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California

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 FOR THE COUNTY OF ORANGE

18 CIVIL COMPLEX CENTER

19 PACIFICARE LIFE AND HEALTH
INSURANCE COMPANY,

20 Petitioner and Plaintiff,

21 v.

22 DAVE JONES, IN HIS CAPACITY AS
INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA,

23 Respondent and Defendant.
24

Case No. 30-2014-00733375-CU-WM-
CXC

Judge Kim G. Dunning

File No. UPA 2007-00004

OAH No. 2009061395

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO
INTERVENE**

Date: January 7, 2015

Time: 1:30 p.m.

Dept.: CX104

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1 INTRODUCTION

2 On June 9, 2014, Dave Jones, in his capacity as Insurance Commissioner of
3 California (“the Commissioner”), issued a decision in *In the Matter of the Order to Show*
4 *Cause and Accusation Against: PacifiCare Life and Health Insurance Company* (“the
5 Opinion”). The Opinion created a new, unfounded, and overreaching interpretation of the
6 California Unfair Insurance Practices Act (“UIPA”), a statutory scheme applicable to
7 every licensee of the California Department of Insurance (“CDI”) doing business in this
8 state. Moreover, the Commissioner designated the Opinion as a “precedent” decision,
9 indicating that it will have a binding effect on all CDI licensees.¹

10 Contrary to California law, the Opinion rules that:

- 11 • An alleged violation of a statute outside the UIPA may be treated as a violation of
12 the UIPA.
- 13 • A single error or act, without regard to the frequency of the error or act, can equate
14 to an unfair business practice under the UIPA. Cal. Ins. Code § 790.03(h)(1-5).
- 15 • The term “knowingly” as used in Insurance Code § 790.03(h) does not require
16 actual knowledge or any scienter whatsoever, but can be satisfied with merely
17 constructive or implied knowledge.
- 18 • An act is “willful” as used in Insurance Code § 790.035, and subject to increased
19 penalties, if the act is done with a mere willingness to commit the act.
- 20 • The phrase “misrepresent[ation of] pertinent facts” in Insurance Code §
21 790.03(h)(1) includes the omission of a statutory notice in a form. Moreover, the
22 Opinion also purports to make any incorrectly paid claim a misrepresentation of
23 pertinent facts.
- 24 • The term “claimants” in section § 790.03(h)(1) includes providers.
- 25 • The Commissioner is entitled to impose thousands of dollars in penalties for each
26

27 ¹ Government Code § 11425.60 allows an agency to designate as a “precedent decision” “a
28 decision or part of a decision that contains a significant legal or policy determination of general
application that is likely to recur.”

1 incorrectly paid claim without ever running afoul of the Constitution’s prohibition
2 against excessive fines.

- 3 • The Commissioner can designate an opinion as a “precedent decision” and set forth
4 new acts that violate the UIPA without conducting a hearing pursuant to Insurance
5 Code § 790.06.

6 Each of these novel interpretations disregards the express language of the UIPA,
7 ignores existing case law interpreting the statute, or both. Based on these incorrect legal
8 rulings, the Commissioner found PacifiCare liable for violating the UIPA – specifically
9 California Insurance Code § 790.03(h) – and imposed an unprecedented penalty, more
10 than ten times what the Administrative Law Judge handling the PacifiCare matter
11 determined was appropriate.

12 But the Opinion reaches significantly beyond PacifiCare. Because the Opinion was
13 designated a “precedent decision,” and because of the UIPA’s general applicability to all
14 California insurance licensees, the Opinion purports to set forth a new interpretation of the
15 UIPA that will be binding on and enforceable against every licensee – including insurers,
16 agents, and brokers – subject to the CDI’s jurisdiction. Indeed, the Commissioner
17 considers that he has adopted a new regulation, in designating the opinion a “precedent.”

18 Through this motion, Association of Life and Health Insurance Companies
19 (“ACLHIC”), American Council of Life Insurers (“ACLI”), National Association of
20 Mutual Insurance Companies (“NAMIC”), Pacific Association of Domestic Insurance
21 Companies (“PADIC”), Personal Insurance Federation of California (“PIFC”), Property
22 and Casualty Insurers Association of America (“PCIAA”), Independent Insurance Agents
23 and Brokers of California (“IIAB-Cal”) and National Association of Insurance and
24 Financial Advisors – California (“NAIFA-CA”) (collectively “Intervenors”) request leave
25 to intervene in this action pursuant to California Code of Civil Procedure § 387.

