WILLIAM S. FREEMAN (SBN 82002)
MARGARET I. BRANICK-ABILLA (SBN 223600)
AMY E. NASH (SBN 264955)
COOLEY LLP
3175 Hanover Street
Palo Alto, CA 94304-1130
Telephone: (650) 843-5000

STUART SEABORN (SBN 198590)
SUZANNA GEE (SBN 170780)
JAY KOSLOFSKY (SBN 97024)
SEAN RASHKIS (SBN 232533)
WILL SCHELL (SBN 252470)
DISABILITY RIGHTS CALIFORNIA
100 Howe Ave., Suite 235N
Sacramento, CA 95825
Telephone: (916) 488-9950

ATTORNEYS FOR PLAINTIFFS
[ADDITIONAL COUNSEL LISTED ON NEXT PAGE]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LESLIE NAPPER, JANET FISCHER, JACQUIE EICHHORN-SMITH, TED YANELLO, and LYNDA MANGIO, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

COUNTY OF SACRAMENTO; BOARD OF SUPERVISORS OF THE COUNTY OF SACRAMENTO; County Supervisor ROGER DICKINSON; County Supervisor JIMMIE YEE; County Supervisor SUSAN PETERS; County Supervisor ROBERTA MACGLASHAN; County Supervisor DON NOTTOLI; SACRAMENTO COUNTY DEPARTMENT OF BEHAVIORAL HEALTH SERVICES; ANN EDWARDS-BUCKLEY, Director, Department of Behavioral Health Services; MARY ANN BENNETT, Mental Health Director,

Defendants.

Case No. 2:10-cv-1119

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Date: TBD
Time: TBD
Place: Courtroom 6, 14th Floor
Judge: Hon. John A. Mendez

ROBERT D. NEWMAN (SBN 86534)
KIMBERLY LEWIS (SBN 144870)
ANTIONETTE D. DOZIER (SBN 244437)
WESTERN CENTER ON LAW AND POVERTY
3701 West Sixth Street, Suite 208
Los Angeles, California 90010
Telephone: (213) 487-7211
MELINDA BIRD (SBN 102236)
DISABILITY RIGHTS CALIFORNIA
3580 Wilshire Blvd., Ste. 902
Los Angeles, CA 90010
Telephone: (213) 427-8747

KIMBERLY SWAIN (SBN 100340)
DISABILITY RIGHTS CALIFORNIA
1330 Broadway, Suite 500
Oakland, CA 94612
Telephone: (510) 267-1200

[ADDITIONAL COUNSEL LISTED ON CAPTION PAGE]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES
(continued)

PAGE

TABLE OF AUTHORITIES
(continued)

PAGE

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This lawsuit challenges the unlawful termination of essential mental health services to thousands of low-income Medi-Cal recipients in Sacramento County. Defendant County of Sacramento ("County") has stated that during the 2010-11 fiscal year, it intends to close mental health programs that provide "core" services to approximately 5,000 County residents with severe mental illness, such as schizophrenia, bipolar disorder and depression. Specifically, the County has stated that beginning on August 1, 2010, it intends to begin eliminating outpatient services that are currently being provided to these clients by four Regional Support Team ("RST") programs and the Transitional Community Opportunities for Recovery and Engagement ("TCORE") program, and to reduce funding significantly for the Consumer Self Help Wellness and Recovery Center ("CSH"), which is also serving the clients. Together, these impacted programs provide most of the outpatient mental health services to Medi-Cal recipients in the County. Although the County claims that it intends to transition these clients to new County-run clinics beginning on July 1, 2010, it has provided virtually no details concerning these clinics, their proposed staffing or the services they are expected to provide, and based on the County's statements to date, it is a virtual certainty that these services will be greatly reduced and vastly inferior to the system that the County is dismantling.

By this motion, Plaintiffs Leslie Napper, Jan Fischer, Jacquie Eichhorn-Smith, Ted Yannello and Lynda Mangio ("Plaintiffs") respectfully request that the Court certify a class consisting of "all current and future recipients of Medi-Cal funded mental health services in the County of Sacramento." "Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23" of the Federal Rules of Civil Procedure. *Protectmarriage.com v. Bowen*, 262 F.R.D. 504, 506-07 (E.D. Cal. 2009), citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996).

