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7
8 SEE SIGNATURE PAGE FOR ADDITIONAL
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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11
12 IN RE: LINCOLN MEMORIAL PARK
LITIGATION

MASTER CASE NO. BC 133 643
Honorable Richard L. Fruin

13 THELMA BINFORD, et. al.,

CLASS ACTION

14 Plaintiffs,

**NOTICE OF MOTION AND MOTION
OF CLASS PLAINTIFFS FOR
PRELIMINARY APPROVAL OF
SETTLEMENT BETWEEN CLASS
PLAINTIFFS AND CEMETERY
DEFENDANTS; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF MIKE ARIAS**

15 vs.

16 LINCOLN MEMORIAL PARK, INC., et al.,

17 Defendants.

Date: September 24, 2004
Time: 1:30 p.m.
Dept: 15

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20 AND RELATED AND CONSOLIDATED
21 ACTIONS

22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

23 NOTICE IS HEREBY GIVEN that on September 24, 2004 at 1:30 p.m. or as soon thereafter
24 as the matter may be heard in Department 15 of the above referenced Court, Class Plaintiffs will
25 move the Court for an order granting preliminary approval of the proposed Settlement with the
26 Cemetery Defendants, Approving the Proposed Form of Notice, Scheduling a Hearing on Final
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Approval and Scheduling a Hearing on Plaintiffs' Counsel's Application for an Award of Fees, Costs and Incentive Payments.

This motion is based on this Notice of Motion and Motion for Preliminary Approval of Settlement, the Memorandum of Points and Authorities, the Declaration of Mike Arias, and on the records and file herein, and on such evidence as may be presented at the hearing on the motion.

Dated: March 18, 2005

ARIAS, OZZELLO & GIGNAC, LLP

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Class Plaintiffs respectfully submit this Memorandum in support of their Motion for Preliminary Settlement Approval pursuant to the Class Action settlement approval procedure described in *California Rules of Court*, Rule 1859. The parties to the Settlement request the issuance of an order: (1) Granting Preliminary Approval of the Proposed Settlement; (2) Approving the Proposed Form of Notice; (3) Scheduling a Hearing on Final Approval; and, (4) Scheduling a Hearing on Plaintiff’s Counsel’s Application for an Award of Fees, Costs and Incentive Payments.

The proposed settlement before this Court disposes of all causes of action against all of the Cemetery Defendants and is binding on all parties to this action. The settlement also will benefit the Settlement Class. Additionally, the parties agree that the potential total value under the Settlement Agreement is in excess of one million six hundred fifty thousand dollars (\$1,650,000.00), including attorneys’ fees, costs, an incentive payment to the Class Representatives, the cost of claims administration, the endowment care fund lien, and substantial repairs and improvements to the cemetery grounds.

As the resulting Settlement is the product of serious, informed and arms-length negotiations and contains no deficiencies, it is worthy of preliminary approval by this Court under the operative standards of *CRC* Rule 1859 and applicable state law. Settlement discussions were conducted with the supervision and assistance of the Honorable Carl J. West. The settlement is fair, adequate, and reasonable and provides relief consistent with the claims asserted. Accordingly, preliminary approval of the settlement at this time is appropriate.

II.

SUMMARY OF CLAIMS AND ALLEGATIONS

A. Background of the Case

The initial Class Action Complaint was filed on August 17, 1995, against Lincoln Memorial Park Cemetery, Hollywood Cemetery Association and over 30 mortuaries. The complexity and nature of these consolidated matters include: five (5) separate Class Actions lawsuits; in excess of

