combined with systemic reforms in the Settlement means that Plaintiff has  
4 obtained substantially all of the relief related to residential treatment requested in the Fourth  
5 Amended Complaint. Importantly, KFHP can no longer limit coverage to non-crisis residential  
6 treatment.

7 Class Members will benefit from KFHP's reformation of its coverage guidelines. All  
8 KFHP members with parity act diagnosis will benefit from the changes, which will make non-  
9 crisis residential treatment available in the future to those members. Class Members, previously  
10 denied residential treatment, who still want residential treatment may submit a new request for  
11 authorization to KFHP, to be evaluated under the Revised Residential Treatment Guidelines.  
12 It is estimated that the changes that will be made to KFHP's residential treatment procedures  
13 will result in payment in the coming years of millions of dollars in benefits to the Class  
14 Members.

15 In sum, the proposed settlement falls well within "the range of plaintiffs' potential  
16 recovery at trial[.]" *Carter, supra*, 224 Cal.App.4th at 821

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

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

22 Moreover, there is no unduly preferential recovery for Dion or Ms. Rieger. Apart from  
23 an incentive typical of those approved in class action litigation, the Class Representatives will  
24 receive nothing different from any other class member—the same benefits apply. The proposed  
25 distribution is thus equitable.

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

27 As summarized above, more than five years of protracted pretrial proceedings were  
28 completed when settlement was reached. Nineteen depositions, cumulatively totaling nearly 102

1 hours of testimony, were completed prior to settlement. Written discovery was no less  
2 comprehensive. In addition to extensive requests for production of documents at deposition,  
3 Plaintiff propounded five sets of document requests, including a joint request with the  
4 *Futterman* plaintiffs, (cumulatively, 104 requests), plus pre-trial interrogatories and requests for  
5 admission. In response to the document requests, KFHP and its exclusive medical groups,  
6 TPMG and SCPMG, produced more than 106,000 pages of documents. Plaintiff submitted to  
7 extensive discovery from KFHP as well. In short, the time is ripe for a full assessment by all  
8 parties of the relative risks and benefits of the Settlement.

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

10 There was no collusion among the settling parties or any other “obvious defect” with  
11 regard to the proposed Settlement. The Settlement was reached only after near-total pre-trial  
12 litigation of the action, over more than five years. Litigation was, at all times, fully adversarial,  
13 with counsel for each side vigorously advocating their clients’ respective positions, as reflected  
14 in the Court’s docket. The assistance of a highly respected mediator, Edwin Oster, guiding  
15 negotiations, has ensured the absence of collusion among the parties. *See Satchell, supra*, 2007  
16 WL 1114010 at \*4. (*See also* Davis Dec. at ¶ 48).

17 The proposed Settlement does not in any way place the attorneys’ interests ahead of the  
18 Class members’ interests. (Davis Dec. at ¶ 497.) Settlement of claims for attorneys’ fees and  
19 litigation expenses were negotiated only after an agreement in principal was reached with  
20 respect to the Class benefits. (*Id.*) As will be fully demonstrated in support of Class Counsel’s  
21 subsequent fee motion at the time of final approval, the amount of fees and litigation expenses  
22 provided for by the Settlement is appropriate under a lodestar/multiplier analysis, as well as  
23 under a percentage of recovery cross-check, consistent with California law. (*Id.*) Only through  
24 the efforts of Class Counsel was any recovery possible. (*Id.*) Moreover, attorneys’ fees,  
25 litigation expenses, and administration expenses are all *separately* provided for by the  
26 Settlement. (*Id.*) A full award of the agreed-upon amounts will have no impact whatsoever on  
27 the systemic relief afforded by the proposed settlement agreement. (*Id.*)

28 Likewise, the proposed Settlement does not place Dion’s or Ms. Rieger’s personal

1 interests, or the interests of any particular segment of the Class, ahead of the Class as a whole.  
2 (Davis Dec. at ¶ 50.) As discussed above, systemic relief is available for every single Class  
3 member. (*Id.*) Apart from a reasonable incentive payment, typical in class action litigation, the  
4 Settlement benefit for Plaintiff is the same as those for the Class members. (*Id.*)

5 The proposed incentive payment of \$17,500 each to the Class Representatives is  
6 reasonable given what they have accomplished on behalf of the Class. The proposed incentive is  
7 separately provided in the Settlement and will not impact the systemic relief provided the Class.

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

9 In granting class certification, this Court has already determined that the qualifications  
10 of Class Counsel (attorneys specializing in complex class actions generally and in insurance  
11 litigation, in particular) are more than ample. Class Counsel are well-suited to realistically  
12 assess the fair and reasonable value of the claims at issue given the full litigation of this action  
13 and Class Counsel's experience in settling and trying other cases against health plans, including  
14 their handling of *Arce v. Kaiser Foundation Health Plan*, a class action involving benefits for  
15 members with autism, and *Gallimore v. Kaiser Foundation Health Plan, Inc.*, a class action that  
16 resulted in a judgment against KFHP regarding its excess skin surgery practices. KFHP's  
17 counsel are also well acquainted with the complicated issues presented by this action and are  
18 unquestionably able to assess the merits of this Settlement and the relative strengths of the  
19 parties' claims and defenses.

20 This was a hard-bargained settlement, hammered out during mediation and extensive  
21 post-mediation negotiations, with the assistance of a highly-respected mediator. Class Counsel  
22 and KFHP's counsel concur that the Settlement represents a fair and reasonable resolution to  
23 this matter in light of the various risks and costs to the respective parties of continued litigation.

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

25 The reaction of the Class Members is a factor that cannot be assessed at the preliminary  
26 approval stage and must await the fairness hearing for consideration of the objections (if any) of  
27 the Class Members. Class Counsel anticipate, however, very few, if any, objections after notice  
28 of this Settlement due to the comprehensive systemic relief that has been obtained on the



Settlement Class members' behalf.

## VI. PROPOSED SCHEDULE

As set forth at paragraph 30 of the Settlement Agreement, the parties propose the following schedule for class notice, opt-out, and Plaintiff's motion for final approval and motion for attorneys' fees and costs and class representative incentive award:

Event Date	Event
16 court days after Class Counsel files a Motion for Preliminary Approval	Hearing on Motion for Preliminary Approval
Within 14 days after entry of Preliminary Approval Order	Class Counsel files a motion for an award of attorneys' fees and costs and class representative incentive award
Within 14 days after entry of Preliminary Approval Order	KFHP posts Notice on kp.org as specified in Paragraph 24(a) of this Agreement
Within 65 days after Preliminary Approval Order	KFHP sends Notice by email as specified in Paragraph 24(b) of this Agreement
95 days after entry of Preliminary Approval Order	Deadline for postmarking of objections and requests to be heard at the Final Approval Hearing
Within 10 days after expiration of deadline for postmarking of objections and requests to be heard at the Final Approval Hearing	Class Counsel will file a notice specifying those who have objected, if any. KFHP will file a declaration testifying to Notice.
Two weeks before the Final Approval Hearing	Class Counsel to file a motion for final approval

## VII. CONCLUSION

For the foregoing reasons, Plaintiff Charles Dion, guardian ad litem Gina Rieger, and the Class respectfully request that the Court issue an order granting preliminary approval of the Settlement of the Class Action, and issue the related orders and make such findings as are set forth in the proposed Preliminary Approval Order.

DATED: August 12, 2019

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

By: 

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