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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 KELLI EWEN,
11 Plaintiff,
12
13 v.
14 NATIONAL HOCKEY LEAGUE,
et al.,
15 Defendants.

Case No. 2:19-cv-03656 FMO(GJSx)

**JOINT CASE MANAGEMENT
STATEMENT**

Hearing: August 22, 2019
Time: 10:00 a.m.
Courtroom: 6D
Before: Hon. Fernando M. Olguin

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17 Plaintiff Kelli Ewen (“Plaintiff”) and Defendants National Hockey League,
18 NHL Enterprises, L.P., and National Hockey League Board of Governors
19 (collectively, the “NHL” or “Defendants”) submit this Joint Case Management
20 Conference Statement pursuant to Federal Rule of Civil Procedure 26(f), Civil
21 Local Rule 16 and this Court’s Order Setting Scheduling Conference (ECF No. 22).

22 **a. Statement of the Case**

23 Plaintiff’s Statement

24 Todd Ewen played in 518 games over eleven seasons in the NHL. As an
25 “Enforcer” – a position requiring him to frequently and viciously hit and fight
26 opponents – Todd participated in 150 career documented fights and suffered
27 numerous blows to the head. Tragically, seventeen years after retiring, Todd
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1 committed suicide. Todd's brain was donated for analysis to the Canadian
2 Concussion Centre and neuropathologist Lili Naz-Hazrati, who found no evidence
3 of chronic traumatic encephalopathy ("CTE"). Upon later re-examination,
4 however, neuropathologists from Boston University and the Mayo Clinic confirmed
5 Todd *did* have CTE, an incurable brain disease associated with repeated head
6 injuries. After her analysis of Todd's brain, Dr. Hazrati went on to become one of
7 the NHL's experts in the MDL proceedings. The NHL continues to support Dr.
8 Hazrati's wrongful conclusions regarding Todd even though she and her institution
9 have admitted the conclusions were erroneous.

10 Kelli Ewen, Todd's wife of 28 years, brings claims against the NHL on
11 behalf of Todd's estate and herself. Kelli asserts the NHL knew of the hazards
12 inherent in its promotion of fighting and violence in the game of professional
13 hockey and knew that the resultant repeated head trauma would cause long term
14 brain damage to its Enforcers. Despite its knowledge, she alleges the NHL fostered
15 an environment that encouraged and pressured players like Todd to fight opponents
16 for entertainment and to increase revenue, also increasing the risk that players
17 developed long-term brain damage, all while downplaying the risks of repeated
18 head trauma. To this day, the NHL carries the dubious distinction of being the last
19 "league of denial" and denies that repeated head trauma poses any risk of
20 permanent brain damage.

21 Kelli also brings claims for wrongful death and for loss of consortium. Kelli
22 asserts that Todd's severe brain damage precipitating his suicide was the
23 foreseeable consequence of the NHL's encouragement of its players to partake in
24 violent bareknuckle fights and denial (to this day) that head blows in hockey pose
25 any long-term risks. Kelly alleges Todd's suicide was a direct and proximate result
26 of his symptoms of CTE caused by the numerous hits to the head he experienced as
27 an NHL player.

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1 NHL's Statement

2 Plaintiff filed this lawsuit more than five years after class actions alleging
3 virtually the same misconduct were filed in 2013 by former NHL players. Those
4 suits were consolidated for pretrial matters in a multi-district litigation proceeding
5 in the U.S. District Court for Minnesota on August 19, 2014 (the "MDL").

6 Plaintiff's counsel in this case participated as co-lead class counsel in the MDL
7 proceeding and served on plaintiffs' executive committee. On July 13, 2018, the
8 court in the MDL denied plaintiffs' motion for class certification.

