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17

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20

21 CHARLES DAVIS, JACKIE DEL ROSARIO,) No. C00-2532 SBA
JESSIE FITCHETT, HARRY PRIETO,)
22 LORRAINE ROBLES, GERALD SCOTT, HONG) **SETTLEMENT AGREEMENT**
T., M.W. AND THE INDEPENDENT LIVING)
23 RESOURCE CENTER OF SAN FRANCISCO,)
24 Plaintiffs,)
25 v.)
26)
27)
28)

1 CALIFORNIA HEALTH AND HUMAN)
SERVICES AGENCY (HHS), GRANTLAND)
2 JOHNSON, Secretary of HHS, sued in his official)
capacity; CITY AND COUNTY OF SAN)
3 FRANCISCO; CALIFORNIA DEPARTMENT)
OF HEALTH SERVICES (DHS); DIANA)
4 BONTA, Director of DHS, sued in her official)
capacity; CALIFORNIA DEPARTMENT OF)
5 SOCIAL SERVICES (DSS); RITA SAENZ,)
Director of DSS, sued in her official capacity;)
6 CALIFORNIA DEPARTMENT OF MENTAL)
HEALTH (DMH); STEPHEN MAYBERG,)
7 Director of DMH, sued in his official capacity;)
CALIFORNIA DEPARTMENT OF AGING)
8 (DOA); LYNDA TERRY, Director of DOA, sued)
in her official capacity,)
9)
Defendants.)
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I.

PARTIES TO THE SETTLEMENT AGREEMENT

The parties to this Settlement Agreement (“Settlement Agreement” or “Agreement”) are named plaintiffs Charles Davis, Jackie Del Rosario, Jessie Fitchett, Lorraine Robles, Gerald Scott, Hong T., M.W.; the Independent Living Resources Center of San Francisco (named plaintiffs Harry Prieto and Henry Rojas being deceased); and the class certified by order of the Court on June 12, 2002, defined as “All adult Medi-Cal beneficiaries who: (1) are or will be come residents of Laguna Honda Hospital and Rehabilitation Center, or (2) are or will be on waiting lists for Laguna Honda Hospital and Rehabilitation Center; or (3) are or will be within two years of discharge from Laguna Honda Hospital and Rehabilitation Center, or (4) are or will become patients at San Francisco General Hospital or other hospitals owned or controlled by the City and County of San Francisco, who are eligible for discharge to Laguna Honda Hospital and Rehabilitation Center” (collectively “Plaintiffs”); and the California Health and Human Services Agency (“CHHSA”) and its Secretary, Grantland Johnson; the California Department of Health Services (“DHS”) and its Director, Diana Bonta; the California Department of Social Services (“DSS”) and its Director, Rita Saenz; the California Department of Mental Health (“DMH”) and its Director, Stephen Mayberg; and the California Department of Aging (“CDA”) and its Director, Linda Terry (collectively, the “State Defendants”).

II.

PURPOSE OF SETTLEMENT

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The parties desire to resolve their differences and avoid the uncertainties of trial and therefore enter into this Settlement Agreement.

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In Plaintiffs’ Third Amended Complaint, to be filed contemporaneously with or prior to the execution of this Agreement, Plaintiffs allege in claims Three, Six and Ten that State Defendants violate 42 U.S.C. § 1983 and the Nursing Home Reform Act, specifically 42 U.S.C. § 1396r (the Pre-Admission Screening and Resident Review provisions of the Medicaid Act with respect to people with mental illness (PASRR/MI)) and implementing regulations.

1 In Plaintiffs' Third Amended Complaint, Plaintiffs allege in Claims Three and Six that State
2 Defendants violate 42 U.S.C. § 12132 (ADA) and 29 U.S.C. § 794 (Section 504) and implementing
3 regulations in failing to assess for the most integrated setting appropriate to individual need.

4 State Defendants have at all times denied Plaintiffs' claims, and both Plaintiffs and State
5 Defendants recognize that the ultimate result of this litigation cannot be predicted with certainty.
6 Moreover, the parties recognize the continuation of the litigation would involve substantial
7 additional legal fees, costs and other expense. Pursuant to this Settlement Agreement, Plaintiffs
8 agree to dismiss without prejudice all claims alleged against all State Defendants upon court
9 approval of this Agreement. After State Defendants' implementation of the specific changes
10 agreed to here in the PASRR/MI process, Plaintiffs agree to dismiss with prejudice claims Three,
11 Six and Ten against all State Defendants.