26 Intervenors seek to join with plaintiff and petitioner PacifiCare Life and Health Insurance
27 Company (“PacifiCare”) in challenging the Opinion.

28 The judgment in this case will have a binding effect on all CDI licensees, including

1 all of Intervenor's members. Intervenor's therefore should be given the right to challenge
2 the novel and purportedly precedential interpretations of the UIPA set forth in the
3 Opinion. If intervention is not granted, Intervenor's members will be denied their due
4 process rights to be heard and to provide input into the law and rules that will directly
5 apply to their conduct. Intervenor's input is particularly important here, where the rulings
6 announced in the Opinion will broadly affect the insurance industry in California and,
7 ultimately, impact the costs and availability of insurance for California consumers.

8
9 **FACTUAL BACKGROUND**

10 **A. The Members of ACLHIC, PIFC, PCIAA, NAMIC, PADIC, ACLI,**
11 **IIAB-CA, and NAIFA-CA.**

12 Intervenor's collectively represent the majority of CDI licensees. Their members
13 write virtually every type of insurance sold in this state, including health, life, auto,
14 homeowners, commercial general liability, commercial multi-peril, and other lines of
15 insurance necessary to enable California's economy to function. Some members are
16 among the largest insurance companies writing policies in California and the United
17 States. Other members are relatively small and localized insurance companies. Still other
18 members are life, health, and property/casualty agents and brokers. All of the Intervenor's
19 members licensed by the CDI are subject to the UIPA and will be directly impacted by the
20 Opinion's unprecedented interpretation of the UIPA.

21 **B. The Insurance Commissioner's Decision In The PacifiCare Matter.**

22 As described, the 220-page Opinion attempts to re-write the UIPA in a single
23 stroke. The Opinion identifies legal "violations" that are not found in the UIPA itself. It
24 claims for the Commissioner broad powers to impose enormous penalties that are not
25 authorized by the statute. It asserts that the Commissioner has the authority to announce
26 new legal rules and to make new regulations for an entire industry without having to
27 follow legal, legislative, or regulatory processes. And it designates as a "precedent
28 decision," binding on *every* CDI licensee, an Opinion that imposes novel and extreme

1 statutory interpretations, governing an extensive number of routine insurance transactions,
2 without any input from the industry over either their legality or their practical impact on
3 the cost of insurance. As a result, the new rules set forth in the Opinion will affect all of
4 Intervenor's members, since every Administrative Law Judge and every CDI enforcement
5 officer will be bound to apply the Opinion's rulings and interpretations.

6 **I. INTERVENORS EASILY SATISFY THE STANDARDS FOR**
7 **INTERVENTION.**

8 Code of Civil Procedure section 387(a) provides that the Court may permit
9 intervention where: (1) the non-party has a direct and immediate interest in the litigation;
10 (2) the intervention will not enlarge the issues in the case; and (3) the reasons for
11 intervention outweigh any opposition by the existing parties. *Truck Ins. Exch. v. Superior*
12 *Court*, 60 Cal. App. 4th 342, 346 (1997); *Reliance Ins. Co. v. Superior Court*, 84 Cal.
13 App. 4th 383, 386 (2000).

14 The purpose of permissive intervention is "to promote fairness by involving all
15 parties potentially affected by a judgment." *Simpson Redwood Co. v. State of Calif.*, 196
16 Cal. App. 3d 1192, 1199 (1987). For that reason, section 387 should be liberally
17 construed in favor of intervention. *Id.* at 1200.