This action readily satisfies the requirements for class certification under Rule 23(a). First, the proposed class consists of well over 5,000 current members, making joinder impracticable. Second, members of the proposed class share common issues of fact and law as

they are currently threatened and will continue to be threatened with the unlawful denial of outpatient mental health services which they are entitled to receive under California's Medicaid program, better known as Medi-Cal. Third, the five Plaintiffs satisfy the typicality requirement because they are threatened with the same unlawful denial of Medicaid-funded mental health services as thousands of other Medi-Cal recipients in the County. Fourth, Plaintiffs are adequate class representatives because they have no conflicts with the claims of putative class members. Likewise, Plaintiffs' attorneys have no conflicts with the claims of putative class members and have substantial experience in class actions, public benefits cases, and other complex civil rights cases in federal court, making them more than adequate class counsel.

This case is appropriate for class certification under Rule 23(b)(2) because the class has been subject to a common set of practices for which they only seek injunctive and declaratory relief. "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001); *see also Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003). This Court should therefore certify the proposed class, approve the five Plaintiffs as class representatives, and appoint Plaintiffs' counsel to serve as class counsel. This Court should also order that notice need not be given to class members of the pendency of this class action at this time.

II. STATEMENT OF FACTS

To avoid unnecessary repetition, Plaintiffs refer the Court to the Statement of Facts in the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, filed concurrently herewith.

III. ERRING ON THE SIDE OF CAUTION, PLAINTIFFS ARE MOVING FOR CLASS CERTIFICATION AT SUCH AN EARLY STAGE IN THE PROCEEDINGS SO AS TO AVOID ANY DOUBTS ABOUT THE SCOPE OF THE PROPOSED PRELIMINARY INJUNCTION IN THIS CASE

Rule 23(c) specifies that at an "early practicable time" after commencement of an action the court shall determine whether the action is to be maintained as a class action. Fed. R. Civ. P. 23(c)(1)(A); *see also Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). It is especially important that the Court rule upon this class certification motion at an early stage in these

proceedings since Plaintiffs have filed a motion for preliminary injunction not just for themselves, but also for all members of the proposed class.

The purpose of a preliminary injunction is to preserve the status quo, returning the parties to their relative positions before the actions that gave rise to the litigation. *GoTo.Com, Inc. v. Walt Disney Co*., 202 F.3d 1199, 1210 (9th Cir. 2000). "There is no general requirement that an injunction affect only the parties in the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987).

It is well-settled that an injunction benefitting non-parties is permissible provided it is necessary to give the relief to which the parties are individually entitled. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996); *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 633-34 (9th Cir. 1972). Although both those cases dealt with permanent injunctions, the principle is the same for preliminary injunctions. *See Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (applying the same standard to a preliminary injunction).

In *Easyriders*, the Ninth Circuit held that an injunction forbidding the California Highway Patrol from engaging in unconstitutional stops of any motorcyclists, instead of merely forbidding stops of the named plaintiffs, was not overbroad. 92 F.3d at 1501. The court reasoned:

> Because the CHP policy regarding helmets is formulated on a statewide level, other law enforcement agencies follow the CHP's policy, and it is unlikely that law enforcement officials who were not restricted by an injunction governing their treatment of all motorcyclists would inquire before citation into whether a motorcyclist was among the named plaintiffs or a member of Easyriders, the plaintiffs would not receive the complete relief to which they are entitled without statewide application of the injunction.

Id. at 1502; *see also Bresgal*, 843 F.2d at 1169-1171 (requiring the enforcement of the Migrant and Seasonal Workers Protection Act on a nationwide basis rather than just against the particular labor contractors who might deal with the individual plaintiffs).

On the other hand, the Ninth Circuit has expressed the view that a preliminary injunction may only cover the named plaintiffs if the lawsuit has not been certified as a class action. *Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984), *vacated*, 481 U.S. 1009 (1987); *see also Zepeda*, 753 F.2d at 728 n.1 ("Without a properly certified class, a court

cannot grant relief on a class-wide basis"); *accord*, *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996).