12 Plaintiffs enter into this Settlement Agreement in connection with and as part of an overall
13 settlement of this case. In that regard, and in further consideration of the settlement of Plaintiffs'
14 PASRR/MI claims, Plaintiffs will dismiss the claims as stated.

15 By entering into and complying with this Settlement Agreement, no party makes any
16 concession as to the merits of the opposing party's claims or defenses.

17 The parties enter into this Agreement in mutual recognition and support of class members'
18 goals to live in the most integrated setting appropriate to individual need.

19 The California Department of Mental Health's philosophy for individualized assessment is
20 based on the concept of recovery and psycho-social rehabilitation, including client-directed
21 assessment and services planning, strengths-based clinical assessment, the wellness approach to
22 services and functional assessment of skills.

23 III.

24 SETTLEMENT TERMS

25 For and in consideration of the terms of this Agreement, and subject to the contingency
26 described in Section IV of this Settlement Agreement, Plaintiffs and State Defendants stipulate and
27 agree as follows, subject to the approval of the Court:

- 28 1. As used herein, "Level I Screen" means the form completed in connection with

1 admission to a nursing facility to identify individuals suspected of having a serious mental illness
2 (MI) or developmental disability (DD), pursuant to the Pre-Admission Screening and Resident
3 Review (PASRR) requirements in 42 U.S.C. § 1396r and 42 C.F.R. § 483.100 *et seq.* “Level II
4 Evaluation” means the evaluation completed for individuals identified on a Level I Screen as
5 having a suspected serious mental health (MI) or developmental disability (DD), pursuant to 42
6 U.S.C. § 1396r and 42 C.F.R. § 483.100 *et seq.*

7 2. DMH and its Director (collectively “DMH”) will make the following changes in the
8 PASRR/MI process: (a) DMH will revise the PASRR/MI Level II Evaluation Form and require its
9 PASRR/MI Level II evaluators to use the revised form in conducting PASRR/MI Level II
10 Evaluations; (b) DMH will revise the DMH Contractor Manual; and (c) DMH will provide training
11 on the revised PASRR/MI Level II Evaluation process to persons conducting PASRR/MI Level II
12 Evaluations.

13 3. DMH will amend the DMH Contractor’s Manual to reflect the revisions stated in
14 Exhibit A. DMH will complete these revisions to the Contractor’s Manual, and provide a copy of
15 the revised manual to plaintiffs counsel, by December 1, 2003.

16 4. The parties agree that by October 1, 2004, DMH will adopt the PASRR/MI Level II
17 Evaluation Form, attached as Exhibit B, for the performance of PASRR/MI Level II Evaluations,
18 and will require persons performing PASRR/MI Level II Evaluations to begin using the attached
19 form and revised Contractor’s Manual by October 1, 2004.

20 5. State Defendants shall have the flexibility to modify or update the PASRR/MI Level
21 II Evaluation Form and DMH Contractor’s Manual consistent with the intent and purpose of this
22 Settlement Agreement. For a period of two years after implementation of the revised PASRR/MI
23 Level II Evaluation Form, State Defendants or their counsel shall notify Plaintiffs’ counsel of any
24 proposed changes, modifications and/or updates to the PASRR/MI Level II Evaluation Form or
25 Contractor’s Manual 45 days prior to finalizing these changes, and provide copies of the changes,
26 and a statement of the reasons for any changes. Copies of any revisions to either the Form or the
27 Contractors’ Manual shall be provided to Plaintiffs’ counsel within two weeks after they are made.