18 **A. Intervenor's Have a Direct and Immediate Interest In This Litigation.**

19 Intervenor's have a direct interest in the outcome of this litigation. "The
20 requirement of a 'direct' and 'immediate' interest means that the interest must be of such
21 a direct and immediate nature that the moving party will either gain or lose by the direct
22 legal operation and effect of the judgment." *Lindelli v. Town of San Anselmo*, 139 Cal.
23 App. 4th 1499, 1505 (2006) (internal citations omitted). A direct interest sufficient to
24 support intervention need not be a pecuniary interest in the outcome of the dispute, nor a
25 specific interest in the property or transaction involved in the case (as is required for
26 intervention as of right). *Simpson Redwood Co.*, 196 Cal. App. 3d at 1200-01. Similarly,
27 a party seeking to intervene does not need to show that its interest inevitably will be
28 affected by the outcome of the litigation, but rather a substantial probability of such effect

1 is sufficient. *Id.* Thus, “[a] person has a direct interest justifying intervention in litigation
2 where the judgment of the action of itself adds to or detracts from his legal rights without
3 reference to rights and duties not involved in the litigation.” *Continental Vinyl Products*
4 *Corp. v. Mead Corp.*, 27 Cal. App. 3d 543, 549 (1972).

5 Intervenor and their members stand to gain or lose substantially by the operation
6 of the judgment in this case, and the decision will have a profound effect on their legal
7 rights and obligations. The decision in this case will impact the rules applicable to the
8 claims handling and business practices of all of Intervenor’s members. It will decide
9 whether the Commissioner’s unlawful interpretation of the UIPA will be overturned, or
10 whether Intervenor’s members instead effectively will be subject to new (and unlawful)
11 rules and regulations. It will adjudicate whether the Commissioner can appropriate to
12 himself the legislative power of declaring new violations of the UIPA and determining
13 appropriate penalties for them. It will determine whether the Commissioner can use his
14 authority to designate an opinion as precedential in order to effectively create new
15 regulations, while simultaneously circumventing the regulatory process, denying
16 Intervenor the opportunity to petition the government, and muting Intervenor’s right to
17 be heard.

18 Intervenor has a direct and powerful interest in this litigation because the
19 Opinion does more than merely impose a penalty on PacifiCare for its alleged violations
20 of the UIPA. Rather, the Opinion interprets regulatory and statutory laws relating to all
21 California insurance licensees in an unprecedented manner. As a “precedent” decision,
22 these interpretations will have a binding effect on all insurance licensees doing business in
23 the state.

24 Summarizing the Opinion’s central holdings makes manifest their manifold
25 potential effects on Intervenor.

- 26 • **An alleged violation of a statute outside the UIPA may be treated as a**
27 **violation of the UIPA.** Contrary to the Opinion, the UIPA itself states that only
28 certain acts expressly delineated in the UIPA itself constitute a violation of the

1 UIPA. If this new ruling stands, it will mean that Intervenors’ members could be
2 subject to fines for acts that are not unlawful under the UIPA, but which the
3 Commissioner unilaterally and after-the-fact decides to treat as UIPA violations.

- 4 • **A single act can violate Insurance Code § 790.03(h)(1-5).** Unlike the Opinion,
5 Insurance Code § 790.03(h)(1-5) requires proof of a *general business practice*, not
6 a single act. If the Commissioner’s improper interpretation stands, it could subject
7 Intervenors’ members to liability for acts that do not rise to business practices and
8 also would transform a single, inadvertent error – repeated multiple times through
9 automation – into a “business practice.”
- 10 • **A single error, without regard to the error’s frequency, can also equate to an**
11 **unfair “business practice.”** The UIPA requires that, to constitute a violation, an
12 act must be performed with frequency. The Opinion ambiguously interprets this to
13 mean “over and over again.” Given the number of insurance claims that
14 Intervenors’ process, the Opinion’s interpretation could result in very rare events –
15 errors that happen in a tiny percentage of claims – being treated as business
16 “practices,” contrary to the UIPA itself.
- 17 • **The term “knowing” as used in Insurance Code § 790.03(h) does not require**
18 **actual knowledge and requires no level of scienter.** This ruling is flatly contrary
19 to settled California law, which requires some level of scienter for an act to be
20 “knowing.” In contrast, the Commissioner’s interpretation amounts to holding that
21 any conduct inconsistent with the law will be considered “knowing.”
- 22 • **An act is “willful” as used in Insurance Code § 790.035 if it is merely done**
23 **with a willingness to commit the act.** Again, this analysis is inconsistent with
24 existing law. In the context of the two-tiered penalty system created by the UIPA,
25 California law holds that conduct cannot be “willful” and therefore subject to more
26 stringent penalties if the actor has a good faith belief that the conduct is lawful.
27 The Commissioner’s contrary interpretation is based on his incorrect reliance on
28 the improper interpretation of a regulation that he himself propounded. The

