

THE ALTERNATE DEFENDER'S OFFICE
COUNTY OF MONTEREY
111 W. Alisal Street
Salinas, CA. 93901
(831) 755-5082

AGREEMENT TO PROVIDE LEGAL SERVICES

July 1, 2017 to June 30, 2018

THIS AGREEMENT is entered into by the County of Monterey, ("the County"), and the Law Office of **Kelly Duncan**, Attorney at Law, State Bar #1161488 ("the Attorney.")

RECITALS

WHEREAS, the United States and California Constitutions and other provisions of state and federal law give indigent defendants, juveniles, and other qualified parties ("the Defendant") a constitutional right to competent legal representation if the Public Defender declines to represent the Defendant due to a conflict of interest; and

WHEREAS, it would be costly, unpredictable, and disruptive of orderly budget procedures if counsel was assigned on a case-by-case basis to represent Defendants where the Public Defender declines to do so due to a conflict of interest; and,

WHEREAS, the Alternative Defender Office ("ADO"), a separate office from the Monterey, California Public Defender except as to budgetary control, has been directed by the Monterey County Administrative Officer ("CAO") to administer all Agreements for legal representation of indigent defendants who cannot be represented by the Public Defender due to conflict of interest; and

WHEREAS, the Board is authorized to enter into this Agreement under Government Code § 3100; and

WHEREAS, the Attorney has offered to represent all Defendants who are referred to him/her by the ADO, subject to the limitations contained in this Agreement; and

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WHEREAS, the ADO has found and determined that the Attorney is qualified as trial counsel in all varieties of criminal proceedings. Minimum qualifications include the ability to perform the duties of a grade 4 Public Defender.

NOW THEREFORE, the Attorney agrees to furnish the County professional services and the County and Attorney agree to enter into this Agreement, both in accordance with the terms and conditions set forth herein.

Article I. GENERAL PROVISIONS

Section 1.01 **Contract Administrator** The Director of the Alternate Defender Office (ADO) will administer the contract. The Monterey County Public Defender is responsible for the ADO budget. The County may change the Administrator at any time with notice to the Attorney.

Section 1.02 **Independent Contractor.** The Attorney and his or her employees and agents, in the performance of this Agreement, are independent contractors in relation to the County of Monterey, and not officers or employees of the County of Monterey. Nothing in this agreement shall create any of the rights, powers, privileges or immunities of an employee of the County of Monterey. The Attorney shall be solely liable for all applicable taxes, including, but not limited to, federal and state income taxes and Social Security taxes, arising out of the Attorney's performance of this Agreement. The Attorney shall not be entitled to receive from the County of Monterey under this Agreement any compensation in the form of sick leave, vacation leave, or retirement benefits or any other kind of type of employee benefits such as workers' compensation, unemployment compensation or insurance, social security benefits or disability insurance benefits. This Agreement for provision of Attorney's professional services to the County is not exclusive; the Attorney retains the right to represent other clients of his or her choosing, so long as that representation does not pose a conflict of interest with clients referred to the Attorney by the County in a particular case.

Section 1.03 **Cooperation.** If the Internal Revenue Service or any other federal or state government agency should inquire about, question, or challenge the independent contractor status of the Attorney or his subcontractors with respect to the County, the parties hereto mutually agree that:

- (a) Each shall inform the other party hereto of such inquiry or challenge; and
- (b) The County and the Superior Court of California, County of Monterey, shall have the right to participate in any discussion or negotiation occurring with the federal or state agency, without regard to who initiated such discussions or negotiations.

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In the event the federal or state agency concludes that an independent contractor relationship does not exist, the County may terminate this Agreement effective immediately upon written notice.

Section 1.04 **Non Assignability.** Except as otherwise provided in Section 2.06 of this Agreement, none of the rights, privileges, interest, immunities, duties, or obligations created by this Agreement are assignable or delegable. Upon disability or inability to accept assigned cases or to continue as assigned counsel in cases previously assigned, this Agreement shall terminate. The Attorney's refusal to accept assigned cases on grounds of conflict of interest among criminal defendants assigned or proposed to be assigned does not constitute "disability" or "inability" as used in this Agreement.