28 6. DMH will provide training to PASRR/MI Level II evaluators on the revised

1 PASRR/MI Level II Evaluation process by September 15, 2004, as follows:

- 2 (a) One full day of live training (six hours of training with a break for lunch).
- 3 (b) The one day training will be videotaped, and the videotape will be provided
- 4 to the contracting agency responsible for conducting PASRR/MI Level II
- 5 Evaluations, for use by all PASRR/MI Level II evaluators.
- 6 (c) Knowledgeable staff with involvement in the PASRR/MI process and/or
- 7 responsibility for alternatives to nursing facility (“NF”) care will participate
- 8 in the training. The training curriculum will include the following:
- 9 (1) orientation to the concept of recovery and psycho-social rehabilitation,
- 10 including client-directed assessment and service planning, strengths-based
- 11 clinical assessment, the wellness approach to services and functional
- 12 assessment of skills; (2) orientation to the history and intent of the
- 13 PASRR/MI program and *ADA/Olmstead* decision; (3) discussion of
- 14 community resources, services and waiver programs; and (4) orientation to
- 15 the use of the new information about Alternative Community Placements
- 16 and Services in the performance of a Level II Evaluation, using clinical
- 17 examples.
- 18 (d) DMH will provide draft copies of any materials to be used for the training to
- 19 counsel for Plaintiffs not less than three weeks prior to finalizing such
- 20 training materials; provided, however, that the draft materials need not
- 21 include specific clinical case studies to be used at the training.
- 22 (e) Plaintiffs’ counsel may comment on the proposed training materials within
- 23 10 days of receipt and DMH will consider any such comments prior to
- 24 finalizing the materials. DMH will have final review and approval, in its
- 25 sole discretion, of the content of the training and training materials, subject
- 26 to (c) above.
- 27 (f) No later than four weeks after the completion of the training referred to in
- 28 this paragraph, DMH will provide counsel for Plaintiffs, or their designee,

1 with a copy of the final version of all training materials, including the
2 clinical case examples, the videotape of the one-day training session, and a
3 description of the training that includes: the date of the training, the number
4 of individuals trained, the name and address of the contractor receiving the
5 training, and the names and business addresses of the trainers.

6 7. By October 1, 2004, State Defendants will provide counsel for Plaintiffs with a
7 written report certifying that each of the following has been completed and briefly summarizing the
8 activities completed or steps taken to accomplish each:

- 9 (a) The Contractors' Manual described in paragraph 3 has been
10 distributed and is being implemented;
- 11 (b) The Level II form described in paragraph 4 has been
12 implemented and is being used by evaluators; and,
- 13 (c) The training described in paragraph 6 has been conducted.

14 8. DMH will provide Plaintiffs' counsel with a monthly data report as follows:

- 15 (a) For 12 consecutive months, beginning with the one-month period following
16 the date that PASRR/MI Level II evaluators first complete PASRR/MI
17 Level II Evaluations, using the revised form attached as Exhibit B, DMH
18 will provide to counsel for Plaintiffs a monthly data report showing for each
19 Medi-Cal eligible individual applying to or residing at LHH (identified by
20 DMH identification number) listing in chronological order, sorted by the
21 date the PASRR Level I form was received by DMH; the date the
22 PASRR/MI Level II Evaluation was completed; and the date the DMH
23 determination was made. For each of the 12 monthly reports, DMH will
24 give counsel for Plaintiffs printed copies of the Level II Evaluations for
25 individuals in the first, third, fifth, seventh, and ninth positions on each of
26 twelve monthly lists, to total five per month. If the total number of
27 individuals at LHH who participate in the PASRR/MI Level II evaluation in
28 any monthly reporting period is less than nine, DMH will provide the list to
Plaintiffs' counsel, and copies of the PASRR/MI Level II evaluations for the

1 individuals in the same positions (first, third, fifth, etcetera) will be provided
2 to the extent possible (e.g., five on the list would result in three Level IIs).
3 However, in the event that the total number of PASRR/MI Level II
4 evaluations forwarded using the methodology described above does not total
5 60 in the 12 consecutive months period, DMH will continue to use the
6 methodology for such time necessary until a total of 60 evaluations have
7 been forwarded. The individuals' names, Medi-Cal numbers, and social
8 security numbers will be redacted from the Level II Evaluation, as will be
9 the names of the evaluator and any other clinical staff of the Level II
10 contractor.

11 (b) For a period of one year beginning on the date that DMH first sends a
12 PASRR/MI Level II Determination Letter based on evaluations made using
13 the revised PASRR/MI Level II Evaluation form attached as Exhibit B,
14 DMH will provide Plaintiffs' counsel, on a monthly basis, with the
15 Determination Letters for all Medi-Cal eligible applicants to or residents at
16 LHH. DMH will redact the individuals' names and Medi-Cal numbers from
17 the Determination Letters provided to Plaintiffs' counsel hereunder.

