

1 HOWREY LLP  
PAUL ALEXANDER (SBN 49997)  
2 1950 University Ave., 4th Floor  
East Palo Alto, CA 94303  
3 Telephone: (650) 798-3500  
Facsimile: (650) 798-3600  
4 E-mail: alexanderp@howrey.com

5 HELLER EHRMAN LLP  
ROBERT B. HAWK (SBN 118054)  
MELYSSA E. MINAMOTO (SBN 245458)  
6 ERIC LLOYD (SBN 254390)  
275 Middlefield Rd.  
7 Menlo Park, CA 94025-3506  
Telephone: (650) 324-7000  
8 Facsimile: (650) 324-0638  
E-mail: robert.hawk@hellerehrman.com

9 LAWYERS' COMMITTEE FOR CIVIL RIGHTS  
OREN SELLSTROM (SBN 161074)  
10 ELISA DELLA-PIANA (SBN 226462)  
131 Steuart Street  
11 San Francisco, CA 94105  
Telephone: (415) 543-9444  
12 Facsimile: (415) 543-0296  
E-mail: osellstrom@lccr.com

13 ACLU OF NORTHERN CALIFORNIA  
ALAN L. SCHLOSSER (SBN 49957)  
14 MICHAEL T. RISHER (SBN 191627)  
39 Drumm Street  
15 San Francisco, CA 94111  
Telephone: (415) 621-2493  
16 Facsimile: (415) 255-8437  
E-mail: mrisher@aclunc.org

17 UNITED STATES DISTRICT COURT

18 EASTERN DISTRICT OF CALIFORNIA: FRESNO DIVISION

19  
20 Pamela Kincaid, Doug Deatherage, Charlene Clay,  
Cynthia Greene, Joanna Garcia, Randy Johnson,  
21 Sandra Thomas, Alphonso Williams, and Jeannine  
Nelson, Individually on Behalf of Themselves and  
22 All Others Similarly Situated,

23 Plaintiff,

24 v.

25 City of Fresno, Alan Autry, Jerry Dyer, Greg  
Garner, Reynaud Wallace, John Rogers, Phillip  
Weathers, Will Kempton, James Province, Daryl  
26 Glenn, Individually and in Their Official Capacities;  
DOES 1-100, inclusive,

27 Defendant.  
28

Civil Action No.: 06-CV-1445-OWW

CLASS ACTION

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF SETTLEMENT**

11 Plaintiffs Doug Deatherage, Charlene Clay, Cynthia Greene, Joanna Garcia, Randy  
12 Johnson, Sandra Thomas, Alphonso Williams, and Jeannine Nelson on behalf of themselves and  
13 the Plaintiff Class (collectively referred to hereinafter as "Plaintiffs") hereby move this Court  
14 under Fed. R. Civ. P. 23(e) for preliminary approval of the settlement of this action with  
15 defendants City of Fresno, Alan Autry, Jerry Dyer, Greg Garner, John Rogers, and Philip  
16 Weathers (collectively the "City Defendants") and ) Defendants Will Kempton, James Province  
17 and Darryl Glenn (collectively "Caltrans Defendants"). These are contained in two separate  
18 agreements, one with the City Defendants and one with the Caltrans Defendants, which are  
19 attached hereto as Exhibits A and B. Taken together, they provide a combination of cash  
20 payments and payments for living allowances such as rent, transportation, and other essentials of  
21 life, of \$1,485,000. In addition, upon final approval of the settlement, this amount will be  
22 immediately be transferred into interest bearing accounts for the benefit of plaintiffs and the  
23 plaintiff class, and all interest on this amount will be used to provide further cash and living  
24 allowance benefits for the benefit of all Plaintiffs. The City Defendants will also pay attorneys  
25 fees of \$750,000 and reimburse costs incurred by Plaintiffs' counsel in the amount of \$100,000.

16 This settlement provides a fair and reasonable -- and also an immediate and essential  
17 -- recovery for the Plaintiffs. As described more fully in the two Settlement Agreements and the  
18 Settlement Plan, which is a part of the Settlement Agreements and is attached hereto as Exhibit  
19 C, the settlement has been carefully crafted to provide the maximum benefit to the Plaintiffs, and  
20 to provide recovery for each member of the Plaintiff Class in an amount commensurate with his  
21 or her loss. Considering the nature of the litigation, the nature of the claims, the risks attendant  
22 to litigation, and all other relevant factors such as the length of litigation, the potential for  
23 appeals, and the needs of all of the Plaintiffs, this settlement plainly represents a major and  
24 substantial recovery for each of the Plaintiffs. Plaintiffs believe that this represents a recovery  
25 on behalf of the homeless that is essentially unprecedented.