1 Commissioner lacks authority to rewrite settled California law simply because he
2 would like to do so.

- 3 • **The term “misrepresent[ation of] . . . pertinent facts” in Insurance Code**
4 **§ 790.03(h)(1) includes the omission of a notice of a statutory right in a form.**
5 The Commissioner’s interpretation of “misrepresentation” would translate even an
6 inadvertent omission of a statutory notice into a misrepresentation of fact.
- 7 • **The term “claimants” in Insurance Code § 790.03(h)(1) includes medical**
8 **providers.** Under the UIPA’s plain language, a “claimant” must be a “beneficiary
9 under the terms of that policy.” Medical providers may benefit from the existence
10 of an insurance policy, but they are not the “beneficiaries” of a policy. Thus,
11 providers cannot be considered “claimants” within the meaning of § 790.03(h)(1).
- 12 • **The Commissioner can designate an opinion as a “precedent decision” and set**
13 **forth new acts as violations of the UIPA without conducting a hearing**
14 **pursuant to Insurance Code § 790.06.** The Insurance Code provides a precise
15 mechanism for adding to the list of methods, acts, and practices that can violate the
16 UIPA – a hearing pursuant to § 790.06. The Commissioner cannot add to the list
17 of acts that violate the UIPA merely by issuing a precedent decision that declares
18 those acts to be violations, as he purports to do here.
- 19 • **The Commissioner can pile up penalties purportedly imposed on a “per act”**
20 **basis without ever violating the Constitution’s prohibition on excessive fines.**
21 But the Commissioner has discretion in assessing penalties precisely so that
22 excessive fines are not imposed. The Opinion purports to establish a schedule that
23 creates “baseline” penalties for certain acts and permits the accumulation of
24 penalties in a manner that is not authorized or envisioned by the statute.

25
26 Even this cursory cataloguing of the Opinion’s key holdings demonstrates why
27 Intervenors (on behalf of their members) have a direct interest in the outcome of this
28 litigation. Intervenors have a strong interest in defending the appropriate and lawful

1 interpretation of the statutory scheme applicable to their members. *See Bustop v. Superior*
2 *Court*, 69 Cal. App. 3d 66, 71 (1977) (finding that a group of parents had a sufficient
3 interest “in a sound educational system and in the operation of that system in accordance
4 with the law” to permit intervention in an action involving a school district desegregation
5 plan); *see also People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 661-63
6 (1983) (the Sierra Club, on behalf of its members, had a strong interest in the enforcement
7 of laws relating to the spraying of phenoxy herbicides when its members used the land
8 that would be sprayed). Intervenors also have a strong interest in ensuring that they are
9 not subject to liability or penalties for acts that were never intended to be within the realm
10 of the UIPA.

11 As discussed in their Verified Complaint in Intervention, Intervenors could
12 challenge the legal standards announced by the Commissioner in the Opinion through
13 their own petition for mandamus and complaint for declaratory relief. *See Spanish*
14 *Speaking Citizens Foundation v. Low*, 85 Cal. App. 4th 1179, 1208 (2000) (describing
15 challenges brought by consumer groups and cities to auto rating regulations as interpreted
16 by the Commissioner in an administrative decision);² *see also* 9 Witkin, Cal. Proc. 5th
17 (2008) Admin. Proc. § 130, p. 1256-57 (“A person aggrieved by an agency determination
18 has a right to independent judicial review of questions of law, such as those dealing with
19 the interpretation and application of statutes or judicial precedents.”) (*citing, inter alia,*
20 *Spanish Speaking Citizens*, 85 Cal. App. 4th at 1216).

21 **B. Intervention Will Not Enlarge The Issues In This Litigation.**

22 Intervenors will not enlarge the issues being litigated if they are permitted to
23 intervene. Where an intervenor attempts only to claim an interest in the action and to
24 participate in the litigation, courts have found that there is no enlargement of the issues.

