

AUSTIN LEGAL GROUP, APC
3990 Old Town Ave, Ste A-101
San Diego, CA 92110

1 Gina M. Austin (SBN 246833)
E-mail: *gaustin@austinlegalgroup.com*
2 Tamara M. Leetham (SBN 234419)
E-mail: *tamara@austinlegalgroup.com*
3 AUSTIN LEGAL GROUP, APC
3990 Old Town Ave, Ste A-101
4 San Diego, CA 92110
Phone: (619) 924-9600
5 Facsimile: (619) 881-0045

6 Attorneys for Proposed Intervenor
KIM Investments, LLC

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
02/05/2020 at 10:06:00 AM
Clerk of the Superior Court
By Carolina Miranda, Deputy Clerk

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SAN DIEGO- CENTRAL DIVISION**

9
10 CITRUS ST PARTNERS, LLC;

11 Petitioner,

12 vs.

13 CITY OF LEMON GROVE; CITY
14 COUNCIL OF THE CITY OF LEMON
GROVE; AND DOES 1-10,

15 Respondents.

16 _____
DOES 11-20

17 Real Parties in Interest and
18 Defendants.

19 _____
20 KIM INVESTMENTS, LLC,

21 Real Party In Interest and
22 Intervenor.

CASE NO. 37-2019-00064690-CU-MC-CTL

**PROPOSED INTERVENOR KIM
INVESTMENTS, LLC'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO INTERVENE**

[Imaged File]

Judge: Hon. Richard S. Whitney
Dept: C-68
Date: May 1, 2020
Time: 10:30 a.m.

Petition Filed: December 5, 2019

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TABLE OF CONTENTS

I.# INTRODUCTION 1#

II.# FACTUAL AND PROCEDURAL BACKGROUND..... 1#

III.# DISCUSSION 2#

 A.# Kim Is Entitled To Intervene Pursuant To Code Of Civil Procedure Section
 387(D)(1)(B) 2#

 1.# KIM Has An Interest In The Property And Transaction That Is The
 Subject Of This Action 3#

 2.# The Disposition Of This Action Will Impair Or Impede KIM’s
 Ability To Protect Its Interest In The Transaction 4#

 3.# KIM’s Interests Are Not Adequately Represented 5#

 4.# KIM’s Request To Intervene Is Timely 5#

 B.# IN THE ALTERNATIVE THE COURT SHOULD PERMIT KIM TO
 INTERVENE PURSUANT TO CODE OF CIVIL PROCEDURE
 SECTION 387(d)(2)..... 6#

 1.# KIM Has A Direct And Immediate Interest In This Case..... 7#

 2.# KIM Will Not Enlarge The Legal Issues 7#

 3.# KIM’s Interests Outweigh Any Opposition To Intervention 8#

 4.# KIM Has Followed Proper Procedure..... 9#

IV.# CONCLUSION 9#

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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28

CASES#

Cal. Physicians’ Service v. Superior Court of L.A. County (1980) 102 Cal.App.3d 91 3

California Physicians’ Service v. Superior Court (1980) 102 Cal.App.3d 91 4

Endangered Habitats League, Inc. v. County a/Orange (2005) 131 Cal.App.4th 777 4

Gray v. Begley (2010) 182 Cal.App.4th 1509 8

Great Western Sav. & Loan Assn. v. City a/Los Angeles (1973) 31 Cal.App.3d 403 4

Jade K. v. Viguri (1989) 210 Cal.App.3d 1459 5

Lincoln Nat. Life Insurance Co. v. State Bd. Of Equalization (1994) 30 Cal.App.4th 1411 6

Lindelli v. Town of San Anselmo (2006) 139 Cal.App.4th 1499 6, 7

Lohnes v. Astron Computer Products (2001) 94 Cal.App.4th 1150 3

People ex rel. Rominger v. County of Trinity (1983) 147 Cal.App.3d 665 6

People v. Superior Court (Good) (1976) 17 Cal.3d 732 5, 6

Reliance Insurance Co. v. Superior Court of Santa Clara County (2000) 84 Cal.App.4th 383 8

