

MAY 09 2014

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10 Themselves and All Others Similarly Situated

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF LOS ANGELES- CENTRAL DISTRICT**

13 ROBERT SCOTT, Individually and On Behalf of  
14 All Others Similarly Situated,

15 Plaintiff,

16 vs.

17 SERVICE CORPORATION INTERNATIONAL,  
18 a Texas corporation, SCI CALIFORNIA  
19 FUNERAL SERVICES, INC., a California  
20 corporation, EDEN MEMORIAL PARK  
21 MANAGEMENT CO., a California corporation,  
22 EDEN MEMORIAL PARK ASSOCIATION, a  
23 California business entity, EDEN MEMORIAL  
24 PARK, a California business entity, JAMES R.  
25 BIBY, an individual and DOES 1 through 100.

26 Defendants.

Case No. BC421528

ASSIGNED FOR APPROVAL OF CLASS  
ACTION SETTLEMENT TO:  
Hon. Daniel Buckley, Dept. 1

ASSIGNED FOR TRIAL TO:  
Hon. Marc Marmaro, Dept. 37

**PLAINTIFFS' MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

*[Plaintiffs' Application for Attorneys' Fees,  
Costs & Incentive Awards; Declarations of  
Michael J. Avenatti, Jason M. Frank, Kenneth  
Jue, Dr. David Stewart, Professor Brian  
Fitzpatrick, Robert Scott, Sean Frank, Rabbi  
Howard Laibson, Barry Chapman, Warren  
Binder, Ivy Greenstein, Linda Pore, Miriam  
Sue Roth and Habib Naeim; [Proposed] Final  
Approval Order; and [Proposed] Judgment  
filed concurrently herewith]*

**Date: May 15, 2014**  
**Time: 9:00 a.m.**  
**Dept.: 1**

1 **TO THE COURT, TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on May 15, 2014 at 9:00 a.m., or as soon thereafter as the  
3 matter may be heard in Department 1 of the California Superior Court for the County of Los Angeles,  
4 located at the Stanley Mosk Courthouse, 111 North Hill Street, Los Angeles California 90012-3014,  
5 Plaintiffs and Class Representatives Robert Scott, Sean Frank, Rabbi Howard Laibson, Barry  
6 Chapman, Warren Binder, Ivy Greenstein, Linda Pore, Miriam Sue Roth and Habib Naeim (the  
7 “Class Representatives”) on behalf of themselves and the certified Classes (collectively “Plaintiffs”)  
8 will, and hereby do, move this Court, pursuant to Rule 3.769 of the California Rules of Court, for an  
9 order:

- 10 1. Granting final approval of the class action settlement between Plaintiffs and  
11 Defendants and directing consummation of the terms of the Settlement Agreement;  
12 and  
13 2. Entering judgment in accordance with the terms of the Settlement Agreement and  
14 retaining jurisdiction over the parties to enforce the terms of the Settlement Agreement  
15 and judgment.

16 Good cause exists for the granting of this motion in that the settlement is fair, reasonable, and  
17 adequate. This motion is based on this notice as well as the attached Memorandum of Points and  
18 Authorities, Plaintiffs’ Application for Attorneys’ Fees, Costs and Incentive Awards, the Declaration  
19 of Michael J. Avenatti, the Declaration of Jason M. Frank, the Declaration of the Kenneth Jue on  
20 behalf of the Claims Administrator, Gilardi & Co., LLC (“Gilardi”), the Declarations of the Class  
21 Representatives; the Declaration of Dr. David Stewart; the Declaration of Professor Brian Fitzpatrick,  
22 and the exhibits attached thereto; the Class Action Settlement Agreement, the Preliminary Approval  
23 Order, the [Proposed] Final Approval and the [Proposed] Judgment filed concurrently herewith, the  
24 documents filed with this Court, and upon such further oral and/or documentary evidence and  
25 argument as may properly be presented to the Court at the time of the hearing on this matter.  
26  
27  
28