Section 1.05 **Negotiated Agreement.** This Agreement has been arrived at through negotiation between the parties. Neither party is to be deemed the party which prepared this Agreement within the meaning of Civil Code § 1654.

Section 1.06 **Headings.** The section and paragraph headings are for convenience only and shall not be used to interpret the terms of this Agreement.

Section 1.07 **Time of Essence.** Time is of the essence in each and all of the provisions of this Agreement.

Section 1.08 **Amendment.** No alteration, variation, or amendment to the terms of this Agreement shall be valid unless made in writing and signed by the parties hereto.

Section 1.09 **Notices.** Notices to the parties in connection with this Agreement shall be given personally or by regular mail addressed as follows:

Contract Administrator
Director, Alternate Defender Office
County of Monterey
111 W. Alisal Street
Salinas, CA. 93901
Telephone: (831) 755-5082

Attorney:
Kelly Duncan
7960 B Soquel Drive #182
Aptos, CA 95003
Telephone: (831) 708-2685

Section 1.10 **Exhibits.** The following exhibits are attached hereto and incorporated by reference:

- (a) Exhibit A – Description of Services
- (b) Exhibit B – Insurance Exemption

Section 1.11 **Integration.** This Agreement, including the exhibits hereto, shall represent the entire Agreement between the parties with respect to the

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subject matter hereof and shall supersede all prior negotiations, representations, or agreements, either written or oral, between the parties as of the effective date hereof.

Article II SERVICES TO BE PROVIDED

Section 2.01 **Attorney Services.** The Attorney shall provide the legal services specified in Exhibit A of this Agreement.

Section 2.02 **Monthly Reports by the Attorney.** The Attorney shall submit to the ADO a monthly report using the ADO monthly report form. A completed report form shall be received by the ADO before the County makes payment for services rendered in the preceding month, and, in any event, the monthly report shall be submitted no later than the fifteenth day of the month for services rendered in the preceding month.

Section 2.03 **Qualifications.** At all time during the provision of professional services pursuant to this Agreement, each and every attorney performing services pursuant to this Agreement shall be and remain a member in good standing of the State Bar of California.

Section 2.04 **Training for Staff.** The Attorney shall insure that sufficient training is provided to his or her staff, to enable them to perform effectively and to increase their existing level of skills in the performance of this Agreement.

Section 2.05 **Expert Personal Services.** It is expressly understood by the parties to this Agreement that the County is purchasing the expert personal services of the Attorney. Any other attorneys used by the Attorney must be approved by the ADO prior to referral in accordance with the subcontractor requirements set forth in Section 2.06.

Section 2.06 **Subcontractor Requirement.** The Attorney may not subcontract with another attorney for performance of work under this Agreement without the prior written consent of the ADO. However, the Attorney may, without prior approval of the ADO, and limited to a total of 30 days per fiscal year, use a duly licensed and appropriately qualified attorney for a special appearance when the Attorney is ill, on vacation, or involved in an emergency. Notwithstanding any such subcontract, the Attorney shall continue to be liable for the performance of all requirements under this Agreement. Attorney agrees that all subcontract agreements he or she enters into for performance of the work under this Agreement shall be in writing, shall include this Agreement attached as an exhibit which shall be incorporated by reference into the subcontract, and shall include:

- (a) The nondiscrimination and compliance provisions set forth in Article VIII of this Agreement.

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- (b) A provision that the Attorney shall provide insurance coverage for subcontractor, or require subcontractor to maintain insurance coverage such that subcontractor's services are insured under the terms and conditions set forth in Article VII of this Agreement.

Section 2.07 **Attorney-Client Relationship.** The Attorney's relationship to defendants assigned to him or her shall be that of attorney and client. The Attorney shall remain responsible for the representation of all Defendants assigned pursuant to this Agreement until the Defendants' cases are concluded in the Monterey County Superior Court, even if the case is concluded after this Agreement expires or this Agreement is otherwise terminated by the parties.

Article III. PERFORMANCE

Section 3.01 **Level of Service.** The Attorney shall meet the specified performance standards set forth in Section 3.02 of this Agreement unless prevented from doing so by circumstances beyond the Attorney's control, including but not limited to natural disasters, fire, theft, and shortages of necessary supplies or materials due to labor disputes.