Royal Indemnity Co. v. United Enterprises, Inc. (2008) 162 Cal.App.4th 194 7

Sanders v. Pacific Gas & Electric Co. (1975) 53 Cal.App.3d 661 5

Simpson Redwood Co. v. State of Calif. (1987) 196 Cal.App.3d 1192 5, 6

Timberidge Enterprises, Inc. v. Santa Rosa (1978) 86 Cal.App.3d 873 6

US Ecology, Inc. v. State of Calif. (2001) 92 Cal.App.4th 113 5

Vaill v. Edmonds (1991) 4 Cal.App.4th 247 4

STATUTES#

Code Civ. Proc. § 387 10

Code Civ. Proc. § 387(d) 3, 5

Code Civ. Proc. § 387(d)(1)(b) 4

Code Civ. Proc. § 387(d)(2) 7

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I. INTRODUCTION

Proposed Intervenor KIM Investments, LLC (“KIM” or “Intervenor”) has a right to intervene in the above-captioned action to protect its interests in its land use application to operate a Medical Marijuana Dispensary (“MMD”) within the City of Lemon Grove (“Defendant” or “City”). Citrus St Partners, LLC’s (“Petitioner” or “Citrus”) attempt to enjoin further processing of KIM’s entitlement through its motion for a preliminary injunction against the City directly interferes with KIM’s interests. If Petitioner is successful in its claims, KIM will be precluded from a final determination on its land use application and could lose its approval due to the proposed establishment of “protective uses” that may disqualify KIM’s ability to operate its MMD entirely. Consequently, the Court must allow KIM to intervene in order to adequately protect its direct and immediate interest in this matter.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 28, 2019, KIM began the City’s zoning clearance process to obtain a conditional use permit (“CUP”) for a MMD at 3515 Harris Street, Lemon Grove, CA 91945. (Declaration Of Gina Austin In Support of Proposed Intervenor’s Motion to Intervene (“Austin Decl.”) ¶10). By May 8, 2019, KIM submitted and complied with all required application requirements for its zoning clearance, and the City deemed the application complete. (Austin Decl. ¶10). At this time, KIM was eligible to move forward with its CUP application. (Austin Decl. ¶10). On May 9, 2019, KIM submitted its CUP application to the City. (Austin Decl. ¶10). On November 14, 2019, Joe Yousif, owner of KIM, received a notification letter from the City stating that his application for CUP-190-0002 was complete and would be set for City Council hearing on Tuesday, January 21, 2020 at 6:00pm. (Austin Decl. ¶16). City staff continued to deem KIM’s application as complete and consistent with the municipal code, and more specifically, that it would be recommending approval of KIM’s project. (Austin Decl. ¶19).

Petitioner submitted its CUP application to establish a MMD at 7309 Broadway, Lemon Grove, CA 91945 a proposed location within 1,000 feet of KIM’s proposed MMD application. (Austin Decl. ¶11). On November 19, 2019, the Lemon Grove City Council voted to deny

1 Petitioner’s CUP application. (Austin Decl. ¶17). On November 22, 2019, Plaintiff sued the City
2 on the basis that the City’s denial of Petitioner’s CUP application was an abuse of discretion.
3 (Austin Decl. ¶¶3, 21). Petitioner also scheduled an Ex Parte Application for a Temporary
4 Restraining Order (“Ex Parte Application”) preventing the City from approving KIM’s CUP
5 application scheduled to be heard on Tuesday, January 21, 2020. (Austin Decl. ¶4, 5). KIM’s
6 counsel received notice of this Ex Parte Application on January 9, 2020. (Austin Decl. ¶4). On
7 January 14, 2020, the court granted Petitioner’s Ex Parte Application and set the OSC Re:
8 Preliminary Injunction for February 14, 2020. (Austin Decl. ¶5).