1 Dated: May 9, 2014

EAGAN AVENATTI, LLP

2 By: *Michael J. Avenatti*  
3 MICHAEL J. AVENATTI  
4 JASON M. FRANK  
5 SCOTT SIMS  
6 Attorneys for Plaintiffs, on behalf of themselves and  
7 all others similarly situated  
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This certified class action lawsuit concerned Eden Memorial Park Cemetery (“Eden”), a Jewish cemetery in Mission Hills, California. At Eden, all decedents who are buried in the ground are placed in cement outer burial containers which, according to the lawsuit, are designed to protect the casketed remains. Plaintiffs allege that during Defendants’ ownership of the cemetery, Defendants have been intentionally and negligently breaking outer burial containers in neighboring graves in order to make new graves fit. Plaintiffs further allege this breaking at times causes the remains to be disturbed, including causing bones to fall out of the broken containers. Plaintiffs contend that at times when the bones have fallen out of the broken containers, cemetery employees have discarded the bones in dumping areas on the cemetery grounds. Plaintiffs contend these dumping areas were later converted into new sections of the cemetery.

By orders dated May 4, 2012 and August 30, 2012, the Court certified Plaintiffs’ claims for fraud, violation of the Consumer Legal Remedies Act (the “CLRA”) and violation of the Unfair Competition Act (the “UCL”) for class action treatment. These class claims were all based on the same theory: Plaintiffs contend that Defendants had a duty to disclose the alleged problems at Eden to Class Members *before* they purchased plots, goods and services at Eden, and *before* they authorized the burial of a loved one at the cemetery. Plaintiffs were seeking the following primary remedies: (a) injunctive relief to stop the alleged burial problems from occurring in the future; (b) the right for Class Members to rescind their transactions at Eden, and obtain their money back, including having the cemetery perform a disinterment free of charge; and (c) “out of pocket” loss damages for those Class Members who elect to keep their graves at the cemetery. With respect to “out-of-pocket” loss damages, Plaintiffs argued these damages should be measured as the difference between what the Class Member paid and what the market value of their purchases would have been at the time of sale if the problems at Eden had been disclosed. As discussed in greater detail in Section III below, there was a highly disputed legal issue as to whether Class Members who elected to keep their graves at Eden could obtain any out-of-pocket losses absent a showing that their own graves were physically harmed.

1 The certified Class definition includes all persons who either purchased plots, goods or  
2 services at Eden during the Class Period, and/or who authorized the burial of a loved one at Eden  
3 during the Class Period. If a Class Member is now deceased, their successor-in-interest is allowed to  
4 pursue claims on the decedent's behalf as part of the Class definition. The Class Period is from  
5 February 7, 1985 (the date when Defendants acquired the cemetery) to September 10, 2009 (the date  
6 the lawsuit was filed).

7 After four and half years of litigation, the jury trial in this action began on January 27, 2014  
8 before the Honorable Marc Marmaro. Nearing the fourth week of trial and after significant  
9 negotiation and mediation before the Honorable Louis Meisinger (Ret.), the parties reached a  
10 proposed settlement of the claims in this lawsuit (the "Settlement Agreement"), a copy of which is  
11 attached as Exhibit "1" to the Declaration of Michael J. Avenatti ("Avenatti Decl."). The Settlement  
12 has been valued at over \$80.5 million, including substantial monetary remedies and permanent  
13 measures designed to prevent the alleged problems at Eden from occurring in the future.

14 By order dated February 27, 2014, this Court granted preliminary approval of the Settlement,  
15 and ordered that notice be provided to the Class by the Claims Administrator, Gilardi & Co., LLC  
16 (the "Claims Administrator"). [Avenatti Decl., ¶ 3; Ex. "2".] The Class's response to the Settlement  
17 has been tremendously positive and supportive. There are approximately 25,000 graves covered by  
18 this class action. To date, there have been approximately 5,457 claims; in other words, over 25% of  
19 the Class submitted claims for the Settlement benefits. [Declaration of Kenneth Jue ("Jue Decl."), ¶  
20 8.] There have only been 46 opt-outs, meaning that less than two tenths of one percent (0.18%) of the  
21 total Class requested to be excluded from the Settlement.<sup>1</sup> [Id., ¶ 9.] And, there is only one  
22 objection to the Settlement out of 25,000 Class Members.<sup>2</sup> [Id., ¶ 10, Ex. C] This objection solely  
23

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24 <sup>1</sup> This does not include the 54 individuals who opted out of this lawsuit in 2012 after receiving notice that the case had  
25 been certified as a class action. These individuals opted out *before* the trial and Settlement in this manner and, thus, were  
not covered by the Settlement terms, nor were they members of the Class at the time of the Settlement. In other words,  
their earlier requests to be excluded from the Class cannot be considered to be a negative reaction to the Settlement,  
because their opt-out requests occurred *prior* to the Settlement.