1 100,000 punitive class members; in excess of 30 individual lawsuits with more than 400 named
2 plaintiffs. At the time of the filing of the lawsuit, Los Angeles County Superior Court had a specific
3 department which heard all Class Action matters and as such, all of the Class Actions and the
4 Individual actions were assigned to Commissioner Bruce E. Mitchell in Department 59 and were
5 consolidated for pre-trial purposes. On October 15, 1996, the United States Bankruptcy Court
6 ordered that Plaintiffs' Motion For Relief From Automatic Stay be granted for the sole purpose of
7 proceeding with the litigation in state court and further held that the Plaintiffs could proceed to
8 judgment and that any judgment could be enforced as against the amount of insurance coverage
9 available to the Real Parties in Interest. Following several Demurrers and Motions To Strike, Class
10 Plaintiffs filed their Second Revised Fifth Amended Consolidated Class Action Complaint (the
11 operative complaint) on May 22, 1997. Following a settlement conference with Court of Appeal
12 Justice John Trotter, Ret., in 1998 the Mortuary Defendants settled with the Class Plaintiffs after
13 three years of litigation. After extensive discovery and briefing the Court on June 12, 2000 the Court
14 certified the Cemetery Class.

15 It is alleged that for at least twelve years, beginning as early as 1983, the owners and
16 employees at Lincoln Memorial Park Cemetery ("Cemetery") engaged in conduct which included
17 the depletion of the Endowment Care Fund, the removal of water lines, the failure to maintain the
18 headstones, the use of headstones as curbstones, the failure to maintain the mausoleum, the failure
19 to maintain the grass, and the failure to maintain the fences. In addition, the owners of the cemetery
20 allegedly failed to maintain the Cemetery as a whole in a dignified and respectful condition.

21 Defendants have denied and continue to deny each and all of the claims and contentions
22 alleged by the Class Plaintiffs, including whether a certifiable litigation class exists.

23 **B. Court Certified Class with 2 Subclasses**

24 The Court, on June 12, 2000, certified the Class with Subclasses defined as:

- 25 1. Maintenance Subclass: (Failure to properly maintain the cemetery); and
- 26 2. Encroachment Subclass: (Failure to provide appropriate grave space for
27 which Defendants had a duty to provide.

1 **C. Court Certified Causes of Action**

2 The causes of action that were certified by the Court for the Subclasses are:

- 3 1. Maintenance Subclass: Breach of Contract, Breach of the Covenant of Good
4 Faith and Fair Dealing, Negligence and Negligence Per Se.
5 2. Encroachment Subclass: Breach of Contract, Breach of the Covenant of
6 Good Faith and Fair Dealing, Negligence and Negligence Per Se.

7 **D. Court Defined Class Membership For Certification Of The Cemetery Class**

8 The Court, in its Certification Order defined the class as follows:

9 The Following Persons May Be a Member of the Class:

10 Persons who are or were vested with the right, pursuant to California Health & Safety Code
11 §7100, to control the disposition of the remains of any decedent who was buried at Lincoln
12 Memorial Park Cemetery ("Lincoln"), located at 16701 South Central Avenue, Carson, California;

13 or

14 Persons who contracted with Lincoln Memorial Park for funeral or burial services of any
15 decedent interred at Lincoln Memorial Park;

16 or

17 Persons who are close family members of any decedent interred at Lincoln; are relatives who
18 lived in the household of the decedent at the time of death; or are qualified individuals with
19 "exceptional circumstances," and who: (a) were aware of the death of the decedent;(b)were aware
20 that funeral or burial services were being performed for the decedent; and (c) were among those on
21 whose behalf or for whose benefit the funeral or burial services were performed.

22 Each Class member may be a member of the following subclasses:

- 23 (a) All persons as described above, who had a decedent interred at Lincoln Memorial
24 Park prior to August 10, 1995 and whose remains were not disinterred prior to May
25 29, 1995.
26 (b) All persons as described above, who had a decedent buried at Lincoln Memorial Park
27 prior to August 10, 1995.
28

1 **E. Court Defined the Class Period**

2 The Court determined the Class Period for each of the Subclasses to be as follows:

- 3 1. Maintenance Subclass: The class period for this subclass is from May 29,
4 1995 through August 10, 1995;
- 5 2. Encroachment Subclass: The class period for this subclass is from the date
6 of a burial to August 10, 1995.