According to *Bresgal* and *Easyriders*, the proposed preliminary injunction in this case should be permissible as a means of providing full relief to the five named Plaintiffs and all others similarly situated. *See also Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1178 n.14 (N.D. Cal. 2009) ("District courts are empowered to grant preliminary injunctions 'regardless of whether the class has been certified.'") (citation omitted). Yet Plaintiffs, mindful of the statements in *National Center for Immigration Rights* and *Zepeda*, want to eliminate any possible objections from Defendants about the scope of the order (e.g., enjoining the closure of the RSTs and the TCORE program). The simplest way to avoid such a potential controversy would be to certify the case as a class action.

IV. THIS LAWSUIT SATISFIES ALL THE REQUIREMENTS OF RULE 23 FOR MAINTENANCE AS A CLASS ACTION

In determining whether an action warrants class treatment under Rule 23, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quotations and citation omitted); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (same).

The Ninth Circuit recently set forth the basic rules for class certification motions in the long awaited decision in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc). A district court "must perform a rigorous analysis" to ensure that the Rule 23 requirements have been met. *Id.* at 581. This "analysis will often, though not always, require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims." *Id.*; *see also Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues"). However, "district courts may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements" and "different parts of Rule 23 require different inquiries." *Dukes*, 603 F.3d at 594. For example, plaintiffs only need "establish common *questions* of law and fact" for

purposes of the commonality inquiry under Rule 23(a)(2), whereas "answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment." *Id.* (emphasis in original).

As discussed below, the proposed class meets all the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (listing Rule 23(a) requirements). In addition, this class meets the requirements of Rule 23(b)(2) in that declaratory and injunctive relief predominates and is appropriate. Fed. R. Civ. P. 23(b)(2); *see also Amchem*, 521 U.S. at 614.

A. The Proposed Class Satisfies the Requirements of Rule 23(a).

1. The Proposed Class is Sufficiently Numerous.

"To satisfy Rule 23's requirements, the proponent must first establish that a class does in fact exist." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). "An adequate class definition specifies 'a distinct group of plaintiffs whose members [can] be identified with particularity.'" *Campbell v. PricewaterhousCoopers, LLP*, 253 F.R.D. 586, 593 (E.D. Cal. 2008), quoting *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978). A class definition must be "precise, objective and presently ascertainable." *O'Connor*, 184 F.R.D. at 319.

Plaintiffs seek to represent a class consisting of "all current and future recipients of Medi-Cal funded mental health services in the County of Sacramento." The class is sufficiently defined in this case.

Rule 23(a)(1) requires a finding that the proposed class is so numerous that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpractibility' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc*., 329 F.2d 909, 913-14 (9th Cir. 1964).

While there is no exact numerical formula, a class of over 100 members satisfies the numerosity requirement. *See* 1 Newberg on Class Actions (4th ed. 2002) § 3.5 at 247 ("as few as 40 class members should raise a presumption that joinder is impracticable"). Courts in the Ninth

Circuit have found that classes of far fewer than 100 persons are sufficiently numerous to render joinder impracticable. *See, e.g., Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982) ("[W]e would be inclined to find the numerosity requirement in the present case satisfied solely on the basis of the number of ascertained class members, i.e., 39, 64, and 71. . . ."); *Perez-Funez v. Dist. Dir., INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) ("Classes consisting of 25 members have been held large enough to justify certification.").

Plaintiffs easily satisfy the numerosity requirement in this case. The County's Mental Health Plan serves approximately 20,000 Medi-Cal recipients with severe and chronic mental illness; of these, approximately half are adults over the age of 18. Branick-Abilla Declaration ("Decl."), ¶ 3, Exhibit ("Ex.") A at 48 (2009 APS Rpt.).[1] One of the RSTs, Human Resources Consultants, alone serves 840 clients, 90 to 95% of whom are Medi-Cal recipients. Place Decl., ¶ 12. Another RST, Visions Unlimited, has over 800 clients. Bates Decl., ¶¶ 2, 3, 15. TCORE currently serves nearly 640 people. Risley Decl., ¶ 6.