26 <sup>2</sup> The only objection to the Settlement currently pending from a Class Member is from Susan Frydrych. [Jue Decl., ¶  
27 10; Ex. C.] There were a few additional objectors who subsequently withdrew their objections after receiving further  
28 information about the Settlement. In addition, there is another Class Member, Joseph Naiman, who indicated he would  
like to speak at the Final Approval Hearing because he does not "agree with the structure of the settlement." [Id., Ex. E.]  
However, he does not state the grounds for his objection as required by this Court's Preliminary Approval Order and, thus,  
any objection is deemed waived. [Prelim. Approv. Order, ¶¶ 17-18.] Finally, there is a letter from a Non-Class Member,

1 concerns Plaintiffs' counsel's attorneys' fees and costs, and thus will be addressed in Plaintiffs'  
2 concurrently filed application for fees and costs. In other words, there are no objections to the  
3 substantive terms of the Settlement. The objection deadline (April 7, 2014) and the opt-out deadline  
4 (May 6, 2014) have already passed, so these numbers should be final.

5 Accordingly, for the reasons provided herein, Plaintiffs request that the Court grant final  
6 approval of the Settlement.

## 7 **II. THE TERMS OF THE SETTLEMENT**

8 The Settlement has been valued at over \$80.5 million. Under the Settlement, Defendants will  
9 have to pay out a minimum of \$35.5 million, not including the additional costs Defendants will incur  
10 in performing the disinterments and permanent measures required under the Settlement. In addition,  
11 the Settlement requires Defendants to institute permanent measures designed to: (a) prevent the  
12 alleged wrongful conduct from occurring in the future; (b) require specific notice, repair and  
13 replacement obligations in the event damage to outer burial containers is discovered; and (c) require  
14 disclosure to future customers of the risk of damage to outer burial containers. Further, the  
15 Settlement provides for the re-sanctification of the cemetery under Jewish law by a Rabbi approved  
16 by Plaintiffs. These permanent measures are conservatively valued at over \$45 million to those Class  
17 Members who elect to keep their graves at Eden, based on the same evidence and analysis upon  
18 which Plaintiffs' claims for out-of-pocket loss damages were based. [See Declaration of Dr. David  
19 Stewart ("Stewart Decl."), ¶¶ 2, 13-26.]

### 20 **A. Monetary Benefits to the Class**

21 Under the terms of the Settlement, Defendants will establish a non-reversionary settlement  
22 fund of \$35,250,000 (the "Settlement Fund") and pay the first \$250,000 of claims administration  
23 costs above and beyond the Settlement Fund. From this fund, Class Members will be able to submit  
24 claims for the following:

25  
26 Elaine Mandler, who is upset that her loved-one's grave is not covered under the Class definition because the burial  
27 occurred in 1968. However, Defendants did not own the cemetery until 1985, and the Court (Judge Mohr presiding)  
28 refused to certify pre-1985 claims for class treatment. [Avenatti Decl., Ex 7 (May 4, 2012 Class Cert. Order) at 3:1-7,  
19:22 – 21:13.] Accordingly, Mrs. Mandler does not have standing to object to the Settlement because she is not a class  
member. [Avenatti Decl., Ex. 2 (Prelim. Approv. Order) at ¶¶ 17-18.]



1            *First*, as described more particularly in Section 8.1 of the attached Settlement Agreement,  
2 those Class Members who have elected to disinter and remove their loved ones from Eden will  
3 receive a full refund of all amounts paid to Eden for plots, goods and services including any finance  
4 charges (Eden generally does not provide any refunds in connection with a disinterment). In addition,  
5 Eden will assist with the disinterment free of charge (Eden usually charges approximately \$1,900 for  
6 its disinterment services).