7 **F. Notice Was Sent to the Class Members**

8 Notice of the Class Certification was sent to the class members along with an opt-out form.
9 Out of the thousands of potential class members, over 120 plaintiffs filed requests for exclusion from
10 the Class.

11 **G. Court Assigned the Entire Matter to Judge Parkin in May 2001**

12 On May 11, 2001, the court assigned the Class Action and all of the Individual Cases, for all
13 purposes, to Judge Robert Parkin (Ret.) sitting by assignment in Department N of the Los Angeles
14 Superior Court in Compton. On July 13, 2001, Judge Parkin set the Class Action trial for October
15 2, 2001. On August 2, 2001, at the start of an individual trial, Judge Parkin, in the course of
16 reviewing Motion in Limine No. 4, became aware that the Class Plaintiffs had stipulated to only
17 pursue the Real Parties In Interest's insurance policies. Real Parties In Interest had previously filed
18 for bankruptcy protection in 1996 and since the only assets available to Petitioners are the insurance
19 policies, Judge Parkin opined that the coverage cases should be prosecuted first, even on the eve of
20 the sixth year of the litigation. In doing so, Judge Parkin stayed the Class Action trial and all of the
21 Individual trials until the insurance coverage disputes have been resolved. The underlying cases
22 remained stayed until the Individual Plaintiffs, on the eve of their Declaratory Relief trial in 2003,
23 settled with all of the insurance carriers. Judge Fruin set the trial date for this matter for April 26,
24 2004, which was continued to June 7, 2004 and then continued to June 21, 2004. This matter was
25 thereafter resolved in a mediation, which resulted in a settlement with the remaining three carriers
26 in the Class Action.

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III.

TERMS AND CONDITIONS OF THE SETTLEMENT

The terms and conditions of the settlement provide or require that:

1. The Class is defined as: All persons who: (1) are or were vested with the right, pursuant to California Health & Safety Code §7100, to control the disposition of the remains of any decedent buried at Lincoln; (2) contracted with any Person for present or preneed funeral and/or burial services at Lincoln; (3) are grandparents, parents, spouses, siblings, children, grandchildren of any decedent buried at Lincoln; and/or (4) close family members who lived in the household of the decedent at the time of death (within the meaning set forth in Christensen v. Superior Court, (1991) 54 Cal.3d 882 and its progeny).

2. The Class Representatives are Joetta D. Brown, Tracy Moore, Solisa Mathews-Sherrills, Dalina Miller, Regina Winston, Thelma Binford and Emma Smith.

3. The total amount of the Settlement Fund is \$1,650,879.25, which consists of the following: Mortuary Settlement Balance for Distribution (\$362,920.05); Cemetery Settlement I (\$330,000.00); Interest Paid to Date for Cemetery Settlement I (\$7,959.20); Cemetery Settlement II (\$950,000.00).

4. Any Settlement Class Member who objects to any aspect of the settlement may appear and be heard at the Final Approval Hearing. Any such person must submit a written notice of objection prior to the Settlement hearing upon the Court and the Class Counsel.

5. Settling Class Plaintiffs will release all claims that have or could have been asserted in the matters against the Settling Defendants. Class Plaintiffs upon final approval will also provide for dismissal of this action, with prejudice, as to the Settling Defendants.

6. Promptly following the final effective date, and subject to Court approval, Class counsel shall retain Four Seasons Landscaping as the Restoration/Contractor. An account shall be established to fund the repairs and improvements to the cemetery up to a maximum cost of approximately \$650,000.00 and funded by the settlement fund. The proposed restoration to the cemetery is as follows:

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- a. Full restoration of the roadways, which would include repairing all cracks and complete slurry coat from entrance to exit;
- b. Re-seeding of the entire complex with perennial seed;
- c. New above ground automatic irrigation system. The main line and valves are to be installed above ground along the perimeter of the property. Lateral lines to be installed no more than two inches deep to prevent the creation of an obvious trip hazard. Sprinkler head will also be installed at approximately two inches depth to prevent trip hazards;
- d. New fencing around cemetery perimeter where existing fence is inadequate (on the north, west, and south sides of the cemetery), including ivy to be put on the newly installed fence area and also on the existing fence area where needed;
- e. New wrought-iron fences to be installed above the cement wall on the east side of the cemetery approximately sixteen lineal feet by six foot high with meshing to prevent animals from entering; and,
- f. New entrance sign which states the name of the memorial park.