25 _____
26 ² Intervenors could bring their own action for declaratory relief to specifically test the validity of
27 the regulations that support the Commissioner’s decision. *See Environmental Protection*
28 *Information Center v. Department of Forestry & Fire Protection*, 43 Cal. App. 4th 1011, 1017-18
(1996) (organization has standing to challenge regulations under Government Code § 11350 “if
either it or its members is or may well be impacted by a challenged regulation.”).

1 *Rominger*, 147 Cal. App. 3d at 664-65 (intervention proper when intervenors raised no
2 new legal or factual issues and the only issue before the court was the validity of County
3 ordinances).

4 The central issue in this action is whether the rules set forth by the Commissioner
5 in the Opinion are consistent with California law and within the scope of the
6 Commissioner's authority. That issue will remain the same if Intervenor are allowed to
7 participate. Intervenor's challenges to the legal rules announced in the Commissioner's
8 Opinion are similar to PacifiCare's challenges, although Intervenor's objections are rooted
9 in concerns about the effect the Opinion's legal rulings will have on their members and on
10 the broader insurance industry. And, as representatives of the majority of California
11 insurers, Intervenor are specially situated to ensure that the entire industry, not just
12 PacifiCare, is represented in this "precedential" action.

13 Similarly, the causes of action in Intervenor's Complaint also overlap with those in
14 PacifiCare's Complaint. Indeed, intervention would be proper even where an intervenor
15 seeks to allege wholly new causes of action, if the new matter would "not delay the
16 litigation, change the position of the parties, or even require introduction of additional
17 evidence" and would not "prolong, confuse or disrupt" the lawsuit. *Simpson Redwood*
18 *Co.*, 196 Cal. App. 3d at 1202-03.

19 In short, permitting Intervenor to participate in this action would enlarge the
20 Court's perspective on the key issues in this matter without enlarging the issues to be
21 litigated. Permitting intervention also would afford Intervenor's members the opportunity
22 to be heard on issues of critical importance to each of them, and to the entire insurance
23 industry.

24 **C. The Reasons Supporting Intervention Outweigh Any Basis for**
25 **Opposition By The Existing Parties.**

26 Intervention is appropriate where the reasons for intervention outweigh any interest
27 on the part of the existing parties in conducting the lawsuit "unburdened by others." *See*
28 *City & County of San Francisco v. State of California*, 128 Cal. App. 4th 1030, 1036

1 (2005). As discussed above, Intervenors have a direct and immediate interest in
2 intervening to protect their members from being subjected to new rules and regulations
3 without due process.

4 In contrast, the existing parties – both of which have been informed of Intervenors’
5 motion – have no substantial interest to oppose intervention. Indeed, PacifiCare has
6 indicated that it does not intend to oppose the motion. The Commissioner has indicated
7 that it will not stipulate to the intervention or file a statement of non-opposition. To the
8 extent the Commissioner actually plans to oppose the motion, he lacks any sound basis to
9 do so. The Commissioner has put the interests of Intervenors’ members directly at issue
10 by designating the Opinion as a “precedent opinion” and by his stated intention to use the
11 rules set forth in the Opinion in further rulings. Through the Opinion, the Commissioner
12 single-handedly has attempted to change the rules and regulations that impact all CDI
13 licenses. It would be unfair and inappropriate to prevent those licensees from protecting
14 their own interests through participation in these proceedings.

15
16 **II. INTERVENORS HAVE MOVED PROMPTLY TO INTERVENE.**

17 Intervenors’ motion to intervene is timely. “[I]t is the general rule that a right to
18 intervene should be asserted within a reasonable time and that the intervener must not be
19 guilty of an unreasonable delay after knowledge of the suit.” *Allen v. Calif. Water & Tel.*
20 *Co.*, 31 Cal. 2d 104, 108 (1947). Indeed, a party may be allowed to intervene at any time,
21 even after entry of judgment, as long as it is reasonable under the circumstances. *Mallick*
22 *v. Superior Court*, 89 Cal. App. 3d 434, 437 (1979).