7            *Second*, as described more particularly in Section 8.2 of the attached Settlement Agreement,  
8 those Class Members who have pre-purchased unused graves, goods or services from Eden will be  
9 entitled to obtain a full refund of all amounts paid to Eden for said plots, goods and services including  
10 any finance charges (Eden generally does not provide a refund for pre-purchased plots). These Class  
11 Members will be required to return any unused plots or merchandise in order to receive a refund.

12            *Third*, as described more particularly in Section 8.3 of the attached Settlement Agreement, the  
13 remainder of the Settlement Fund (after deductions for claims administrations costs,<sup>3</sup> incentive  
14 awards and attorneys' fees and costs approved by the Court) will be divided pro-rata (on a per grave  
15 basis) among those Class Members who submit claims during the claims period. Importantly, Class  
16 Members will be able to submit claims for monetary benefits even if they are keeping any used or  
17 unused graves at the cemetery. However, there is a limit of one-claim per grave.<sup>4</sup>

18            *Fourth*, as noted above, Defendants will pay up to \$250,000 of claims administration costs  
19 separate and apart from the Settlement Fund. Any claims administration costs in excess of \$250,000  
20 will be deducted from the Settlement Fund.

21            In addition, Defendants are required to deposit the full amount of the Settlement Fund into an  
22 interest-bearing escrow account established by the Claims Administrator upon final approval by this  
23 Court.

24  
25  
26 <sup>3</sup> Defendants have agreed to pay the first \$250,000 in claims administration costs separate and apart from the  
\$32,250,000 Settlement Fund. Any claims administration costs in excess of \$250,000 will come from the Settlement  
Fund.

27 <sup>4</sup> For example, if two siblings submit a claim based upon a parent's grave, the amount of the claim will need to be  
28 divided amongst the siblings.

1           **B.       Permanent Requirements and Measures**

2           As more particularly described in Section 7 of the Settlement Agreement, Eden has agreed to  
3 permanently employ a series of measures designed to prevent the occurrence of the alleged wrongful  
4 conduct in the future. These measures have been valued at approximately \$45,000,000 (as discussed  
5 in greater detail in Section IV below). [Stewart Decl., ¶¶ 2, 13-26.]

6           *First*, prior to the excavation of a new grave, Eden will probe the new grave space by inserting  
7 a metal rod into the ground at various locations to ensure there is not an outer burial container from  
8 an adjacent grave encroaching into the new grave space.

9           *Second*, prior to the excavation of a new grave, Eden will be required to verify through  
10 probing that there is sufficient space to safely dig the new grave space without damaging any adjacent  
11 burials. If there is insufficient space, the excavation will not go forward.

12           *Third*, prior to the excavation of a new grave, Eden will check its records to determine if any  
13 adjacent burials used a sectional outer burial container (an older container that is known to be fragile  
14 and can fall apart when the surrounding dirt is removed). If there is a sectional container, Eden will  
15 take additional measures to perform the excavation safely and appropriately in order to avoid causing  
16 any damage to the sectional container or the interred remains, including using shoring or other  
17 appropriate reinforcement methods.

18           *Fourth*, if during the excavation of a new grave, Eden causes or discovers damage to an  
19 adjacent outer burial container (e.g. cracked, broken, etc.) as determined by Eden, Eden will use its  
20 best efforts to notify the next of kin of the deceased in the affected outer burial container and offer to  
21 replace it free of charge. If Eden is unable to contact the next of kin within a reasonable time, it will  
22 make appropriate repairs to the affected outer burial container prior to making the burial in the  
23 adjacent grave and will also make a record of the damage and repair in its permanent records.

24           *Fifth*, Eden will conspicuously disclose (in bold type) in both its Purchase Contracts and  
25 Interment Order Authorization forms, the following:

26           “The digging of a grave may cause damage to an outer burial container in an adjacent  
27 grave. If an outer burial container is damaged by such digging, the cemetery will use its  
28 best efforts to notify the next of kin as reflected in the cemetery’s records. The cemetery

1 will repair the damage if possible, or replace the outer burial container free of charge at  
2 the request of the next of kin or authorized representative.”