26 Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval to  
27 the two Settlement Agreements and the Settlement Plan attached hereto, stay further proceedings  
28 in this action pending a final approval hearing on the fairness of the Settlement Agreements, and

1 authorize notice to class members of the terms of the proposed settlement as set forth herein.

2  
3 **I. HISTORY OF THE LITIGATION**

4 The history of this litigation is well-known to this Court. It began with the filing of the  
5 original Complaint on October 17, 2006. Plaintiffs asserted that Defendants violated Plaintiffs'  
6 Fourth Amendment right against unreasonable searches and seizures, Fourteenth Amendment  
7 rights to Due Process and Equal Protection of the Law, all pursuant to 42 U.S.C. § 1983 as well  
8 as the California Bane Act, Cal. Civ. Code § 52.1, Cal. Civ. Code. § 2080, and committed  
9 unlawful conversion of their property. On October 25, 2006, the Court granted a Temporary  
10 Restraining Order against the City of Fresno Defendants. Thereafter, in November, 2006, the  
11 Court held a Hearing on the Preliminary Injunction, and granted a Preliminary Injunction against  
12 the City Defendants on December 8, 2006.

13 On March 16, 2007, the Court denied Defendant Will Kempton's motion to dismiss all  
14 causes of action pursuant to Eleventh Amendment immunity. Thereafter, on August 14, 2007,  
15 the Court granted Plaintiffs' Motion for Class Certification on August 14, 2007, allowing  
16 Plaintiffs to proceed on behalf of a class of "All persons in the City of Fresno who were or are  
17 homeless, without residence, after October 17, 2003, and whose personal belongings have been  
18 unlawfully taken and destroyed in a sweep, raid or cleanup by any of the Defendants."

19 On February 28, 2008, Plaintiffs and the Caltrans Defendants filed motions for summary  
20 judgment as to liability. On May 12, 2008, Judge Wanger issued decisions on the parties'  
21 motions for summary judgment, which granted in part and denied in part those motions in a  
22 formal decision and order.

23 All parties, through their respective counsel of record, participated in a mediation session  
24 before Magistrate Judge Snyder on May 20, 2008, beginning at 9:30 a.m., and ending after 6:00  
25 p.m. Also in attendance for some or all of the mediation session were many of the Plaintiff class  
26 representatives, and City Manager Andy Souza, Senior Risk Manager Kerry Trost, and Assistant  
27 City Attorney Francine Kanne on behalf of the City of Fresno Defendants. This session resulted  
28 in a settlement agreement between the Plaintiffs and the Caltrans Defendants that was placed on

1 the record before Judge Snyder. Thereafter, on May 27, 2008, the Fresno City Council  
2 considered and voted to approve the settlement. The parties then finalized and documented the  
3 settlement in two Settlement Agreements (one with the City Defendants and one with the  
4 Caltrans Defendants) and the Settlement Plan (which sets forth the plan for distribution of the  
5 settlement proceeds). As stated at the outset of this memorandum, these three documents are  
6 attached hereto as Exhibits A, B and C.

7  
8 **II. THE PROPOSED SETTLEMENT**

9  
10 Plaintiffs have reached two separate Settlement Agreements, one with the City Defendants  
11 and one with the Caltrans Defendants. Both will be implemented by a single Settlement Plan,  
12 which sets forth the details of how the settlement funds will be allocated and distributed. Under the  
13 terms of these two agreements, the City of Fresno Defendants and the Caltrans Defendants will  
14 provide Settlement consideration totaling \$1,485,000. If the settlement is approved by the Court,  
15 the aforementioned Settlement consideration will be allocated into two separate funds: the “Cash  
16 Fund,” which will distribute cash and cash equivalent to verified members of the Plaintiff Class;  
17 and the “Living Allowance Fund,” which will distribute funds to third parties for the payment of  
18 various living expenses on behalf of verified members of the Plaintiff Class. The City of Fresno  
19 Defendants and the Caltrans Defendants shall contribute \$400,000 and \$85,000 to the Cash Fund,  
20 respectively, and the City of Fresno Defendants shall contribute \$1,000,000 to the Living  
21 Allowance Fund.