23 Intervenors have acted promptly here. PacifiCare filed its petition for writ of
24 administrative mandamus on July 10, 2014. On September 26, 2014, the Commissioner
25 filed an answer to the petition. After discussing the desire to intervene amongst
26 themselves and after hiring counsel, Intervenors (through their counsel) contacted Adam
27 Cole, Deputy Commissioner and General Counsel for the California Department of
28 Insurance, and Steve Velkei, counsel for PacifiCare, to inform Mr. Cole and Mr. Velkei

1 that Intervenors intended to intervene in this action. *See* accompanying Declaration of
2 Vanessa Wells. Prior to this conversation, Intervenors' counsel was informed that the
3 parties intended to meet and confer on October 16, 2014 regarding case management
4 issues. *Id.* Intervenors therefore ensured that they informed Commissioner's counsel of
5 their intent to intervene on October 15, prior to this meeting. During the October 15
6 discussion, Mr. Cole did not indicate whether the Commissioner would oppose
7 Intervenors' motion. *Id.* Mr. Velkei indicated that he did not anticipate that PacifiCare
8 would oppose Intervenors' motion.

9 On October 30, 2014, Intervenors' counsel met in person with Mr. Cole and other
10 representatives of the Commissioner. Intervenors' counsel subsequently provided Mr.
11 Cole with a draft copy of Intervenors' Complaint. On November 18, 2014, Mr. Cole
12 informed Intervenors' counsel that the Department would not stipulate or file a statement
13 of non-opposition to the intervention. Intervenors are filing this motion promptly, within
14 a few days of learning of the Commissioner's position.

15 Other than PacifiCare's Petition and the Commissioner's Answer, no other
16 substantive documents have been filed. This matter is in the very early stages. The
17 administrative record has not yet been prepared and lodged with the Court, and the
18 schedule for briefing and hearing of the merits of the petition has not been set. There will
19 thus be no disruption in the case if Intervenors are permitted to intervene at this stage.
20

21 **III. CONCLUSION.**

22 This case presents significant issues regarding interpretations of laws that are
23 binding on all insurers licensed by the CDI. Intervenors' represent the majority of
24 California insurers subject to those laws and they thus have an immense interest in the
25 outcome of this litigation. Intervenors respectfully request that this Court grant their

26 ///

27 ///

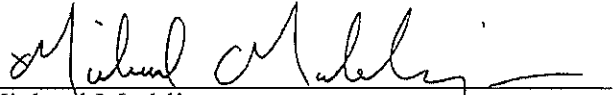
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motion for leave to intervene and permit the filing of their Proposed Complaint in Intervention.

Dated: November 21, 2014

HOGAN LOVELLS US LLP

By: 

Michael Maddigan
Attorneys for Intervenors
Association of California Life and Health Insurance Companies, Personal Insurance Federation of California, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, Pacific Association of Domestic Insurance Companies, American Council of Life Insurers, Independent Insurance Agents and Brokers of California, and National Association of Insurance and Financial Advisors – California

1 **PROOF OF SERVICE**

2 I, Carmela Barrera, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On November 21,
6 2014, I served a copy of the within document(s):

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
8 **MOTION FOR LEAVE TO INTERVENE**

- 9 by transmitting via facsimile the document(s) listed above to the fax number(s) set
10 forth below on this date before 5:00 p.m.
11 by placing the document(s) listed above in a sealed envelope with postage thereon
12 fully prepaid, the United States mail at Los Angeles, California addressed as set
13 forth below.
14 by placing the document(s) listed above in a sealed Federal Express envelope and
15 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal
16 Express agent for delivery.
17 by personally delivering the document(s) listed above to the person(s) at the
18 address(es) set forth below.
19 by transmitting via e-mail or electronic transmission the document(s) listed above
20 to the person(s) at the e-mail address(es) set forth below.

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27 I am readily familiar with the firm's practice of collection and processing correspondence
28 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same

1 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
2 motion of the party served, service is presumed invalid if postal cancellation date or postage
3 meter date is more than one day after date of deposit for mailing in affidavit.

4 I declare under penalty of perjury under the laws of the State of California that the above
5 is true and correct.

6 Executed on November 21, 2014, at Los Angeles, California.

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9 Carmela Barrera

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