3 Families are required to sign a Purchase Contract prior to any purchase of plots, goods or  
4 services at Eden. Families are also required to sign an Interment Order Authorization form prior to  
5 any burial. Consequently, this provision will ensure that Eden discloses to families prior to any  
6 purchase or burial the risk of damage to outer burial containers.

7 *Sixth*, a Rabbi approved by Plaintiffs will perform a Re-Sanctification ceremony at Eden in  
8 accordance with Jewish law.

9 **C. Mutual Release.**

10 As consideration for the benefits and obligations set forth above, Defendants and Plaintiffs will  
11 receive comprehensive mutual releases of all claims that were alleged or should have been alleged in  
12 the class action as more particularly described in Sections 5 and 6 of the attached Settlement  
13 Agreement.

14 **D. Incentive Awards & Attorney Fees & Costs**

15 The Settlement provides that Class Counsel may request up to \$23,500,000 in fees and costs.  
16 The Settlement further provides that the nine Class Representatives may request incentive awards in  
17 the amount of \$20,000 each. This Court granted preliminary approval of these amounts on February  
18 27, 2014 and found that the amounts were fair, reasonable and appropriate under the circumstances of  
19 this case. [Avenatti Decl., Ex 2 (Prelim. Approv. Order) at ¶ 5, Tentative Opinion adopted by Court  
20 at 3.] Defendants do not oppose these amounts. For a further discussion, please see Plaintiffs’  
21 Application for Attorneys’ Fees, Costs and Incentive Awards filed concurrently herewith.

22 **E. The Court-Approved Notice Program.**

23 The notice program approved by this Court in its Preliminary Approval Order was  
24 administered by Gilardi, the Claims Administrator. Notably, because this case had already been  
25 certified as a class action, notice of the pendency of this action was previously directly mailed to  
26 potential Class Members: one round in July 2012 and a second round of notices in November and  
27 December 2012 after the Court amended the Class definition. [Avenatti Decl., ¶ 14.] A third round  
28 of notices about this Settlement was mailed to the Class in March 2014 pursuant to this Court’s

1 Preliminary Approval Order.

2 Specifically:

3 (1) On March 7, 2014, the Claims Administrator directly mailed notice to all Class  
4 Members and any relatives indicated on Defendants' cemetery records. As a result, approximately  
5 50,836 notices were directly mailed to potential Class Members. [Jue Decl., ¶ 3.] A copy of the  
6 notice is attached to the Jue Declaration as Exhibit "A."

7 (2) Beginning on March 6, 2014, the Claims Administrator published notice of the  
8 Settlement in the Los Angeles Jewish Journal, a periodical in which Eden has advertised and is  
9 widely read by members of the Jewish community likely to have been customers of Eden or have  
10 loved ones interred at Eden. This published notice ran for four consecutive weeks. [Jue Decl., ¶ 6.]  
11 A copy of the published notice is attached to the Jue Declaration as Exhibit "C." In addition, after the  
12 Settlement was announced on February 27, 2014, there were a number of news reports in the national  
13 and local press regarding the Settlement, including in the Associated Press, Business Week, and the  
14 *Los Angeles Times*, among others. [Avenatti Decl., ¶ 15.]

15 (3) Prior to March 7, 2014, the Claims Administrator also included the notice and claim  
16 form on its settlement website ([www.edenclassaction.com](http://www.edenclassaction.com)), along with the fully executed Settlement  
17 Agreement, the Motion for Preliminary Approval and this Court's Preliminary Approval Order.

18 **F. The Court Approved Claims Period and Process.**

19 Pursuant to this Court's Preliminary Approval Order, the following deadlines were  
20 established:

- 21 (1) **March 7, 2014:** The claims period began and notice of the Settlement was mailed and  
22 published to the Class.
- 23 (2) **April 7, 2014:** Deadline for objections to the Settlement
- 24 (3) **May 6, 2014:** Deadline for requests for exclusion from the Settlement (i.e. "opt-outs")
- 25 (4) **May 9, 2014:** Deadline for Plaintiffs to file Motion for Final Approval of Settlement,  
26 Application for Attorneys' Fees and Costs, and Responses to Objections, if any.
- 27 (5) **May 15, 2014:** Final Approval Hearing
- 28 (6) **June 5, 2014:** End of Claims Period

1 To date, there have been approximately 5,457 claims, including approximately 1,600 claims  
2 for disinterments / refunds. [Jue Decl., ¶ 8.] There have only been 46 opt-outs. [Id., ¶ 9.] And,  
3 there is only 1 Class Member (Susan Frydrych) currently objecting to the Settlement (not including  
4 the Naiman request to speak at the Final Approval Hearing which is not a valid objection under the  
5 Court's Preliminary Approval Order). [Id., ¶ 10, Ex. E.] The opt-out and objection deadlines have  
6 passed, so these numbers should be final.