In determining the impracticability of joinder under Rule 23(a)(1), the court may consider other factors besides the sheer size of the class. *Jordan*, 669 F.2d at 1319; *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982). One such factor is the "relatively small size of each class member's claim." *Jordan*, 669 F.2d at 1319. Here, while the services at stake are critical to the health, indeed the survival, of members of the proposed class, the dollar amount of each class member's claim is relatively small and these needy individuals do not have the financial resources to pursue separate actions. A second factor is whether the "class is composed of unnamed and unknown future" members since the "joinder of unknown individuals is inherently impracticable." *Id*. at 1320. The proposed class in this case includes unnamed and unknown future applicants and recipients of the Medi-Cal program. A third factor in determining the impracticability of joinder is "whether injunctive or declaratory relief is sought." *Id*. at 1319.

[1] The declarations of Robert D. Newman, William S. Freeman and Melinda Bird are filed in support of this motion. All other declarations cited herein have been filed concurrently in support of Plaintiffs' Motion for Preliminary Injunction.

This lawsuit only seeks injunctive and declaratory relief. In sum, the proposed class meets the requirements of Rule 23(a)(1).

2. The Case Presents Many Common Questions of Law and Fact.

On its face, Rule 23(a)(2) requires that there be questions of either "law or fact" common to members of the proposed class. Fed. R. Civ. P. 23(a)(2). "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998); *accord*, *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). "The commonality test is 'qualitative rather than quantitative' – one significant issue common to the class may be sufficient to warrant certification. . . ." *Dukes*, 603 F.3d at 599. The courts do not treat commonality as a difficult hurdle; the requirement should be "construed permissively." *Hanlon*, 150 F.3d at 1019.

The overarching issue in this case is the County's plan to make system-wide changes in the outpatient mental health services it provides to thousands of Medi-Cal recipients. *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (commonality requirement is met "where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members"). The County has announced that during the next fiscal year it intends to end all funding for the RST and TCORE programs and to reduce funding significantly for the CSH. The County reportedly intends to replace these critical outpatient programs, which have been operated for more than a decade by nonprofit agencies with their own employees, with new clinics, which will be operated by the County with the County's own employees.

Among the common issues of fact are the following:

(1) whether the County's new clinics will treat the same number of clients and offer the same level of services as do the RSTs, TCORE program and the CSH;

(2) whether the County has developed adequate plans to transition existing clients of the RSTs, TCORE program and the CSH to the new clinics beginning on July 1 without any interruption in service;

(3) whether, as a result of the proposed elimination of existing programs and transition to County-run clinics, thousands of Medi-Cal recipients in this County will be denied medically necessary, outpatient mental health services; and

(4) whether the County's policies favor the institutionalization of persons with disabilities by maintaining the funding for costly inpatient care – the Mental Health Treatment Center and Crestwood Psychiatric Health Facility – while cutting the funding for less expensive and more effective outpatient mental health services – the RSTs, TCORE program and the CSH.

These common questions of fact in turn raise several common questions of law, including whether Defendants will be violating the Americans with Disabilities Act of 1990, 42 U.S.C. § 12312, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and California Government Code § 11135, by: (1) failing to provide services to people with disabilities in the most integrated setting appropriate to their needs; (2) denying people with disabilities the opportunity to benefit from the County's mental health services or providing them with less effective services; (3) using methods of administration that discriminate by placing people with disabilities at risk of institutionalization or that defeat the purpose of the County's Mental Health Plan; (4) selecting sites for new clinics that may not be accessible to people with disabilities; and (5) failing to make modifications and/or accommodations when necessary to avoid discrimination.

Other common questions of law are whether Defendants' proposed actions also violate requirements of the Medicaid Act, 42 U.S.C. § 1396a, that Medicaid recipients such as Plaintiffs and members of the class be provided with (1) services that are sufficient in amount, duration, and scope to reasonably achieve their purposes; (2) comparable Medicaid services to individuals with similar needs; and (3) services according to reasonable standards. Additional common questions of law in this case are whether Defendants' failure to provide adequate notice and opportunity for hearing prior to depriving members of the class of critical Medi-Cal mental health services violates the federal and state constitutional guarantees of due process and the Medicaid Act's notice and hearing provisions.