9 While the City was reviewing KIM’s CUP application materials, the Lemon Grove
10 Planning Commission approved a day care facility at 3468 Citrus Street, Lemon Grove,
11 California 91945 on October 22, 2019. (Austin Decl. ¶14). Section 17.32.090(B) of the Lemon
12 Grove Municipal Code (“LGMC”) prohibits the establishment of an MMD within 1,000 feet of a
13 “regulated use” (other MMDs) or a “protected use” (public parks, playgrounds, licensed day care
14 facilities, schools, and alcohol and substance abuse treatment centers). (Austin Decl. ¶12). Upon
15 the day care’s satisfaction of the conditions enumerated in its proposed CUP, the day care will be
16 deemed a “protected use” that will disqualify KIM’s CUP application. (Austin Decl. ¶15).
17 Consequently, the delay in the City Council’s final approval of KIM’s CUP application could
18 cause irreparable harm to KIM, and requires KIM to become a party to this suit. KIM has
19 invested a significant amount of time and resources to gain the approval of its CUP application.
20 (Austin Decl. ¶20).

21 III. DISCUSSION

22 A. **Kim Is Entitled To Intervene Pursuant To Code Of Civil Procedure Section** 23 **387(D)(1)(B)**

24 Code of Civil Procedure section 387(d) reads as follows:

25 “(1) The court shall, upon timely application, permit a nonparty to intervene in the
26 action or proceeding if either of the following conditions is satisfied:

27 (a) A provision of law confers an unconditional right to intervene.

28 (b) The person seeking intervention claims an interest relating to the property or
transaction that is the subject of the action and that person is so situated that the

1 disposition of the action may impair or impede that person’s ability to protect
2 that interest, unless that person’s interest is adequately represented by one or
3 more of the existing parties.

4 (2) The court may, upon timely application, permit a nonparty to intervene in the
5 action or proceeding if the person has an interest in the matter in litigation, or in the
6 success of either of the parties, or an interest against both [emphasis added].”

7 Thus, the Court is required to allow intervention if the person seeking intervention:

- 8 (1) Claims an interest relating to the property or transaction which is the subject of the
9 action; and
- 10 (2) That person is so situated that the disposition of the action may as a practical
11 matter impair or impede that person’s ability to protect that interest; unless
- 12 (3) That person’s interest is adequately represented by existing parties...” (Code Civ.
13 Proc. § 387(d); *Cal. Physicians’ Service v. Superior Court of L.A. County* (1980)
14 102 Cal.App.3d 91, 96.)

15 Intervention pursuant to Code of Civil Procedure section 387(d) is mandatory if the
16 petition to intervene is timely made and the intervenor’s interest is not adequately represented by
17 existing parties. (Code Civ. Proc. § 387(d); *Lohnes v. Astron Computer Products* (2001) 94
18 Cal.App.4th 1150, 1153 [emphasis added].) KIM has a direct property interest in this litigation,
19 as the Petitioner has asked the court to enjoin the City from processing KIM’s land use
20 entitlement for KIM’s proposed MMD. The Petitioner’s temporary restraining order, and the
21 Court’s granting of the temporary restraining order, has already impaired KIM’s likelihood to
22 operate its MMD without KIM having any ability to protect its strong interest in the continuance
23 of City processing.

24 No current party to the record is adequately representing KIM’s interest. Petitioner is
25 specifically attempting to impair KIM’s interest, while the City is focused on defending its own
26 decision-making process as it relates to Petitioner’s CUP application. As demonstrated further
27 below, KIM meets the standard enumerated by Code of Civil Procedure section 387(d) and is
28 therefore entitled to intervene as of right.

1. KIM Has An Interest In The Property And Transaction That Is The
Subject Of This Action

The Code of Civil procedure requires that the court allow intervention if the person
seeking intervention “claims an interest relating to the property or transaction which is the subject

1 of the action.” (Code Civ. Proc. § 387(d)(1)(b); *California Physicians’ Service v. Superior Court*
2 (1980) 102 Cal.App.3d 91, 96.) The court must determine what “transaction” is the subject of
3 this action. A transaction is an “[a]ct of transacting or conducting any business; negotiation,
4 management, proceeding; that which is done; an affair...Something which has taken place,
5 whereby the cause of action has arisen.” (*Id.*)

6 KIM has a direct property interest in this litigation. Petitioner has requested this Court to
7 enjoin the City from further processing KIM’s land use entitlement to operate a MMD at 3515
8 Harris Street. KIM has expended approximately \$1.5 million dollars processing its application
9 and has strictly complied with all City permitting processes and requirements for this project. The
10 Court’s determinations within this litigation will have an immediate impact on KIM’s ability to
11 obtain approval of its MMD. This case’s direct interference with KIM’s land use entitlement
12 clearly demonstrates KIM’s direct, real, and immediate interest in this action.