22 The settlement mandates the distribution of these funds in a manner that is practical and  
23 beneficial for all parties. As discussed below, the distribution of the funds will be supervised by a  
24 highly qualified Settlement Administrator, Liza Apper. Ms. Apper has testified before this Court.  
25 She has credibility with all parties. She is uniquely well-qualified to serve in this role. Verified  
26 Plaintiff Class members will be assisted in establishing bank accounts to which their entire  
27 allocation from the Cash Fund may be transferred. Settlement Plan ¶ 4.2.1. Those Class members  
28 who do not have bank accounts may instead receive their allocation from the Cash fund in periodic

1 installments which will generally be limited to \$100 per week, in cash or check form. Settlement  
2 Plan ¶ 4.2.2. Class members entitled to a share of the Living Allowance Fund may direct the  
3 Settlement Administrator to issue all or a portion of their allocation to a third party for the payment  
4 of various living expenses. Examples of approved uses of Living Allowance Fund proceeds  
5 include: rent, move-in costs (e.g. first and last month's rent and deposit), utilities, and transportation  
6 costs. Settlement Plan ¶ 4.3. The parties contemplate that this structure will enable Class members,  
7 who are among the most vulnerable members of society, to create stability in their lives by  
8 providing a means by which they can obtain the basic necessities of life.

9 If the Court approves the Settlement agreement, potential members of the Plaintiff Class  
10 will be required to submit a verified claim form (Exhibit E hereto) to the Settlement Administrator.  
11 Settlement Plan ¶ 3.1. The timing and deadline for filing such a claim shall be as set forth in the  
12 Order of the Court giving preliminary approval to the Settlement Agreement and will be included in  
13 the Notice of this Settlement Agreement provided to the class. *Id.* The Settlement Administrator  
14 shall determine the validity of all claims, and determine each Class member's level of entitlement  
15 to recovery from the Cash Fund and the Living Allowance Fund, as set forth in the Settlement Plan.  
16 Settlement Plan ¶¶ 3.2-4.12. If a verified Class member dies before all of his or her distributions  
17 are made, any undistributed amount would revert to either the Cash Fund or the Living Allowance  
18 Fund and be distributed to Class members in keeping with the scheme set forth in the Settlement  
19 Plan. Settlement Plan ¶ 4.10.

20 The Settlement agreement further provides security to all parties. The City of Fresno  
21 Defendants have agreed to comply with the terms of Administrative Order No. 6-23 (Exhibit D  
22 hereto) for a period of not less than five years from the date of the Court's approval of this  
23 settlement. City Settlement Agreement ¶ 3.1.2. Moreover, the Caltrans Defendants have agreed to  
24 follow their written procedures for handling personal property located on Caltrans property, and  
25 abide by the principles set forth in the Court's Preliminary Injunction, for this same five year  
26 period. Caltrans Settlement Agreement ¶ 3.1.2. The Defendants have agreed that the Court shall  
27 retain jurisdiction of this matter to resolve any dispute which arises with regard to compliance with  
28 the aforementioned policies. City Settlement Agreement ¶ 3.1.2; Caltrans Settlement Agreement ¶

1 3.1.2. Thus, the Plaintiff Class members will be adequately protected against future violations of  
2 their rights, while the Defendants will have the benefit of knowing that their conduct complies with  
3 the law.

4 As part of the settlement, the City of Fresno Defendants have agreed to pay to Plaintiffs'  
5 counsel attorneys' fees in the amount of \$750,000, and costs in the amount of \$100,000. City  
6 Settlement Agreement ¶ 3.1.1. These fees and costs will be paid directly by the City of Fresno  
7 Defendants, and will not affect the amount of the Settlement Consideration. Notice of the proposed  
8 Settlement will be accomplished pursuant to a Notice Plan that follows the successful Notice Plan  
9 previously approved by the Court at the time it certified the Plaintiff Class. This Notice Plan is set  
10 forth below in this memorandum. Plaintiffs' counsel will also seek the Court's approval for  
11 incentive awards to eight plaintiffs of \$1,000 each, to be paid out of the Cash Fund, if the Court so  
12 orders. City Settlement Agreement ¶ 3.4.2. The costs of administering both the Cash Fund and the  
13 Living Allowance Fund shall not exceed 3% of the total, and shall be paid out of the two Funds in  
14 proportion to their size. Settlement Plan ¶ 5.1.