Any differences in the ways in which these policies and practices affect individual class members do not undermine the finding of commonality. *Staton*, 327 F.3d at 954-55 (where plaintiffs have alleged a "complex of discriminatory practices," individual class members need not have been affected by every practice); *Jordan*, 669 F.2d at 1320 ("The legality of defendant's practices or policies will usually be a question common to the class, and the existence of different factual questions with respect to various [plaintiffs] will not defeat satisfaction of the commonality requirement"). A common inquiry is plainly the most efficient and appropriate way to answer any and each of the common factual and legal questions posed in this case.

3. The Claims of the Named Plaintiffs Are Typical of the Class They Seek To Represent.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[2] "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *accord*, *Dukes*, 603 F.3d at 614. It is sufficient if the class representatives and members of the class "share a 'common issue of law or fact,'" *Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990) (quoting *Blackie*, 524 F.2d at 904), "and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief." *Id*. (quotations and citation omitted).

The named Plaintiffs' claims are typical of those of the class. All five class representatives are County residents and Medi-Cal recipients. Napper Decl., ¶¶ 3, 4; Fischer Decl., ¶ 2; Eichhorn-Smith Decl., ¶ 2; Yannello Decl., ¶ 3; Mangio Decl., ¶¶ 9, 10. All five class representatives currently receive mental health services from nonprofit agencies under contract with the County. Napper Decl., ¶¶ 2, 9, 10, 13; Fischer Decl., ¶¶ 2, 6, 9, 10; Eichhorn-Smith Decl., ¶¶ 1, 7-10, 11; Yannello Decl., ¶¶ 3, 5; Mangio Decl., ¶¶ 2, 13, 14. The County is threatening to eliminate or reduce the funding for these nonprofit agencies. Napper Decl., ¶¶ 2,

[2] The "commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw.*, 457 U.S. at 158; *accord*, *Staton*, 327 F.3d at 957.

14, 15; Fischer Decl., ¶¶ 2, 12; Eichhorn-Smith Decl., ¶¶ 1, 11; Yannello Decl., ¶ 7; Mangio Decl., ¶¶ 2, 17.

4. The Named Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class.

Rule 23(a)(4) requires that the named class representative "fairly and adequately protect the interests of the class." The rule is satisfied where, as here: (1) the representatives' claims are sufficiently interrelated to and not antagonistic with the class' claims; and (2) counsel for the representatives are qualified, experienced and generally able to conduct the litigation. *Hanlon*, 150 F.3d at 1020; *accord*, *Dukes*, 603 F.3d at 614. Here, the interests of the class and the interests of the Plaintiffs are the same. Both seek to prove that Defendants' proposed elimination of existing programs and Defendants' plan to force the Plaintiffs to transition to County-run clinics violate federal and state law. There is no antagonism between the Plaintiffs' claims and those of the class they seek to represent, especially since Plaintiffs only seek declaratory and injunctive relief against Defendants to require their compliance with the law.

The named Plaintiffs have affirmed their willingness to undertake the responsibilities of serving as class representatives. They have never been the class representative in any other class actions. Plaintiffs understand the fiduciary obligations of a class representative in a class action lawsuit and intend to represent fairly and adequately the interests of the proposed class in this case, regardless of whether this case is resolved by settlement or trial. They do not have any interests in conflict with the interests of the proposed class. Napper Decl., ¶ 16; Fischer Decl., ¶ 14; Eichhorn-Smith Decl., ¶ 13; Yannello Decl., ¶ 9; Mangio Decl., ¶ 18.

The named Plaintiffs have retained counsel who have the resources and expertise to prosecute this action vigorously on behalf of the class. For example, Robert Newman of the Western Center on Law & Poverty has been lead counsel or co-counsel in dozens of class action lawsuits concerning indigents' rights to public assistance, health care and housing in federal and state courts, many of which have resulted in published opinions. Newman Decl., ¶¶ 5-6. In March of 2007, Mr. Newman received the award of California Lawyer of the Year in the field of public policy from California Lawyer Magazine along with another of Plaintiffs' counsel herein,

Melinda R. Bird. *Id.*, ¶ 10; Bird Decl., ¶ 5. Mr. Newman has also been selected for listing for several years in the area of Class Actions/Mass Torts in Southern California Super Lawyers. Newman Decl., ¶ 10.