9 Plaintiff's claims fail for multiple reasons. As a threshold matter, Plaintiff's
10 claims center on numerous subjects that have been collectively bargained between
11 the NHL, as bargaining representative of its Member Clubs, and the National
12 Hockey League Players' Association ("NHLPA"), as bargaining representative of
13 all NHL players. These include, but are not limited to, the NHL's playing rules,
14 which are incorporated into the applicable collective bargaining agreements and
15 which Plaintiff alleges did not adequately deter fighting and impacts to players'
16 heads, resulting in the injuries for which Plaintiff seeks recovery, as well as
17 provisions concerning supplemental discipline and player health and safety.
18 Plaintiff's claims, which will require the determination of whether the NHL owed
19 and breached any duty to Todd Ewen, arise under and/or are substantially
20 dependent on interpretations of collective bargaining agreements between the NHL
21 and the NHLPA and are inextricably intertwined with those agreements. Plaintiff's
22 claims are therefore preempted by federal labor law and subject to the grievance
23 provisions of the applicable collective bargaining agreements.

24 Even if Plaintiff's claims were not preempted by federal labor law, they
25 would fail for additional reasons. First, the NHL respectfully submits that the
26 statute of limitations has run as to each of Plaintiff's claims. Second, Plaintiff
27 cannot establish that the NHL owed or breached any duty to Mr. Ewen, or made
28 any misrepresentation to him. To the contrary, as the record evidence established

1 during the MDL, the NHL and its Member Clubs—along with the NHLPA—have
2 acted consistently with medical knowledge as it has developed over time with
3 regard to the management and treatment of player injuries, including concussions,
4 as well as the education of players about the risks of head injuries and the
5 importance of reporting any such injury to Member Club medical personnel.

6 **b. Subject Matter Jurisdiction**

7 Plaintiff's Statement

8 Plaintiff pleaded in her Complaint that this Court had subject matter
9 jurisdiction due to the diversity of the Parties under 28 U.S.C. § 1332, in part by
10 alleging “Plaintiff is a resident of a different state than the Defendant[.]”

11 Plaintiff alleged her state of residence was Missouri while Defendants were
12 headquartered in New York. In its subsequent answer (ECF No. 20), the NHL pled
13 that it is an unincorporated association and that in terms of corporate structure, the
14 association is comprised of its individual teams, and that those teams reside in the
15 states where they play. This includes Missouri and California, which Defendants
16 assert destroys diversity. At the same time, Defendants assert this Court has subject
17 matter jurisdiction due to the fact Defendants intend to raise a defense of complete
18 preemption under § 301 of the Labor Management Relations Act (“LMRA”). 29
19 U.S.C. § 185. Plaintiff asserts that none of her claims are preempted under the
20 LMRA.

21 Plaintiff agrees with Defendants that the Court should resolve subject matter
22 jurisdiction through motion practice and that a limited amount of discovery may be
23 necessary to do so. Plaintiff believes the most straightforward means of achieving
24 this is through Rule 12 motion practice, including regarding Defendant's asserted
25 preemption defense, as was done previously in the related MDL proceedings.

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1 NHL's Statement

2 The basis for the Court's subject matter jurisdiction is a contested threshold
3 issue that should be resolved by the Court at the outset, as it will dictate the course
4 of the litigation. Contrary to the allegations in the Amended Complaint, there is no
5 diversity jurisdiction under 28 U.S.C. § 1332. The NHL is an unincorporated
6 association of 31 Member Clubs (*see* Amended Complaint ¶ 26), and, therefore, has
7 the citizenship of each of those Member Clubs. *See Nelson v. Nat'l Hockey*
8 *League*, 20 F. Supp. 3d 650, 659 n.1 (N.D. Ill. 2014) (The NHL "is an
9 unincorporated association and, therefore, is a citizen of every state in which one of
10 its members is a citizen."), *aff'd*, *Boogaard v. Nat'l Hockey League*, 891 F.3d 289,
11 293 n.4 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 601 (2018). Because one of the
12 Member Clubs (St. Louis Blues Hockey Club, L.P., operating as the St. Louis
13 Blues) is a citizen of Missouri, where Plaintiff alleges citizenship and residency,
14 diversity is lacking. Plaintiff also could not establish diversity by alleging
15 residence and citizenship in California where three Member Clubs (operating as the
16 Anaheim Ducks, Los Angeles Kings and San Jose Sharks) are citizens.