13 Moreover, it is well established in California that a party seeking the issuance of a permit
14 or a license has a clear and beneficial right to proper and lawful agency action. (*Endangered*
15 *Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777; *Vaill v. Edmonds* (1991)
16 4 Cal.App.4th 247, 257-58; *Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973) 31
17 Cal.App.3d 403, 409-10.) KIM seeks issuance of a conditional use permit to operate a MMD in
18 the City. Thus, KIM has a clear, present and beneficial interest in the City’s ministerial duty to
19 fairly and timely process KIM’s CUP application, which will be directly affected by this
20 litigation.

21 2. The Disposition Of This Action Will Impair Or Impede KIM’s
22 Ability To Protect Its Interest In The Transaction

23 Code of Civil Procedure section 387(d) also requires that the person seeking to intervene
24 is so situated that the disposition of the action may impair or impede that person’s ability to
25 protect that interest. (Code Civ. Proc. § 387(d).) The disposition of this matter will impact KIM’s
26 ability to protect its interest in the property at issue.

27 KIM’s ability to obtain approval and operate its proposed MMD now rests on the outcome
28 of this action. If the Court prohibits the City from actively approving and processing the permits

1 required for KIM’s proposed MMD operation, it is highly likely the proposed protected day care
2 use at 3468 Harris Street will obtain final approval and disqualify KIM’s ability to operate a
3 MMD at its proposed location. Without KIM’s ability to intervene within this matter, it cannot
4 protect its strong interest in the continued processing and approval of its proposed MMD
5 operations.

6 3. KIM’s Interests Are Not Adequately Represented

7 The Court has “broad discretion” in determining whether to permit intervention,”
8 especially when there is evidence showing that the interests in defending claims would not
9 necessarily be adequately represented by the named defendants. (*US Ecology, Inc. v. State of*
10 *Calif.* (2001) 92 Cal.App.4th 113, 139-140; *People v. Superior Court (Good)* (1976) 17 Cal.3d
11 732, 737; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1468; *Simpson Redwood Co. v. State of*
12 *Calif.* (1987) 196 Cal.App.3d 1192.)

13 KIM’s interests will not be adequately represented by either party to the record. Petitioner
14 has no intention of protecting KIM’s interests and is specifically attempting to hinder KIM’s
15 interest in its land use entitlement by asking the Court to forbid the City from moving forward
16 with KIM’s project approval. This is inarguably the exact opposite of adequate representation of
17 KIM’s interest.

18 Moreover, the City will not be adequately representing KIM’s interest in this action. The
19 City is primarily concerned with protecting its own decision-making and actions as it relates to
20 Petitioner’s CUP application. KIM is the only party that can adequately advocate and protects its
21 interests in this litigation and thus should be permitted to intervene.

22 4. KIM’s Request To Intervene Is Timely

23 KIM’s intervention in this matter is timely. (See *Sanders v. Pacific Gas & Electric Co.*
24 (1975) 53 Cal.App.3d 661, 668-669 (applying the principle that the right to intervene should be
25 asserted within a “reasonable time”).) KIM’s counsel received notice of Plaintiff’s intention to
26 file the Ex Parte Application for Temporary Restraining Order and Order to Show Cause re
27 Preliminary Injunction on January 9, 2020. On January 14, 2020, Plaintiff’s Ex Parte Application
28 was heard. Based on the Court’s decision at that hearing, KIM files this Motion to Intervene and

1 all its supporting papers just over one week from the temporary restraining order hearing. No
2 other proceedings have occurred in this matter. Accordingly, KIM’s motion for intervention
3 should be granted under Code Civil Procedure section 387(d)(1)(b) as it meets all statutory
4 criteria necessary.

5 **B. IN THE ALTERNATIVE THE COURT SHOULD PERMIT KIM TO**
6 **INTERVENE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION**
7 **387(d)(2)**

8 Code of Civil Procedure section 387(d)(2) reads as follows:

9 “The court may, upon timely application, permit a nonparty to intervene in the
10 action or proceeding if the person has an interest in the matter in litigation, or in the
11 success of either of the parties, or an interest against both.”