Section 3.02 **Standards of Representation.** Each and every attorney performing services pursuant to this Agreement shall perform such services in a competent manner and in conformity with the highest professional standards and practices.

Section 3.03 **Compliance with Law.** Each and every attorney performing services pursuant to this Agreement shall fully comply with all applicable laws, rules, and regulations in providing services pursuant to this Agreement.

Article IV. PAYMENTS BY COUNTY

Section 4.01 **Monthly Payments by County.** Subject to the limitations set forth herein, the County through the Auditor-Controller shall pay the Attorney a monthly payment equal to 1/12th of the maximum amount of the County's liability over the full term of this Agreement, payable on or before the thirtieth day of each month during the term of this Agreement for those services rendered in the immediately preceding month pursuant to this Agreement. Warrants for payment shall be made in the name of **Kelly Duncan**. This limit on the monthly amount may be exceeded on a case-by-case basis, with the prior written consent of the ADO, as Contract Administrator, provided the maximum amount of the County's liability over the full term of this Agreement may not be exceeded.

Section 4.02 **Maximum Payment by the County.** The maximum compensation to be paid by the County, except as provided in Exhibit A and Section 4.03, over the full term of this Agreement shall not exceed eighty-four

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thousand dollars (\$84,000.00). The Attorney shall be liable for all payments owed subcontractors and other attorneys retained by the Attorney pursuant to Section 2.06 and all other costs incurred by the Attorney, other than those listed in Section 4.03, regardless of whether this Agreement expires, is terminated for cause by the County, or is terminated without cause by the County. Payment is due to the Attorney on the 30th or 31st of each month.

Section 4.03 **Extraordinary Expenses.** The foregoing maximum payment shall include all ordinary expenses incurred in representing defendants pursuant to the terms of this Agreement. It is understood that the compensation pursuant to this Agreement is sufficient to cover ordinary expenses, and those ordinary expenses are included in the contract maximum payment specified in Section 4.02 above. The Attorney may be allowed additional ancillary expenses, as approved by the ADO Director, following a written request. Ancillary expenses are listed below:

- (a) Approved reasonable and necessary mileage and travel expenses of investigators and attorneys when working beyond a 150-mile radius from their offices.
- (b) Expert witness expenses.
- (c) Investigator expenses.
- (d) Interpreter expenses.

Article V. TERM OF AGREEMENT

Section 5.01 **Duration of Agreement.** This Agreement shall be in full force and effect commencing on July 1, 2017 and ending on June 30, 2018, unless sooner terminated as provided herein. Termination of this agreement does not terminate the Attorney's duty to defend, indemnify or hold harmless the County, as provided in Section 7.01, or to maintain sufficient insurance, as provided in Section 7.02.

Section 5.02 **Termination without Cause.** This Agreement may be terminated by the County without cause by giving thirty (30) days prior written notice of an intention to terminate.

If this Agreement is terminated by the County without cause, the Attorney shall be entitled to compensation as determined by one of the following methods, whichever is greater:

- 1) The amount paid by the County pursuant to this Agreement as of the date of termination; or
- 2) A *pro rata* amount determined by the formula in Section 5.03.

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In no event shall the Attorney be required to refund monies already paid by the County pursuant to this Agreement if the County terminated this Agreement without cause.

Section 5.03 **Method of Computing Pro Rata Payment.** If this Agreement is terminated without cause, Section 5.02 will determine use of the following weighed *pro rata* formula:

- (a) Misdemeanor - \$200 for each misdemeanor case assigned pursuant to this Agreement, through the date of termination.
- (b) Non-serious Felonies - \$75 per hour for each non-serious felony case assigned pursuant to this Agreement, through the date of termination. Non-serious felonies are offenses that are not listed in Penal Code sections 1192.7(c) and 667.5(c).
- (c) Serious Felonies - \$100 per hour for each serious felony case assigned pursuant to this Agreement, through the date of termination. Serious felonies are those offenses listed in Penal Code sections 1192.7(c) and 667.5(c).

If pro rata payments pursuant to this section are paid to Attorney, these payments shall constitute complete and final payment for services rendered pursuant to this Agreement, if this Agreement is terminated without cause.