17 Nevertheless, this Court has federal question jurisdiction under 28 U.S.C. §
18 1331 because the claims in Plaintiff's Amended Complaint arise under the laws of
19 the United States, specifically Section 301 of the Labor Management Relations Act.
20 29 U.S.C. § 185 ("Section 301"). Section 301 requires the application of federal
21 substantive law and completely preempts and displaces entirely any state law cause
22 of action. It does not matter that a lawsuit—like Plaintiff's suit here—purports to
23 assert tort claims under state law instead of contract claims. *See Boogaard*, 891 F.
24 3d at 294. If the claims are founded directly on rights created by collective
25 bargaining agreements or are substantially dependent on analysis of a collectively
26 bargained agreement, they are federal claims governed by Section 301. As
27 explained above, among the many reasons that Plaintiff's claims are preempted by
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1 federal labor law is Plaintiff's theory that the NHL's playing rules, which are
2 incorporated into the applicable collective bargaining agreements, did not
3 adequately protect Mr. Ewen from the injuries that are the subject of this litigation.
4 *See Boogaard v. Nat'l Hockey League*, 126 F. Supp. 3d 1010, 1020 (N.D. Ill. 2015)
5 (“[I]t is unlikely that the NHL would have assumed responsibility for ‘keeping
6 players reasonably safe’ and ‘preventing brain trauma’ while simultaneously
7 adopting a collective bargaining agreement that prohibited them from taking steps
8 necessary to meet those responsibilities.”). The NHL asserts that each of Plaintiff's
9 claims is preempted by federal labor law, but even if only one claim is preempted,
10 the Court will have subject matter jurisdiction over this action if it exercises
11 supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over any claim that the
12 Court determines is not preempted.

13 In order to resolve this threshold dispute as to whether and why this Court
14 has subject matter jurisdiction, the NHL respectfully suggests that the Court allow
15 the parties to brief their respective positions. Thus, the NHL proposes that each
16 side submit opening briefs in support of its position on September 23, 2019 and that
17 responsive briefs be due 30 days thereafter, with reply briefs due 14 days thereafter.

18 The NHL believes that any discovery necessary for the jurisdiction and
19 preemption determinations was completed in the MDL proceeding. However, to
20 the extent the Court determines that any additional discovery is necessary, the
21 parties could focus initial discovery on either issue. After determining he had
22 subject matter jurisdiction, a similar procedure to resolve preemption issues was
23 used by Judge Gary Feinerman of the U.S. District Court for the Northern District
24 of Illinois in *Nelson, supra*—a litigation in which Plaintiff's counsel also
25 participated—prior to Judge Feinerman holding that most of the plaintiff's tort
26 claims against the NHL, which included factual allegations similar to those in this
27 case, were preempted.

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1 **c. Legal Issues**

2 Plaintiff's Statement

3 This case will present the following key legal issues:

4 1. Whether the NHL owed a duty to protect Todd Ewen from, or warn
5 him of, the sequelae associated with repeated head trauma inherent in the role of
6 Enforcer and if so, whether defendants breached that duty;

7 2. Whether defendants fraudulently concealed the long-term
8 consequences of head trauma in NHL hockey from Todd Ewen;

9 3. To the extent the NHL contends it warned Todd Ewen regarding the
10 risks of repeated head trauma, was any such warning legally sufficient;

11 4. Whether the NHL's actions and omissions caused injury to Plaintiff;

12 5. If the NHL's actions and omissions caused injury to Plaintiff, what is
13 the measure of compensable damages;

14 6. Whether defendants wrongfully caused Todd Ewen's death.

15 NHL's Statement

16 The principal legal issues in dispute are:

17 1. Whether Plaintiff's claims are preempted by federal labor law;

18 2. Whether Plaintiff's claims are barred by applicable statutes of
19 limitations;

20 3. Whether Plaintiff's negligence-based claims are barred by contributory
21 or comparative negligence and/or assumption of risk;

22 4. Whether Plaintiff can establish that the NHL owed any duty of care or
23 duty to warn Mr. Ewen;

24 5. Whether Plaintiff can establish that the NHL breached any duty owed
25 to Mr. Ewen;

26 6. Whether Plaintiff can establish that the NHL made any fraudulent
27 statement;

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1 *Key Witnesses:*

- 2 1. Ann C. McKee, M.D., Professor of Neurology and Pathology, Boston
3 School of Medicine;
4 2. Kelli Ewen, widow of Todd Ewen;
5 3. NHL personnel, including Commissioner Gary Bettman; and,
6 4. NHL team personnel who witnessed or otherwise possess relevant
7 information regarding Todd Ewen's head injuries while an NHL player.