Additionally, subject to Court approval, the Restoration Contractor shall purchase a Performance Bond in the amount of approximately \$14,000.00 to guarantee the completion of the repair and improvement plan. The cost of the Bond will be paid from the settlement fund.

7. Class Plaintiffs' counsel will request the Court to award attorneys' fees, in the amount of approximately \$387,000.00 (30% of the settlement), and costs, in the amount of approximately \$312,000.00, from the settlement fund, Additionally, Class counsel will also seek an award, not to exceed an aggregate total of \$65,000.00 for the Class Representatives for their efforts on behalf of the Settlement Class.

8. Class Plaintiffs shall pay \$56,000.00 to the Department of Consumer Affairs against a lien reimbursing the Endowment Care Fund.

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offer, or is presumptively valid subject only to any objections that may be raised at a final hearing.”

This Court will ultimately determine the reasonableness of any attorneys’ fees or repayment of costs advanced by Plaintiffs’ counsel. These are matters always set in the Court’s discretion after reviewing the applications. The Court must also factor in objections raised by Class members (the criteria for approval of final settlement are set forth at *Newberg* commencing at §11.41). Class Plaintiffs request that this Court take the initial steps in this process by granting preliminary approval of the Settlement.

V.

**THE PROPOSED SETTLEMENT FULFILLS ALL
CRITERIA FOR PRELIMINARY SETTLEMENT APPROVAL**

The preliminary approval stage is an “initial assessment” of the fairness of the proposed settlement to be made by the Court on the basis of written submissions and informal presentations from the settling parties, if requested by the Court. These requirements have been fulfilled in the instant case by the submission to this Court of this Memorandum and Declaration of Mike Arias.

The purpose of this preliminary evaluation is simply to determine whether the proposed Settlement is within the range of possible approval and thus whether notice to the class of the terms and conditions and the scheduling of a formal fairness hearing is worthwhile. (*See, Newberg on Class Actions, Settlement of Class Actions, §11.25; see also, Liebman v. J.W. Petersen Coal & Oil Co.* (N.D. Ill. 1973) 73 F.R.D. 531). Whether the settlement is within the range of approval in turn involves an initial examination by the *court* of the terms of the settlement to determine whether the proposal appears “reasonable on its face.” (*See, Magana v. Platzer Shipyard, Inc.*, (S.D. Tex. 1977) 74 F.R.D. 61, 79. Additionally, California courts favor class action settlement. *See, Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.

In reviewing a class action settlement for preliminary approval, the court has broad powers to determine whether a proposed settlement is fair under the circumstances of the case. *See, Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438. To grant preliminary approval of any class action settlement, the court need find only that the settlement falls within the range of possible final

1 approval. *See*, 2 Newberg on Class Actions, Settlement of Class Actions, §11.25; *see also*, *Holden*
2 *v. Burlington Northern, Inc.*, (D. Minn. 1987) 665 F.Supp. 1398, 1402; *In re Montgomery County*
3 *Real Estate Antitrust Litigation* (D. Md. 1979) 83 F.R.D. 305, 313.

4 There are three steps to the Court's settlement approval process: (1) preliminary approval of
5 the proposed settlement at an informal hearing; (2) dissemination of notice of *the* settlement to all
6 affected class members; and (3) a "formal fairness hearing," or final settlement approval hearing, at
7 which class members may be heard regarding the settlement, and at which evidence and argument
8 concerning the fairness, adequacy, and reasonableness of the settlement is presented. The foregoing
9 three-step settlement approval process is prescribed by the Manual for Complex Litigation, Third
10 (Federal Judicial Center 1995) §30.41, is widely followed by federal courts, and has been adopted
11 by California courts. (Manual for Complex Litigation, Third §30.41; *see also*, *Bell v. American Title*
12 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1599-1602 [describing settlement approval process]).