William Freeman of Cooley LLP, another of Plaintiffs' counsel, has been involved in dozens of federal court class action cases over the past thirty years, often as lead counsel for his clients. Freeman Decl., ¶ 4. Mr. Freeman's firm has also acted frequently as counsel for plaintiffs in class actions to vindicate individual rights. *Id.*, ¶ 5.

A third of Plaintiffs' lawyers is Melinda R. Bird of Disability Rights California. Since 1978, Disability Rights California has been advocating for the legal, civil and service rights of people with disabilities throughout California. Bird Decl., ¶¶ 2, 3. Ms. Bird's work has been primarily in the entitlements to Medicaid-funded health and mental health services and disability rights, and she too has been lead counsel or co-counsel in numerous civil rights class action lawsuits in state and federal court. *Id.*, ¶ 5. Ms. Bird's honors include being named Advocate of the Year in 2010 by California Mental Health Advocates for Children and Youth, and a "Top Women Litigator" in California in 2007 by the California Daily Journal. *Id.* For several years, she has been named a Southern California Super Lawyer in the areas of Constitutional Law/Civil Rights. *Id.*

Plaintiffs and their counsel clearly satisfy the requirements of Rule 23(a)(4).

B. The Court Should Certify the Class under Rule 23(b)(2).

In addition to meeting the requirements of Rule 23(a), the proposed class must also satisfy one of the Rule 23(b) categories. Rule 23(b)(2) is an appropriate basis for certification when the defendant "has acted or refused to act on grounds that apply generally to the class," thereby making appropriate declaratory and injunctive relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2).

Certification of a class under Rule 23(b)(2) does not require that every single class member must have been injured or aggrieved in the same way by defendant's conduct. A class may properly be certified under Rule 23(b)(2) if the opposing party's "[a]ction or inaction is directed to a class . . . even if it has taken effect or is threatened only as to one or a few members

of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966). Thus, it is sufficient if the defendant has adopted or engaged in a pattern of activity that is "central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994).

Certification of a class under Rule 23(b)(2) is appropriate here because Plaintiffs and members of the class all are threatened with imminent across-the-board reductions in outpatient mental health services. Unless the Court grants a preliminary injunction, then, as of October 1, 2010, the County will have closed the four RSTs and the TCORE program and will have made drastic reductions in the funding for the CSH. Whatever programs the County hastily cobbles together in the upcoming weeks will not be an adequate substitute for the existing programs. The resulting loss in available outpatient mental health services will not affect just one or two class members, but could well affect every member of the class.

Finally, this action is appropriate under Rule 23(b)(2) because class actions for declaratory or injunctive relief also help to avoid mootness and to facilitate enforcement of judgments. 1 Newberg at § 2.28; 2 Newberg at § 5.03. Absent class certification, when the named Plaintiffs cease to receive Medi-Cal or mental health services from Sacramento County, the case would become moot. At the very least, there would be no one with standing to enforce any order entered by the Court. However, other residents of Sacramento County who meet the class definition or who may do so in the future are also entitled to the same rights under state and federal law. Therefore, classwide final injunctive and declaratory relief is appropriate to avoid mootness and to facilitate enforcement of any judgment this Court may enter. 1 Newberg at § 2.28; 2 Newberg at § 5.03; *see also Lynch v. Rank*, 604 F. Supp. 30, 38-39 (N.D. Cal. 1984) (certifying a nationwide class so that poor and disabled individuals outside California and "public interest groups in other forums will not be forced to throw their efforts and resources into relitigating the issue"). Rule 23(b)(2) is satisfied in this case.

V. THE COURT SHOULD DESIGNATE PLAINTIFFS' COUNSEL AS CLASS COUNSEL PURSUANT TO RULE 23(G)(1)

When a class is certified, the court must appoint class counsel (Fed. R. Civ. P. 23(g)(1)) and the class certification order must list these counsel. Fed. R. Civ. P. 23(c)(1)(B). The Federal Rules list four factors the court must consider in appointing class counsel:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

Pursuant to these four factors, Plaintiffs' counsel qualify for appointment as class counsel in this case. The extensive papers which Plaintiffs have filed concurrently herewith in support of their motion for preliminary injunction bespeak the hard work that Plaintiffs' counsel have done on this action up until the present day. Counsel have interviewed and obtained declarations not only from the five named Plaintiffs and several other class members, but also from a number of service providers and experts in the field of mental health. The moving papers also reflect counsel's gathering of documentary evidence regarding the County's mental health system, past and present, and legal research into the merits of a number of different claims.