8 NHL's Statement Regarding Evidence

9 Categories of relevant documents that have been or likely will be produced
10 include:

- 11 1. Documents related to collective bargaining between the NHL and
12 NHLPA regarding, among other things, player health and safety, playing rules,
13 supplemental discipline and playing environment;
14 2. Documents related to Mr. Ewen's hockey playing history, both in the
15 NHL and in other amateur and professional leagues;
16 3. Documents related to Mr. Ewen's post-hockey professional career,
17 including income and finance related materials;
18 4. Documents related to Mr. Ewen's medical history, including Dr. Lili
19 Naz-Hazrati's autopsy report, in which she confirmed no pathology consistent with
20 CTE, and corroborative reports by other clinicians. (Contrary to Plaintiff's
21 assertion, Dr. Hazrati has not admitted that her conclusions were erroneous.);
22 5. Documents related to Mr. Ewen's knowledge about CTE;
23 6. Documents related to player education on head hits in hockey by the
24 NHLPA and NHL;
25 7. Documents related to treatment of player concussions by NHL Clubs;
26 8. Documents discussing the state of the science regarding CTE.

27 Potential witnesses likely include:

- 28 1. Plaintiff;

- 1 2. NHL personnel;
- 2 3. Medical professionals who treated or examined Mr. Ewen, including
- 3 Drs. Hazrati, Ann McKee, Kevin F. Bieniek and Dennis W. Dickson;
- 4 4. NHL Club doctors, trainers and other personnel who possess relevant
- 5 information regarding Mr. Ewen's playing or medical history;
- 6 5. NHLPA personnel;
- 7 6. Doctors, trainers and other personnel from other hockey leagues or
- 8 organizations who possess relevant information regarding Mr. Ewen's playing or
- 9 medical history;
- 10 7. Mr. Ewen's family members;
- 11 8. Mr. Ewen's post-hockey career business associates; and
- 12 9. Experts, including a neuropathologist, neurologist, epidemiologist, a
- 13 warnings expert and a sports psychologist.

14 **e. Insurance**

15 Plaintiff's Statement

16 Not applicable.

17 NHL's Statement

18 The NHL asserts that it has insurance coverage that may potentially apply to
19 this litigation. On or about April 15, 2014, one of the NHL's insurers commenced
20 an action against the NHL and several insurers concerning insurance coverage for
21 certain concussion-related lawsuits against the NHL. That litigation, captioned *TIG*
22 *Ins. Co. f/k/a Transamerica Ins. Co. v. NHL, et al.*, Index No. 651162/2014 (N.Y.
23 Sup. Ct., N.Y. Cty.), currently is pending but is stayed. The NHL produced its
24 applicable insurance policies to Plaintiff's counsel in the MDL proceeding.

25 **f. Magistrate Judge**

26 Pursuant to Local Rule 73-2, the parties have filed a statement (ECF No. 17)
27 informing the Court that they do not consent to proceed before a magistrate judge.
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1 **g. Discovery**

2 Substantial fact and expert discovery has already taken place in the MDL. In
3 addition, the parties to the MDL negotiated various agreements, including a
4 protective order and deposition protocol, that the parties anticipate asking the Court
5 to adopt for use with regard to remaining discovery in this litigation. With these
6 facts in mind, the parties propose the following schedules.

7 Plaintiff's Statement

8 **Fact Discovery.** Plaintiff proposes a fact discovery cutoff date of February
9 28, 2020. Plaintiff presently anticipates pursuing additional discovery from: (1)
10 Defendants with respect to Todd Ewen and issues related to Todd Ewen's NHL
11 career; (2) third parties, including but not limited to, the individual teams for whom
12 Todd Ewen played, and relevant current and former employees of those teams; and
13 (3) other entities and persons possessing potentially admissible evidence regarding
14 the claims asserted by Plaintiff.