12 If the Court determines that KIM is not entitled to intervene as a matter of right, then KIM
13 should be permitted to intervene at the Court’s discretion pursuant to Code of Civil Procedure
14 section 387(d)(2). (Code Civ. Proc. § 387(d)(2); *Simpson Redwood Co, supra*, 196 Cal.App.3d at
15 1201.) This provision is liberally construed in favor of intervention. (*Lindelli v. Town of San*
16 *Anselmo* (2006) 139 Cal.App.4th 1499, 1505; *Lincoln Nat. Life Insurance Co. v. State Bd. Of*
17 *Equalization* (1994) 30 Cal.App.4th 1411, 1423; *Simpson Redwood Co., supra*, 196 Cal.App.3d
18 at 1200.) When granting a motion for intervention, it need not be certain that such interest will be
19 affected by the outcome of the case; a substantial probability is sufficient. (*Timberidge*
20 *Enterprises, Inc. v. Santa Rosa* (1978) 86 Cal.App.3d 873, 881.)

21 “The purposes of intervention are to protect the interests of others who may be affected by
22 the judgment and to obviate delay and multiplicity of actions.” (*People ex rel. Rominger v.*
23 *County of Trinity* (1983) 147 Cal.App.3d 665, 660 (citing *People v. Superior Court (Good)*
24 (1976) 17 Cal.3d 732, 736.) Trial courts have discretion to allow a party to intervene under Code
25 of Civil Procedure section 387(d)(2) where (1) the nonparty has a direct and immediate interest in
26 the action; (2) the intervention will not enlarge the issues in the litigation; (3) the reasons for the
27 intervention outweigh any opposition by the parties presently in the action; and (4) proper
28 procedures have been followed. (*Royal Indemnity Co. v. United Enterprises, Inc.* (2008) 162
Cal.App.4th 194, 203.) KIM meets each element required for permissive intervention and, thus,

1 should be granted leave to intervene.

2 1. KIM Has A Direct And Immediate Interest In This Case

3 For purposes of permissive intervention, a “direct and immediate interest” exists when
4 “the moving party will either gain or lose by the direct legal operation and effect of the
5 judgment.” (*Lindelli, supra*, 139 Cal.App.4th at 1505 (internal quotation marks omitted).)

6 KIM has a direct and immediate interest in this case. As part of Petitioner’s attempt to
7 require the City to re-evaluate its CUP application denial, it has requested this Court to prohibit
8 the City from further processing KIM’s land use entitlement to operate a MMD at 3515 Harris
9 Street. KIM has expended approximately \$1.5 million dollars into this location and the proposed
10 MMD use for this project site. The Court’s determinations within this litigation will have an
11 immediate impact on KIM’s ability to obtain approval of its MMD land use entitlement due to the
12 proposed, disqualifying “protective uses.” This case’s direct interference with KIM’s land use
13 entitlement clearly demonstrates KIM’s direct, real, and immediate interest in this action.

14 If the Court should prohibit the City from actively approving and processing the permits
15 required for KIM’s proposed MMD operation, it is highly likely that the proposed protected day
16 care use at 3468 Harris Street will obtain final approval and disqualify KIM’s ability to operate a
17 MMD at its proposed location. Because the proposed day care is currently in the process of
18 satisfying its CUP requirements, along with the inevitable delays litigation brings, there is
19 sufficient probability that KIM will lose its direct and immediate interest if the Plaintiff is
20 successful in its claims.

21 2. KIM Will Not Enlarge The Legal Issues

22 The court must exercise its discretion in determining, in each case, whether the original
23 action between the existing parties should be allowed to proceed undisturbed by an intervenor's
24 claim; and the more indirect the connection of that claim with the issues raised in the original
25 action, the less likelihood there is of the court permitting intervention. (*Royal Indemnity Co.,*
26 *supra*, at 203.)

27 KIM raises no new legal issues by this intervention. The primary issues within this
28 litigation is the injunction to prevent further processing of KIM’s MMD project and the City’s

1 alleged abuse of discretion in its review of Petitioner’s CUP application. In KIM’s Answer in
2 Intervention, KIM does not raise any new legal issues to be decided by the Court. KIM simply
3 seeks to participate in the proceeding to ensure it has the ability to defend Plaintiff’s request to
4 stop the processing of KIM’s land use entitlement.