As discussed above (*see* pages10-11 *supra*), Plaintiffs' counsel have extensive knowledge and experience in handling class actions and other complex litigation, including public benefits cases, and are knowledgeable as to the applicable law. With regard to the last of the four factors, Plaintiffs' counsel fully intend to commit the necessary resources to represent the class in this case. Freeman Decl., ¶ 8; Newman Decl., ¶ 14; Bird Decl., ¶ 9. One of Plaintiffs' law firms, Cooley LLP, has over 200 attorneys in its Palo Alto office alone and unquestionably has the capacity and resources by itself to achieve a successful outcome for the class in this lawsuit. Freeman Decl., ¶ 6. In terms of future work on this case, Plaintiffs' counsel will, in all likelihood, be taking the depositions of numerous County officials, obtaining documents from the County

and third parties, interviewing additional class members, and taking any other actions necessary to prepare this case for final resolution, whether by summary judgment or trial. *Id.*, ¶ 8; Newman Decl., ¶ 14; Bird Decl., ¶ 9. In short, the Court should appoint Plaintiffs' counsel as class counsel in its class certification order with Mr. Newman and Mr. Freeman serving as lead counsel.

VI. THE COURT SHOULD NOT REQUIRE THAT NOTICE BE GIVEN TO CLASS MEMBERS OF THE PENDENCY OF THIS ACTION AT THE PRESENT TIME

Because Plaintiffs seek to certify a class under Rule 23(b)(2), notice is not required. Fed. R. Civ. P. 23(c)(2)(A); *see also Elliot v. Weinberger*, 564 F.2d 1219, 1228-29 (9th Cir. 1977), *aff'd in relevant part, rev'd in part*, 442 U.S. 682 (1979); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336-37 (1st Cir. 1991). There are several reasons why notice is less necessary in a (b)(2) class action than a (b)(3) class action: class members have no right to request exclusion from a (b)(2) class action; the "characteristics of the class may reduce the need for formal notice"; and the cost of providing notice "could easily cripple actions that do not seek damages." Rule 23 Advisory Committee's Note (2003); *see also* 2 Newberg at § 8.05 ("[C]lass actions seeking declaratory or injunctive relief under Rule 23(b)(2) are not subject to the individual notice requirements of Rule 23(c)(2).").

"The authority to direct notice to class members in a . . . (b)(2) class action should be exercised with care." Rule 23 Advisory Committee's Note (2003). Notice is not necessary in this case because the named Plaintiffs' claims are typical of those of the class as a whole, they are clearly adequate representatives of the class, and they are represented by experienced counsel. *See Elliot*, 564 F.2d at 1229 (notice not necessary for nationwide (b)(2) class where named plaintiffs are adequate representatives with experienced counsel); *Stolz v. United Bhd. of Carpenters*, 620 F. Supp. 396, 408 (D. Nev. 1985) (notice unnecessary for (b)(2) class where named plaintiffs are adequate representatives). Moreover, because absent class members cannot opt out of a (b)(2) class, one of the primary reasons why notice is required in a (b)(3) class is not at issue in (b)(2) cases. *Elliot*, 564 F.2d at 1229 n.14. Accordingly, Plaintiffs respectfully request that this Court exercise its discretion to certify the class without requiring any notice to absent class members, at least at this stage of the litigation.

VII. CONCLUSION

Plaintiffs satisfy all of the requirements of Rule 23(a) and Rule 23(b)(2). Plaintiffs respectfully request that the Court certify the proposed class, approve Plaintiffs Leslie Napper, Jan Fischer, Jacquie Eichhorn-Smith, Ted Yannello and Lynda Mangio as class representatives, appoint Plaintiffs' counsel to represent the class, and dispense with any requirement of notice to class members prior to judgment or settlement.

Dated: June 9, 2010

Respectfully submitted,

WESTERN CENTER ON LAW AND POVERTY

By: */s/ Robert D. Newman*
ROBERT D. NEWMAN

Attorneys for Plaintiffs

859311 v2/HN