15 **Expert Discovery.** Plaintiff proposes the following schedule for expert
16 witness disclosures and discovery:

- 17 1. Mutual disclosure of expert reports on March 27, 2020
- 18 2. Deadline for expert discovery, including depositions, on May 29,
19 2020; and
- 20 3. Deadline for rebuttal reports: June 26, 2020.

21 NHL's Statement

22 **Fact Discovery.** The NHL proposes that once the Court determines that it
23 has subject matter jurisdiction, fact discovery should commence and be completed
24 in six months. However, while briefing on jurisdiction is in progress and a decision
25 pending, the parties should serve document requests and interrogatories, and
26 responses thereto. In addition, Plaintiff should provide properly executed medical
27 authorizations so the NHL can proceed with the time-consuming collection of Mr.
28 Ewen's medical records.

1 The NHL agrees with Plaintiff that any remaining discovery pertaining to the
2 NHL will be specific to Mr. Ewen's case. The NHL anticipates seeking fact
3 discovery from Plaintiff and the estate of Todd Ewen, neither of which was subject
4 to discovery in the MDL. The NHL also anticipates seeking additional discovery
5 from relevant third parties, including, but not limited to: (1) the NHLPA; (2) the
6 NHL Clubs for which Mr. Ewen played (i.e., the St. Louis Blues, Montreal
7 Canadiens, Anaheim Ducks and San Jose Sharks), as well as the physicians,
8 trainers and coaches employed by those Clubs; (3) NHL teammates of Mr. Ewen;
9 (4) medical professionals and medical centers that provided treatment to Mr. Ewen
10 (a prerequisite to which is an authorization by Mr. Ewen's estate); (5) Mr. Ewen's
11 post-hockey career employers and business associates; (6) Mr. Ewen's family
12 members; (7) the Boston University CTE Center and its personnel who examined
13 Mr. Ewen's brain and determined that he had CTE; and (8) the Mayo Clinic and its
14 personnel who examined Mr. Ewen's brain.

15 ***Expert Discovery.*** Consistent with the schedule for expert discovery in the
16 MDL, the NHL proposes the following schedule for expert disclosures and
17 discovery:

- 18 1. Plaintiff's expert reports disclosed 30 days after the close of fact
19 discovery;
- 20 2. The NHL's expert reports disclosed 60 days thereafter; and
- 21 3. Close of expert discovery, including depositions, 30 days after
22 disclosure of NHL's expert reports.

23 Rebuttal and sur-rebuttal reports would only be permitted by leave of the
24 Court.

25 **h. Motions**

26 Plaintiff's Statement

27 Plaintiff does not anticipate adding other parties or claims or to transfer
28 venue in this case, but may, if necessary, file an amended pleading.

1 NHL's Statement

2 The NHL filed its answer to the Amended Complaint on June 28, 2019 (ECF
3 No. 20), which sets forth the NHL's affirmative defenses. Based on current
4 information, the NHL's position is that it is unlikely that it will file any motion
5 seeking to add other parties or claims, or to transfer venue. However, if the Court
6 grants leave for Plaintiff to file another amended complaint, the NHL would
7 respond to the new complaint.

8 **i. Class Certification**

9 This litigation is not a class action.

10 **j. Dispositive Motions**

11 Plaintiff's Statement

12 Plaintiff proposes that dispositive and *Daubert* motions be filed within 45
13 days following service of expert rebuttal reports.

14 NHL's Statement

15 The NHL proposes that the cut-off date for dispositive motions and *Daubert*
16 motions be 45 days after the completion of expert discovery.

17 In addition to labor preemption grounds, the NHL anticipates seeking
18 summary judgment, or judgment on the pleadings, on multiple potential grounds,
19 including that: the statute of limitations has run as to each of Plaintiff's claims;
20 Plaintiff cannot establish that the NHL owed or breached any duty; Plaintiff has
21 failed to adequately plead that the NHL made any misrepresentation or that Mr.
22 Ewen relied on any such misrepresentation; and Plaintiff cannot establish that Mr.
23 Ewen's play in the NHL caused him to develop CTE, or that CTE or the NHL
24 caused him to commit suicide.