15 **III. PRELIMINARY APPROVAL OF THE SETTLEMENT AND THE NOTICE PLAN**  
16 **SHOULD BE GRANTED.**

17 Federal Rule of Civil Procedure 23 requires that “[t]he claims, issues, or defenses of a  
18 certified class may be settled, voluntarily dismissed, or compromised only with the court's  
19 approval.” Fed. R. Civ. P. 23(e)(1). In determining whether to grant final approval to the  
20 settlement of a class action, the standard that the court applies is “whether the settlement is  
21 fundamentally fair, adequate and reasonable.” Fed. R. Civ. P. 23(e)(1)(C); *Class Plaintiffs v. City*  
22 *of Seattle*, 955 F.3d 1269, 1276 (9<sup>th</sup> Cir. 1992); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d.  
23 Cir. 2001).

24 Prior to considering whether final approval should be granted, the Court first decides  
25 whether it should preliminarily approve the proposed settlement and whether notice of the  
26 settlement should be provided to members of the class. The Manual for Complex Litigation  
27 (Fourth) Section 21.632 (2004) describes the process:

28 Review of a proposed class action settlement generally involves two  
hearings. First, counsel submit the proposed terms of settlement and the

1 judge makes a preliminary fairness evaluation. In some cases, this initial  
2 evaluation can be made on the basis of information already known,  
3 supplemented as necessary by briefs, motions or informal presentations by  
4 parties.... The judge must make a preliminary determination on fairness,  
5 reasonableness and adequacy of the settlement terms and must direct the  
6 preparation of notice of the ...proposed settlement, and the date of the  
7 fairness hearing.

8 A preliminary approval hearing “is not, of course, a definitive proceeding on the fairness of  
9 the proposed settlement, and the judge must be careful to make clear that the determination  
10 permitting notice to members of the class is not a finding that the settlement is fair, reasonable and  
11 adequate.” *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983).

12 Rather, the preliminary approval hearing “is simply a determination that there is in effect ‘probable  
13 cause’ to submit the proposal to members of the class and to hold a full-scale hearing on its  
14 fairness, at which time all interested parties will have an opportunity to be heard and after which a  
15 formal finding on the fairness of the proposal will be made. *Id.*

16 The primary inquiry at the preliminary approval stage is whether there are any obvious  
17 deficiencies in the proposed settlement, whether there is any reason to doubt its fairness and  
18 whether it appears that the settlement is the result of arms-length negotiations. *See id.* at 1385;  
19 Manual for Complex Litigation §§ 21.62, 21.632. This standard is readily met by the proposed  
20 settlement in this case.

21 **A. The Proposed Settlement Readily Meets the Standard of Being Fair,**  
22 **Reasonable and Adequate.**

23 As described above – and set forth in detail in the exhibits to this motion – this  
24 settlement provides a total recovery of over \$1,485,000 in cash and living allowance for such  
25 essentials as rent, transportation, food and the like to the Class. In addition, the entire amount will  
26 be paid into an interest bearing account soon after final approval, and the interest will accrue for the  
27 benefit of the class. The cash portion of the settlement will be paid either into bank accounts that  
28 will be safe for the homeless to use, or in small cash increments to minimize the risk that the money  
will be stolen or lost. The living allowance portion, which is \$1,000,000, is in many ways the  
equivalent of cash, since it will provide for rent, utilities, transportation, and other essentials (e.g.  
identification cards). This portion of the settlement will be paid directly for the rental and utility

1 payments, and other life necessities, that will provide a place to live for the homeless class.

2 This settlement resulted directly from a lengthy and adversarial mediation process presided  
3 over by Magistrate Judge Snyder. This mediation session began on May 20, 2008 at 9:30 a.m. and  
4 did not conclude until approximately 6:00 p.m. Each party was represented by experienced  
5 counsel, well-versed in the facts of the case, the applicable law, and the settlement process. During  
6 this extensive process, Magistrate Judge Snyder played a critical role both in keeping the parties at  
7 the bargaining table and supervising the process to ensure fairness. During this process, counsel for  
8 Plaintiffs consulted several times with the class representative plaintiffs to ensure that they  
9 understood the process, the offers and counter-offers being made, and the result of the process.

10 Counsel for Plaintiffs had conducted extensive document and deposition discovery. They  
11 had also met many times both with the class representatives and with many members of the class in  
12 this case in order to evaluate their claims. These meetings provided a reasonable sense both of the  
13 size of the class and of the nature and extent of damages that the class might recover. Counsel set  
14 out their conclusions in a lengthy mediation brief and in several discussions with Magistrate Judge  
15 Snyder.