5 3. KIM’s Interests Outweigh Any Opposition To Intervention

6 When deciding permissive intervention, courts weigh the parties’ opposition in order to
7 give litigants “freedom to control the scope of litigation they initiate.” (*Id.* at 212.) Petitioner
8 currently controls the scope of this litigation. Control over the issues does not, however, give
9 Petitioner the power to prevent interested parties from contesting the claims that affect them,
10 which is KIM’s goal in joining this lawsuit.

11 Courts do not recognize one party’s opposition as a freestanding basis for denying
12 permissive intervention. For example, in *Reliance Insurance Co. v. Superior Court of Santa*
13 *Clara County* (2000) 84 Cal.App.4th 383, 387-88, the Court of Appeal reversed a trial court’s
14 denial of permissive intervention because it was opposed by a party. In *Reliance*, the plaintiffs
15 sued a moving company for losing approximately \$2 million worth of their possessions. The
16 Court of Appeal held that it was reversible error to deny permissive intervention to the moving
17 company’s insurer in light of the plaintiffs’ objections. The Court reasoned that the insurer had a
18 real stake in the controversy because the moving company had its corporate status suspended,
19 lacked the legal capacity to defend the action itself, and was therefore vulnerable to a default
20 judgment, which the insurer might have to pay. In *Gray v. Begley* (2010) 182 Cal.App.4th 1509,
21 1521-25, permissive intervention in favor of an insurer was upheld over the opposition of both
22 parties because the insured defendant attempted to settle with the plaintiff to the potential
23 detriment of the insurer. Both *Gray* and *Reliance* reflect the principle that a direct and immediate
24 interest outweighs the opposition of one party, as is the case here, or even both the parties, when
25 fairness to the intervenor requires it.

26 Here, KIM should be allowed to intervene because its interests will be impacted by the
27 rulings of this court as is exhibited by the recent decision to grant Plaintiff’s request for a
28 temporary restraining order to enjoin the City from further approving and processing KIM’s CUP

1 application. KIM's interest in the outcome of Plaintiff's claims substantially outweighs any
2 opposition from Plaintiff because KIM will be irreparably harmed if Plaintiff is successful in its
3 claims. This litigation, which directly involves KIM's ability to open its proposed MMD, will
4 result in factual and legal determinations concerning the City's ability to complete the CUP
5 process. KIM has no ability to protect its interest in this litigation unless intervention is allowed.

6 4. KIM Has Followed Proper Procedure

7 Code of Civil Procedure section 387 establishes the procedures for intervention. An
8 intervenor must (1) seek leave of court; (2) submit a proposed complaint [or answer] in
9 intervention; which (3) states the grounds upon which the intervention rests; and (4) serve the
10 intervention papers on all of the parties who have appeared. (Code Civ. Proc. § 387.) Because
11 KIM followed each of these procedures and has met all requirements under the code, the Court
12 can, and should, grant KIM's request for intervention.

13 **IV. CONCLUSION**

14 Due to KIM's direct and immediate interest in this litigation, the lack of adequate
15 representation of this interest, and the timeliness of this motion to intervene, intervention by
16 KIM is required.

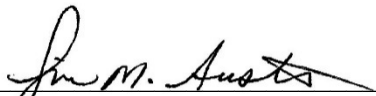
17 Alternatively, this Court should grant KIM's motion to intervene due to: (1) KIM's
18 direct and immediate interest in this litigation; (2) the ability of this case's disposition to impair
19 KIM's interest; (3) the lack of any new legal issues being proposed; (4) the substantial
20 outweighing of KIM's interests against any opposition to intervene in this case; and (5) KIM's
21 compliance with proper intervention procedures.

22 For the foregoing reasons, this Court should grant KIM's motion to intervene.

23 Dated: February 4, 2020

Respectfully Submitted,

AUSTIN LEGAL GROUP, APC

26 By: 
27 Gina M. Austin/Tamara Leetham,
28 Attorneys for KIM Investments, LLC