25 **k. Settlement/Alternative Dispute Resolution**

26 Plaintiff's Statement

27 The parties have not formally discussed settling this dispute and have not
28 pursued any alternative dispute resolution.

1 NHL's Statement

2 During the MDL proceeding, plaintiffs' counsel and the NHL engaged in
3 extensive settlement discussions, with retired Magistrate Judge Jeffrey Keyes
4 serving as a court-appointed mediator. After very lengthy discussions, the
5 mediation culminated in a settlement agreement, pursuant to which the NHL
6 offered each of the 146 plaintiffs who had filed concussion-related claims and each
7 unfiled claimant (i.e., former players or their estates, including Mr. Ewen's, who
8 had retained counsel but not yet filed claims against the NHL): (1) a base payment
9 of \$22,000; (2) agreed-upon neuropsychological testing; (3) an agreed-upon
10 neurological exam and blood testing (for players with specified neuropsychological
11 testing results); and (4) for such players or the estates of players (such as Mr.
12 Ewen's), eligibility to receive up to an additional \$75,000 pursuant to criteria
13 developed by MDL plaintiffs' counsel and an independent claims administrator. Of
14 the 146 plaintiffs, 140 accepted this settlement offer or voluntarily dismissed their
15 claims; a total of 305 former players or their estates have participated in the
16 settlement or otherwise voluntarily dismissed their claims.

17 Plaintiff is the only unfiled claimant who chose not to accept the settlement
18 and to proceed with litigation against the NHL. Accordingly, the NHL's position is
19 that any further settlement discussions would be unproductive at this time.

20 **I. Pretrial Conference and Trial**

21 Plaintiff's Statement

22 Plaintiff proposes a pre-trial conference to occur within 30 days of a ruling
23 on any dispositive motion and for trial to begin within 90 days of the pre-trial
24 conference. If no dispositive motions are filed, plaintiffs proposes that a pre-trial
25 conference occur within 30 days after the disclosures of expert testimony.
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1 NHL's Statement

2 The NHL proposes that a pretrial conference be held 30 days after the Court
3 rules on the parties' summary judgment and *Daubert* motions and that trial should
4 commence 90 days thereafter.

5 **m. Trial Estimate**

6 Plaintiff's Statement

7 Plaintiff anticipates a three-week trial, and that each side will call
8 approximately seven witnesses.

9 NHL's Statement

10 The NHL also anticipates a three-week trial, but it expects to call 10-15
11 witnesses.

12 **n. Trial Counsel**

13 Plaintiff's Statement

14 Trial counsel for Plaintiffs will be William T. Gibbs of Corboy & Demetrio,
15 Brian C. Gudmundson of Zimmerman Reed, LLP, and Mark O'Mara of O'Mara
16 Law Group.

17 NHL's Statement

18 Trial counsel for the NHL will be John Beisner, Jack DiCanio, Shepard
19 Goldfein and Matthew Martino, of Skadden, Arps, Slate, Meagher & Flom, LLP,
20 and Joseph Baumgarten and Adam Lupion, of Proskauer Rose LLP.

21 **o. Independent Expert or Master**

22 The parties expect this action to involve contested scientific issues (including
23 the state of the science surrounding CTE) and expert reports and *Daubert* motions
24 pertaining to those issues, but agree that appointment of a special master or
25 independent expert is unnecessary at this time.

26 **p. Other Issues**

27 Plaintiff anticipates seeking discovery from one or more Canadian citizens
28 and entities, which may require the Court's assistance in management and

1 resolution of attendant issues. Because several case management documents have
2 already been negotiated (e.g., ESI Protocol) and substantial discovery has already
3 occurred in the MDL, the parties agree there are no other issues that may impact the
4 management of these proceedings to raise at this time.

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6 Respectfully submitted,

7 ZIMMERMAN REED, LLP

8 Date: August 8, 2019

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I, Brian C. Gudmundson, am the ECF User whose ID and password are being used to file the JOINT CASE MANAGEMENT STATEMENT. In compliance with C.D. Cal. L.R. 5-4.3.4, I hereby attest that the concurrence in the filing of the document has been obtained from the other signatory.

s/ Brian G. Gudmundson
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