5.04 **Termination of Cause.** The ADO may cancel and terminate this Agreement for cause, immediately, upon written notice to the Attorney. "Cause" includes, but is not limited to, the revocation or suspension of the Attorney's license to practice law or the failure of the Attorney to perform a material requirement of this Agreement. The amount received by the Attorney to the date of termination for cause shall constitute full compensation pursuant to this Agreement.

Article VI. RECORDS OF CONFIDENTIALITY

Section 6.01 **Confidentiality.** The Attorney, and his or her employees, agents, and subcontractors, shall comply with any and all applicable federal, state, or local laws which provide for the confidentiality of records and prohibits them from being opened for examination for any purpose without proper court or client authorization. Confidential medical or personal records and the identities of clients and complainants shall not be disclosed unless there is proper consent to such disclosure or a court order requiring disclosure. Confidential information gained by the Attorney from access to any such records, and from contact with the Attorney's clients and complainants, shall

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be used by the Attorney only in connection with provision of services under this Agreement.

Section 6.02 Maintenance and Availability of Records. The Attorney shall prepare and maintain all reports and records that may be required by federal, state, or county rules and regulations and the ADO, as Contract Administrator, and shall furnish such reports and records to the County of Monterey and to the state and federal governments, upon request in compliance with applicable rules of confidentiality.

Pursuant to Government Code § 8546.7, if this Agreement involves the expenditure of public funds in excess of \$10,000.00, the parties to this Agreement may be subject to the examination and audit of the State Auditor, and the request of the County of Monterey or as part of any audit of the County of Monterey, for a period of three years after final payment under this Agreement. As provided by Government Code § 8546.7, these audits will be confined to those matters connected with the performance of this Agreement, including but not limited to the costs of administering the Agreement.

Section 6.03 Retention of Records. The Attorney shall maintain and preserve all records related to this Agreement (and shall assure the maintenance of such records in the possession of any third party performing work related to this Agreement) for the minimum period as required by law or the professional rules for the retention of client records, but, in no event for less than minimum of three years from the date of the last action taken in the case.

Article VII. INDEMNIFICATION AND INSURANCE

Section 7.01 Indemnification. Attorney shall indemnify, defend, and hold harmless the county, its officers, agents, and employees, from, and against, any and all claims, liabilities, and losses whatsoever (including damages to property and injuries to or death of persons, court costs, and reasonable attorney's fees) occurring or resulting to any and all persons, firms or corporations furnishing or supplying work, services, materials, or supplies in connection with the performance of this Agreement, and from any and all claims, liabilities, and losses occurring or resulting to any person, firm, or corporation for damage, injury, or death arising out of or connected with the Attorney's performance of this Agreement, unless such claims, liabilities or losses arise out of the sole negligence or willful misconduct of the County. "Attorney's performance" includes Attorney's action or inaction and the action or inaction of Attorney's officers, employees, agents and subcontractors. The Attorney's obligation to defend, indemnify and hold harmless County shall survive the termination or expiration of this Agreement and shall extend for a term to include the statute of limitations applicable to claims arising out of Attorney's performance of this Agreement.

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Section 7.02 **Insurance.** Without limiting Attorney's duty to indemnify, Attorney shall maintain in effect throughout the term of this Agreement a policy or policies of insurance with the following minimum limits of liability.

Commercial general liability insurance, including but not limited to premises and operations, including coverage for Bodily Injury, Property Damage, Personal Injury, Contractual liability, Broadform Property Damage, Independent Contractors, Products and Completed Operations, with a combined single limit for Bodily Injury and Property Damage of not less than \$1,000,000 per occurrence.

Business automobile liability insurance, covering all motor vehicles, including owned, leased, non-owned, and hired vehicles, used in providing services under this Agreement, with a combined single limit for Bodily Injury and Property Damage of not less than \$1,000,000 per occurrence.

Workers' Compensation Insurance, if Attorney employs others in the performance of this Agreement, in accordance with California Labor Code section 3700 and with Employer's Liability limits not less than \$1,000,000 each person, \$1,000,000 each accident, and \$1,000,000 each disease.