16 Thus, there is no question whatsoever that the settlement resulted from an intense, arms-  
17 length process. This process provides the Court with strong assurance that that the resulting  
18 settlement is fair, reasonable and adequate. *Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at  
19 1385.

20 **B. The Fairness, Reasonableness and Adequacy of the Proposed Settlement Are**  
21 **Underscored by the Immediate Needs of the Plaintiff Class and By The**  
22 **Procedures Put in Place for Addressing the Rights of the Homeless.**

23 While the proposed settlement readily meets the “fairness” standard, there is another factor  
24 that underscores both the adequacy of the settlement and its significance to the Plaintiff Class.  
25 Many members of the Plaintiff Class are suffering significantly from their homeless situation. They  
26 are exposed to the elements and to physical harm on a daily basis. At least two class members –  
27 including the lead Class representative – have died during the pendency of this litigation. This  
28 settlement achieves two ends that are of critical importance to the Class. First, it provides, at long  
last, some reasonably immediate relief to the Class who badly need that assistance. There is



1 concern that many members of the Class might not survive to receive the benefits of a litigation  
2 recovery, whatever that might be, since a lengthy appellate process was likely should Plaintiffs  
3 prevail at a trial.

4 Second, this settlement provides that the City of Fresno's newly enacted Administrative  
5 Ordinance, which tracks this Court's Preliminary Injunction in this case very closely, will remain in  
6 effect for at least five years from the date of final approval and that the Court will retain jurisdiction  
7 to address quickly any dispute that might arise about whether the City is honoring those procedures.  
8 Further still, the settlement provides that the City will give counsel for Plaintiffs advance notice of  
9 any proposed change to the Administrative Ordinance so that any adverse change can be addressed  
10 before it happens. This provides Plaintiffs – and all homeless people in Fresno – with a strong  
11 assurance that the conduct that led to this litigation will not recur.

12 **C. The Proposed Settlement Distribution Plan is Fair and Designed to Enhance the**  
13 **Benefits of the Settlement for the Class.**

14 The Settlement Plan for distribution of the settlement proceeds is expressly designed to  
15 address the needs of the Plaintiff Class as well as the fact that there different class members  
16 suffered different amounts of injury. First, the Settlement Plan builds in five different levels of  
17 potential recovery, which is intended to correspond closely to the different levels of injury and  
18 damage that it appears various members of the Plaintiff Class have suffered. Moreover, these  
19 levels, and the way they are designed, ensure that each class member gets a fair and reasonable  
20 share of the settlement. No class member can take more than his or her fair share by, for example,  
21 presenting repeated requests for assistance. The shares are fair and at pre-determined levels.

22 Second, the Settlement Plan is divided between a Cash Fund of \$485,000 and a Living  
23 Allowance Fund of \$1,000,000, both of which are for the exclusive benefit of the Class. The Cash  
24 Fund is designed to meet the needs of the Class for immediate cash for the purchase of items their  
25 needs and to provide them with the ability to regain their sense of personal worth and dignity. The  
26 Living Allowance Fund is designed to provide for basic needs such as rent, including first and last  
27 month's rent and security deposit (though it is not limited to that) so that Class members can have a  
28 clean and decent place to live. For many Class members, this will be the first time in years that

1 they have had this. They look forward with considerable anticipation to the simple pleasure of a  
2 clean, safe place to live and a private shower or bath.

3 Third, the Settlement Plan ensures that the money will not be stolen or wasted. Plaintiffs  
4 carefully considered the how the settlement should be balanced and how to ensure that it was  
5 preserved to provide benefits over time to each member of the Class. The Plan allows for a blend  
6 of benefits that are intended to ensure that they are real and lasting. For many if not all Class  
7 members, this will provide a meaningful chance for them to set their lives on a positive course.

8 Fourth, Plaintiffs have proposed to appoint Liza Apper as Settlement Administrator. Ms.  
9 Apper, who is already familiar to the Court, has worked selflessly for the benefit of the homeless  
10 community in Fresno for over fifteen years. She has a deep and important knowledge of the  
11 homeless themselves, their needs, and how best to address those needs. Her integrity and  
12 commitment to the homeless community are clear and beyond dispute. Just as important, she is one  
13 of the few individuals who command the confidence of both City of Fresno government and the  
14 homeless. She is uniquely qualified to perform the difficult task of making the judgments that will  
15 be essential to implementation of the Settlement Plan.