18 (c) For a period of one year beginning on the first full month after PASRR/MI
19 Level II evaluators first use the revised PASRR/MI Level II Evaluation form
20 attached as Exhibit B, DMH will provide to counsel for Plaintiffs copies of
21 all monthly, quarterly and annual PASRR/MI performance summaries sent
22 by the independent contractor to DMH. DMH will copy and send the reports
23 to counsel for Plaintiffs within one week of receiving them from the
24 contractor.

25 9. The Settlement Agreement is the product of negotiation and bargaining. Plaintiffs
26 and State Defendants have made concessions and obtained favorable outcomes that might not have
27 been required or obtained if this case had been decided by the Court. Neither this Settlement
28 Agreement, nor any provision hereof, shall constitute an admission by any party, nor shall this

1 Agreement, nor any provision hereof, be admissible in any subsequent legal or administrative
2 proceeding initiated by any person or entity, whether or not a party to this Agreement, to establish
3 or evidence liability on the part of State Defendants, except as may be relevant to enforcement of
4 the terms hereof in a proceeding between the parties hereto.

5 10. All parties agree to bear their own fees and costs herein, including but not limited
6 to, attorneys' and expert witness fees and costs. It is further agreed and understood that upon
7 commencement of any subsequent action based upon or including any dismissed claims, Federal
8 Rule of Civil Procedure 41(d) shall not serve as a basis for Plaintiffs to be liable to Defendants for
9 any costs. Nothing in this Agreement precludes Plaintiffs from seeking an award of attorneys' fees
10 and costs for time expended and expenses incurred related to any proceedings undertaken to
11 enforce the terms of this Agreement.

12 11. This Settlement Agreement is made by reference to 42 U.S.C. § 1396r, 42 U.S.C.
13 § 12132, 29 U.S.C. § 794 and the implementing regulations. If these statutes and regulations or
14 other applicable authorities are modified or repealed, nothing in this Agreement is intended to or
15 should be construed to require State Defendants to comply with statutory or regulatory obligations
16 that no longer exist, and the parties agree that this Agreement will not provide an independent basis
17 to enforce any such obligations.

18 12. The parties have entered into this Agreement to resolve with finality all pending
19 claims between them related to the PASRR/MI evaluation process and to avoid the time and
20 expense of litigation. Plaintiffs retain the right to re-file claims One, Two, Four, Five, Seven, Eight
21 and Nine of the Third Amended Complaint against State Defendants. Plaintiffs retain the right to
22 re-file claims Three, Six, and Ten of the Third Amended Complaint against State Defendants if
23 State Defendants are unable or otherwise fail to fully implement paragraphs 3, 4, and 6 of the
24 Agreement in a timely manner in accord with the Agreement. The parties agree that this
25 Agreement is the product of mutual negotiation and preparation, and accordingly, shall not be
26 deemed to have been prepared or drafted by either party. The parties further agree that any court
27 seeking to interpret it should construe the Settlement Agreement as the product of mutual
28 negotiation and preparation.

1 13. If one party believes that the other party has failed to comply with any term of this
2 Agreement, that party shall notify the other party's counsel in writing. The notice shall specify the
3 term(s) of the Settlement Agreement with which the other party allegedly has failed to comply and
4 the reason(s) for the allegation. Such notification shall propose dates for a meet and confer session.
5 Within 20 days from receipt of the notice, opposing counsel shall provide counsel for the party
6 alleging noncompliance with a written response. The response shall specify whether the party
7 agrees or disagrees with the allegation, the basis for agreement or disagreement and, when
8 appropriate, the steps the party proposes to take to remedy the alleged noncompliance or violation.
9 Within 15 days following receipt of the response, the parties shall meet and confer to discuss
10 resolution of the alleged noncompliance. The parties shall engage in good faith in this meet and
11 confer process prior to seeking judicial relief. No effort by a party to resolve a dispute informally
12 shall be construed to limit the defenses or the relief available to that party in any subsequent court
13 proceedings.

14 14. The terms set forth herein are not subject to modification except by a writing signed
15 by all parties or the parties' counsel of record.