13 **A. The Settlement Is the Product of Serious, Informed, and Non-collusive Negotiations**

14 This Settlement is extremely fair in terms of its net benefits to the Settlement Class members.
15 The Settlement was the result of extensive discussions and negotiations between parties and
16 settlement conferences mediated by the Honorable Carl J. West and reached only after Class
17 Plaintiffs' counsel and Defendants' counsel had engaged in substantial investigation, document
18 review, extensive written discovery, conducted over 600 depositions, consulted with insurance
19 coverage counsel over a 5 year period, and spent several months of fervent and intense preparation
20 for trial. As this Court is aware, the claims against the Defendants have been the subject of extensive
21 scrutiny. Defendants have been represented by able counsel, who has vigorously defended the
22 claims against the various Defendants. As such, the settlement is reasonable in light of: (1) the
23 guaranteed continued vigorous representation by counsel, (2) the various defenses to liability; and
24 (3) the overall difficulties in prosecuting an action of this nature. In short, the settlement has no
25 deficiencies that would require this Court to reject the proposed settlement.

26 Courts presume the absence of fraud or collusion in negotiation of settlement unless evidence
27 to the contrary is offered. In short, there is a presumption that the negotiations were conducted in
28 good faith. *Newberg*, §11.51; *In re Chicken Anti-Trust Litigation* (MD GA 1980) 560 F.Supp. 957,

1 962; Pridd v. Edelman (6th Cir. 1989) 883 F.2d 438, 447; Mars Steel Corp. v. Continental Illinois
2 National Bank and Trust Co. (7th Cir. 1987) 834 F.2d 677, 681. Courts do not substitute their
3 judgment for that of the proponents, particularly when settlement has been reached by experienced
4 counsel familiar with the litigation. Hammon v. Barry (DDC 1990) 752 F.Supp. 1087; Steinberg
5 v. Carey (SD NY 1979) 470 F.Supp. 471; In re Armored Car Anti-Trust Litigation (ND GA 1979)
6 472 F.Supp. 1357; Sommers v. Abraham Lincoln Federal Savings & Loan Association (ED PA
7 1978) 79 F.R.D. 571.

8 While the recommendations of counsel proposing the settlement are not conclusive, the Court
9 can properly take them into account, particularly if they have been involved in litigation for some
10 period of time, appear to be competent, have experience with this type of litigation, and significant
11 discovery has been completed. See Newberg §11.47.

12 **B. The Settlement Has No Deficiencies**

13 This Settlement is extremely fair in terms of its net benefits to the Settlement Class members.
14 The Settlement was the result of extensive discussions and negotiations between parties and
15 settlement conferences mediated by the Honorable Carl J. West and reached only after Class
16 Plaintiffs' counsel and Defendants' counsel had engaged in substantial investigation, document
17 review, extensive written discovery, conducted over 600 depositions, consulted with insurance
18 coverage counsel over a 5 year period, and spent several months of fervent and intense preparation
19 for trial. As this Court is aware, the claims against the Defendants have been the subject of extensive
20 scrutiny. Defendants have been represented by able counsel, who has vigorously defended the
21 claims against the various Defendants. As such, the settlement is reasonable in light of: (1) the
22 guaranteed continued vigorous representation by counsel, (2) the various defenses to liability; and
23 (3) the overall difficulties in prosecuting an action of this nature. In short, the settlement has no
24 deficiencies that would require this Court to reject the proposed settlement.

25 The Court should grant preliminary approval of a Class action settlement "if the preliminary
26 evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious
27 deficiencies, such as unduly preferential treatment of Class representatives or of segments of the
28 Class, or excessive compensation for attorneys, and appears to fall within the range of possible