Professional Liability Insurance, because insurance is required for the professional services being provided (i.e., the Attorney is authorized by a license to engage in a business or profession regulated by the California Business and Professions Code), in the amount of not less than \$1,000,000 per claim, and \$2,000,000 in the aggregate, to cover liability for malpractice or errors or omissions made in the course of rendering professional services. If professional liability insurance is written on a "claims-made" basis rather than an occurrence basis, the Attorney shall, upon the expiration or earlier termination of this Agreement, obtain extended reporting coverage ("tail coverage") with the same liability limits. Any such tail coverage shall continue for at least three years following the expiration or earlier termination of this Agreement.

Other Insurance Requirements. All insurance required by this Agreement shall be with a company acceptable to the County and issued and executed by an admitted insurer authorized to transact insurance business in the State of California. Unless otherwise specified by this Agreement, all such insurance shall be written on an occurrence basis, or, if the policy is not written on an occurrence basis, such policy with the coverage required herein shall continue in effect for a period of three years following the date the Attorney completed its performance of services under this Agreement.

Each liability policy shall provide that the County shall be given notice in writing at least thirty (30) days in advance of any endorsed reduction in coverage or limit, cancellation, or intended non-renewal thereof. Each policy

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shall provide coverage for Attorney and additional insureds with respect to claims arising from each subcontractor, if any, performing work under this Agreement, or be accompanied by a certificate of insurance from each subcontract showing each subcontractor has identical insurance coverage to the above requirements.

Commercial general liability and automobile liability policies shall provide an endorsement naming the County of Monterey, its officers, agents, and employees as additional insureds, and shall further provide that such insurance is primary insurance to any insurance or self-insurance maintained by the County and that the insurance of the additional insureds shall not be called upon to contribute to a loss covered by the Attorney's insurance.

Prior to the execution of this Agreement by the County, Attorney shall file certificates of insurance with the County's ADO, as Contract Administrator, and with County's Contracts/Purchasing Division, showing that the Attorney has, in effect, the insurance required by this Agreement. The Attorney shall file a new or amended certificate of insurance within five calendar days after any change is made in any insurance policy, which would alter the information on the certificate then on file. Acceptance or approval of insurance shall in no way modify or change the indemnification clause in this Agreement, which shall continue in full force and effect.

Attorney shall, at all times during the term of this Agreement, maintain in force the insurance coverage required under this Agreement and shall send, without demand by County, annual certificates to County's Contract Administrator and County's Purchasing Division. If the certificates are not received by the expiration date, County shall notify Attorney and Attorney shall have five calendar days to send in the certificate, evidencing no lapse in coverage during the interim. Failure by Attorney to maintain such insurance is a default of this Agreement, which entitles County, at its sole discretion, to terminate this Agreement immediately.

Article VIII. NON-DISCRIMINATION

Non-Discrimination. Attorney shall be required to submit and comply with the non-discrimination clause set forth below.

During the performance of this agreement, the Attorney shall not unlawfully discriminate against any employee, or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40), sexual preference, or gender. The Attorney shall ensure that the evaluation and treatment of his or her employees and applicants are free of such discrimination. The Attorney shall comply with the provisions of the California Fair Employment and Housing Act

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(Government Code §12900, *et seq.*) and the applicable regulations promulgated hereunder (California Code of Regulations, Title 2, § 7285.0, *et seq.*).

The applicable regulations of the Fair Employment and Housing Commission implementing Government Code § 12900, *et seq.*, set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations, are incorporated into this Agreement by reference and made a part hereof as if set forth in full.

The Attorney shall include the non-discrimination and compliance provisions of the clause in all agreements with subcontractors to perform work under the contract.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year written below.

County of Monterey:

By: _____
Contracts/Purchasing Officer

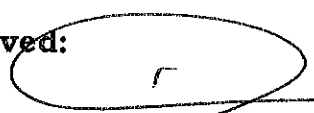
Date: _____

Attorney:

By:  _____
Kelly Duncan
Attorney at Law

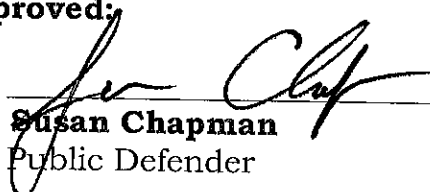
Date: 5/19/17

Approved:

By:  _____
Frank W. Dice
ADO, Contract Administrator

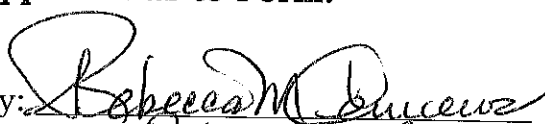
Date: 5/19/2017

Approved:

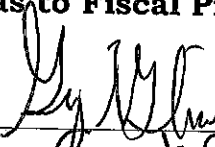
By:  _____
Susan Chapman
Public Defender

Date: 5/22/17

Approved as to Form:

By:  _____
Name: Rebecca M. Ceniceros
Deputy County Counsel
Date: June 7, 2017

Approved as to Fiscal Provisions:

By:  _____
Name: Gary F. Gibbons
Date: 6-8-17

Approved as to Indemnity/Insurance Language:

By: _____
Name: _____

Date: _____

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EXHIBIT A

Scope of Work

Contractor shall accept all assignments from the ADO, pursuant to Penal Code § 987 *et seq.*, in which the court finds that the Public Defender has properly declined to represent the accused due to a conflict of interest. This obligation requires Contractor to act as legal counsel and provide representation for indigent adult defendants charged with criminal offenses, including misdemeanor charges and probation violations.

Contractor shall be assigned no more than 150 clients during the term of this Agreement. Concurrent cases, concurrent probation violations, and clients who cannot be represented due to conflict of interest are not counted as clients for purposes of meeting the client limitation. This Agreement is concurrent client based; therefore, one client equals one client, regardless of the number of individual cases assigned to that client on a concurrent basis. These limitations cannot be exceeded unless the parties mutually agree in writing to change these limitations.

The County, Alternate Defender's Office (ADO), Public Defender and Contractor are aware of a pending Auditor-Controller operational audit of indigent defense in Monterey County. All parties are concerned about providing competent counsel for appointed clients which complies with applicable caseload/workload standards. Standards identified by the National Advisory Committee, State Bar of California, National Legal Aid and Defenders Association, are all included in the pending audit and will be reported appropriately.

The ADO shall assign cases rotationally. The classes of cases in which Contractor will be appointed are as follows:

1. Misdemeanors

PAYMENTS BY COUNTY

Monthly Payments by County. Subject to the limitations set forth herein, the County through the Auditor-Controller shall pay Contractor a monthly payment equal to one twelfth (1/12th) of the maximum amount of the County's liability over the full term of this Agreement, payable on or before the thirtieth day of each month during the term of this Agreement for those services rendered in the immediately preceding month pursuant to this Agreement. Warrants for payment shall be made in the name of **Kelly Duncan**. This limit on the monthly amount may be exceeded on a case-by-case basis, with the prior written consent of the ADO, as Contract Administrator, provided the

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maximum amount of the County's liability over the full term of this Agreement may not be exceeded.

Maximum Payment by the County. The maximum compensation to be paid by the County over the full term of this Agreement shall not exceed eighty-four thousand dollars (\$84,000.00). Contractor shall be liable for all payments owed subcontractors and other attorneys retained by Contractor and all other costs incurred by Contractor, regardless of whether this Agreement expires, is terminated for cause by the County, or is terminated without cause by the County.

Extraordinary Expenses. County and Contractor agree that the compensation paid pursuant to this Agreement is sufficient to cover ordinary expenses, and those ordinary expenses are included in the contract maximum payment of \$84,000.00.

Contractor may be allowed additional ancillary expenses, as approved by the ADO Director, following a written request.

Ancillary expenses shall be paid only upon amendment to this Agreement, signed by Contractor and County. In no event shall payments to Contractor cause the total compensation paid under this contract to exceed \$84,000.00.

Ancillary expenses are listed below:

- (e) Approved reasonable and necessary mileage and travel expenses of investigators and attorneys when working beyond a 150-mile radius from their offices.
- (f) Expert witness expenses.
- (g) Investigator expenses.
- (h) Interpreter expenses.

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EXHIBIT B

Workers Compensation Justification:

At the time of execution of this Agreement, Contractor does not have employees and therefore, does not carry Worker's Compensation Insurance coverage. Should Contractor hire employees during the term of this Agreement, Contractor shall comply with County's insurance requirements pertaining to Worker's Compensation.

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