16 The Settlement Plan is thus plainly fair and reasonable. It is an integral part of the  
17 Settlement Agreements and it deserves preliminary approval along with the Settlement Agreements  
18 themselves.

19 **D. The Incentive Payment to Class Representatives Is Fair and Reasonable.**

20 After the principal terms of the Settlement Agreements were negotiated, counsel for  
21 Plaintiffs sought allocation of a very small percentage of the total settlement as an incentive  
22 payment to the eight class representatives. This relatively small incentive payment is certainly  
23 deserved. Since prior to the filing of this action in October, 2006, the Class representatives have  
24 continually given substantial amounts of their time in making special efforts to notify class  
25 members of the pendency of this case, in attending numerous meetings to discuss the case and  
26 repeat the basic information to class members, in attending court hearings, and also attending  
27 depositions in the case. The Class representatives were among the primary witnesses to testify at  
28 the hearing on Plaintiff's Motion for Preliminary Injunction, which halted the practices complained

1 of in the case. They were willing to step forward and spend considerable time and energy to protect  
2 the interests of the class. Some feel this led them to be targeted by others in the area because of  
3 their willingness to challenge the conduct they found offensive in this case. Indeed, the lead class  
4 representative, Pamela Kincaid, died during the course of this litigation as the result of a severe  
5 beating she received during the pendency of this case. The relatively small incentive award sought  
6 as a part of the overall Settlement Plan is fair and reasonable and should be approved. *See Cohen v.*  
7 *Chilcott*, 522 F.Supp.2d 105, 124 (D.D.C. 2007).

8 **E. The Proposed Notice Plan is Fair and Reasonable.**

9 Notice of the Settlement Agreements and the Settlement Plan will be provided to the  
10 Class in essentially the same manner approved by the Court in August, 2007 for notice of the  
11 certification of the class. Specifically, Plaintiffs shall distribute the Notice in the following manner:

12 (a) Plaintiffs shall make a reasonable and diligent effort to personally provide  
13 the Notice to potential class members at shelters or places where homeless people who may be  
14 potential class members are generally known to be located;

15 (b) Plaintiffs shall provide copies of the Notice to the St. Benedict Catholic  
16 Worker, the Poverello House, Naomi's House, the Fresno Rescue Mission, Central California Legal  
17 Service, California Rural Legal Services, and Marjoree Mason Center for distribution to homeless  
18 persons who come into contact with those organizations;

19 (c) Plaintiffs shall publish the Notice in the Community Alliance, a free  
20 newspaper that is generally distributed to and read by homeless persons, among others; and

21 (d) To the extent that Class Members have a known mailing address, Plaintiffs  
22 shall mail the Notice to that known address by first class mail.

23 **3. Timing of Notice.** Plaintiffs shall begin providing notice in the manner described  
24 above within five (5) days after receiving the Court's Order preliminarily approving the plan for  
25 notice as well as the form and content of the notice, and will complete that process as soon as  
26 practicable, with the goal of completing the notice within twenty (20) days following preliminary  
27 approval by the Court. The costs of the notice will be advanced by counsel and recoverable out of  
28 the costs provided for in the City Settlement Agreement.

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**F. The Provision for Attorneys' Fees and Costs is Fair and Reasonable.**

The provision for attorneys fees and costs covers all fees and costs incurred in this action from its inception in October, 2006 to its final conclusion by all counsel for Plaintiffs. Counsel for Plaintiffs estimate that the attorneys' fees provided for as a part of this settlement are 30% or less than their actual fees at fair and reasonable rates. The fees cover the efforts of all counsel, including those from the ACLU, the LCCR and Heller Ehrman. Had this matter proceeded to trial and had Plaintiffs prevailed, Plaintiffs would have been entitled to actual fees plus, potentially, a lodestar multiplier. The cost amount is, in all likelihood, significantly less than actual costs incurred once the final settlement is completed.

**IV. CONCLUSION**

For all the reasons set forth above, Plaintiffs urge that the Court preliminarily approve the two Settlement Agreements, the Settlement Plan, and the Notice Plan submitted herewith.

Respectfully submitted,  
HOWREY LLP  
HELLER EHRMAN LLP  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS  
ACLU OF NORTHERN CALIFORNIA

Dated: June 4, 2008

/s/ Paul Alexander  
Paul Alexander  
Attorneys for the Plaintiffs and the Plaintiff Class