16 15. If this Settlement Agreement is disapproved by the Court or the Court fails to enter
17 specified dismissals, orders or judgments, then this Settlement Agreement is terminated and shall
18 have no further force and effect, and it and all negotiations and proceedings connected therewith
19 shall be without prejudice to the rights of any party and shall not be used in any subsequent
20 proceeding in any of these actions or in any other action or proceeding.

21 16. The parties enter into this Settlement Agreement freely and voluntarily, having
22 consulted and been advised by counsel. The undersigned counsel of record for the parties have full
23 authority to execute this Settlement Agreement on the parties' behalf.

24 17. This Agreement may be executed in one or more counterparts.

25 18. This action shall be dismissed, and the parties shall seek to include the following
26 terms related to this Settlement Agreement in an order of the Court, which order shall also include
27 terms related to the Settlement Agreement in this action between Plaintiffs and the City and County
28 of San Francisco, as follows:

1 (a) Plaintiffs will dismiss without prejudice all claims in the Third Amended
2 Complaint as to all State Defendants upon court approval of this Agreement.
3 Within 10 court days of receiving from State Defendants the written
4 notification described in paragraph 7 of this Agreement, Plaintiffs will either
5 dismiss with prejudice claims Three, Six and Ten as to all State Defendants
6 or will notify counsel for State Defendants that Plaintiffs believe State
7 Defendants have not adequately complied with the requirements of the
8 Settlement Agreement and intend to pursue enforcement proceedings. If
9 enforcement proceedings are pursued, Plaintiffs will dismiss with prejudice
10 claims Three, Six and Ten of the Third Amended Complaint within 10 court
11 days after State Defendants either are found by the Court to have fully
12 implemented paragraphs 3, 4, and 6 of the Agreement or have taken the
13 steps determined to be necessary to implement paragraphs 3, 4, and 6 of the
14 Agreement.

15 (b) Upon dismissal of the action as provided in paragraph 18(a), the allegations
16 in claims Three, Six and Ten of the Third Amended Complaint and the
17 prayer for declaratory and injunctive relief shall be fully compromised and
18 settled pursuant to this Settlement Agreement and final judgment as against
19 State Defendants.

20 19. All notifications required in this Settlement Agreement shall be sent by facsimile
21 and First Class mail as specified in subparagraphs 19(a) and (b) and shall be deemed effective on
22 the first business day after they are sent by facsimile.

23 (a) Notifications to counsel for Plaintiffs shall be addressed to:

24 Kim Swain
25 Michael Stortz
26 Protection & Advocacy, Inc.
27 433 Hegenberger Road, Suite 220
28 Oakland, CA 94621

Facsimile: (510) 430-8246

(b) Notifications to counsel for State Defendants shall be addressed to:

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2 Beverley R. Meyers
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5 455 Golden Gate Avenue, Suite 11000
6 San Francisco, CA 94102

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One Maritime Plaza, 18th Floor
San Francisco, CA 94111

Facsimile: (415) 703-5480

Facsimile: (415) 421-2922

7 20. This Agreement shall be governed and construed by its text only. The headings at
8 the beginning of each section shall have no force or effect.

9 21. State Defendants shall make good faith efforts to adhere to the time frames in this
10 Settlement Agreement. If at any time State Defendants believe it will not be possible to meet a
11 time frame, State Defendants' counsel shall immediately notify Plaintiffs' counsel in writing,
12 specifying the reasons they are unable to meet the time frame and their proposed new time frame
13 for performance. Time frames which cannot be met due to circumstances beyond the reasonable
14 control of the State Defendants shall be adjusted accordingly to reflect the next date upon which
15 compliance can be expected. If the new time frame is acceptable to Plaintiffs, it shall become the
16 new time frame for performance without formal modification of the judgment, and shall be deemed
17 a modification of this Settlement Agreement upon written confirmation signed by counsel for each
18 party. If the new time frame and/or date is unacceptable to Plaintiffs, Plaintiffs and State
19 Defendants will meet and confer pursuant to paragraph 13.

20 22. The timing of any applications to the Court, notice to the class, and fairness hearing
21 pursuant to this Settlement Agreement shall be coordinated with the corresponding proceedings
22 pursuant to the separate settlement agreement between Plaintiffs and Defendants City and County
23 of San Francisco in this action.

24 23. The parties agree to file a joint application with the Court, and to take all other steps
25 necessary, to request a fairness hearing and to seek the Court's preliminary approval of this
26 Settlement Agreement pursuant to Federal Rule of Civil Procedure 23.

27 24. If the Court withholds its approval of this Settlement Agreement for any reason, the
28 parties shall meet and confer to determine whether the Settlement Agreement can be amended or

1 modified in a manner so as to secure the Court's approval, failing which, the Agreement shall be
2 null and void and cannot be referred to or relied upon as a settlement of any party's obligations or
3 rights or as a measure of any duty.

4 25. Notice of the proposed settlement pursuant to this Settlement Agreement is attached
5 as Exhibit 3 to Swain Declaration. The parties will request that the Court direct that such notice be
6 provided to the class as set forth in paragraph 11.1 of the Settlement Agreement between Plaintiffs
7 and Defendant City and County of San Francisco, attached to Swain Declaration as Exhibit 1. If
8 the Court rules that notice to the class is not required, the parties will proceed with notification of
9 class members, as feasible, in conjunction with the class notice distributed pursuant to any
10 agreement between Plaintiffs and Defendants City and County of San Francisco, as set forth in
11 paragraph 11.2 of the Settlement Agreement between Plaintiffs and Defendant San Francisco,
12 attached to Swain Declaration as Exhibit 1.

13 26. The Court's Order approving this stipulated Settlement Agreement shall continue
14 for a period of 36 months from the date of entry of Judgment. The Court shall retain jurisdiction of
15 this action for the duration of the Order and for such time thereafter as is necessary to effectuate the
16 purposes of this Settlement Agreement. If the Court declines to accept continuing jurisdiction, the
17 terms and conditions of this Settlement Agreement shall nevertheless be fully binding upon the
18 parties as an agreement in settlement of the litigation.

19 IV.

20 FUNDING TO IMPLEMENT THE SETTLEMENT

21 27. State Defendants' obligation to perform this Settlement Agreement is contingent
22 upon the availability of sufficient funds to implement the PASRR/MI evaluation process provided
23 for herein. For that purpose, State Defendants will use their best efforts, including efforts made
24 through the Budget Act to obtain the funding necessary to implement this Settlement Agreement.
25 Such efforts may include representations that support the following principles: (1) the goal that
26 people with disabilities live in the most integrated setting appropriate to individual need and (2) a
27 philosophy for individualized assessment based on the concept of recovery and psycho-social
28 rehabilitation, including client directed assessment and services planning, strengths-based clinical

1 assessment, the wellness approach to services, and functional assessment of skills. Plaintiffs accept
2 State Defendants' representations that they will use their best efforts to secure funding.
3 Notwithstanding the provisions of paragraph 18(a) above, Plaintiffs agree that should funding not
4 be obtained, Plaintiffs may not seek enforcement of the Settlement Agreement on that ground, but
5 rather, agree that their only recourse is the re-filing of the complaint in accordance with paragraphs
6 12 and 28. Although Plaintiffs do not agree that these matters are protected by the deliberative
7 process privilege, for purposes of entering into this settlement, Plaintiffs accept State Defendants'
8 assertion of privilege here.

9 28. If State Defendants notify counsel for Plaintiffs in writing that they are unable to
10 perform the Agreement due to the unavailability of sufficient funds and Plaintiffs re-file claims
11 within one year of such notification, State Defendants expressly agree to waive the following
12 procedural defenses based on the passage of time between the dismissal of this action without
13 prejudice and the time that those claims are re-filed, which are defenses based on statutes of

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1 limitations, laches, delay in prosecution, claim preclusion, or issue preclusion, and all objections to
2 certification of a class as defined in Section I.

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4 IT IS SO STIPULATED:

5
6 DATED: _____
7
8 KIM SWAIN
9 Protection & Advocacy, Inc.
10 Attorneys for PLAINTIFFS

11
12 BILL LOCKYER
13 Attorney General of the State of California
14 DOUGLAS M. PRESS
15 Supervising Deputy Attorney General

16
17 DATED: _____
18
19 BEVERLEY R. MEYERS
20 Deputy Attorney General
21 Attorneys for STATE DEFENDANTS

22
23 DATED: _____
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25 TRACY L. SALISBURY
26 Shartsis, Friese & Ginsburg LLP
27 Attorneys for STATE DEFENDANTS
28

[Plaintiffs' signatures on following pages]
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