### 7 **III. THE REMEDIES SOUGHT IN THIS CLASS ACTION**

8 Plaintiffs' claims in the Class Action were based on the theory that Class Members were  
9 fraudulently induced to select Eden over other cemeteries based upon Defendants' failure to disclose,  
10 and active concealment of, the alleged problems at Eden. Plaintiffs were seeking the following three  
11 types of relief: (1) injunctive relief to prevent the alleged problems at Eden from occurring in the  
12 future; (2) the right for Class Members to rescind their transactions at Eden, and obtain their money  
13 back, including having the cemetery perform a disinterment free of charge; and (3) out-of-pocket loss  
14 for those customers who keep their graves at the cemetery.

15 Notably, Plaintiffs were not permitted to seek emotional distress damages on behalf of the  
16 Class in the class action. Specifically, in connection with May 4, 2014 Class Certification Order, the  
17 Court denied the class certification of Plaintiffs' emotional distress claims and held that these claims  
18 would need be pursued separately from the class action and on an individual basis. [Avenatti Decl.,  
19 Ex. 7 (May 4, 2014 Class Cert. Order) at 19-21.] This was based, in part, on the fact that the  
20 California Supreme Court ruled that in the context of a wrongful burial practices claim, a party cannot  
21 obtain emotional distress damages unless the party can establish a "well-founded substantial  
22 certainty" that their own loved-one's grave was disturbed. Christensen v. Sup. Ct. (1991) 54 Cal.3d  
23 868, 902. In this case, with a handful of exceptions, the groundskeepers who admitted to breaking  
24 outer burial containers in order to make new burials fit were unable to specifically identify every  
25 grave that was damaged. [Avenatti Decl., ¶ 19.] Efforts to identify the damaged graves through  
26 Ground Penetrating Radar ("GPR") also proved to be unsuccessful, because the GPR was unable to  
27 capture reliable images underground. [Id.] As a result, in order to identify all of the damaged graves  
28 at the cemetery, Plaintiffs would have needed to exhume every grave at the cemetery, which was

1 obviously not a viable option. [Id.] Consequently, the class action claims were limited to economic  
2 remedies for fraud.

3 Under California law, when a party is fraudulently induced to enter into a sales transaction,  
4 the defrauded party is entitled to either: (a) rescind the transaction and get his/her money back in  
5 exchange for the return of the purchased items; or (b) keep the purchased items and seek out-of-  
6 pocket loss as damages. Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1240. The  
7 second option -- out-of-pocket loss -- is measured as the difference between what the party paid and  
8 the reasonable market value of what the party received at the time of sale if the true quality or other  
9 characteristics of the transaction were known. See, e.g. Judicial Council of California Civil Jury  
10 Instruction (“CACT”) 1923.<sup>5</sup> The “value” is the “reasonable market value” which “is normally  
11 determined by the price at which it could be resold in an open market or by private sale if its quality  
12 or other characteristics which affect its value were known.” Bagdasarian v. Gragnon (1948) 31  
13 Cal.2d 744, 753. Through expert testimony and market surveys (discussed in greater detail in  
14 following section), Plaintiffs were seeking to establish that each Class Member lost as much as 95%  
15 of the amount they paid as out-of-pocket loss damages, and that Class Members could obtain these  
16 damages even if they kept their graves at the cemetery. Defendants disagreed and argued that unless  
17 each Class Member could show that their *own* grave was physically harmed, then the Class Members  
18 received exactly what they paid for and could not seek out-of-pocket damages, especially if they kept  
19 their graves at the cemetery. This was a hotly disputed legal and factual issue in this case, and would  
20 have undoubtedly been the subject of appeal had Plaintiffs prevailed at trial.

21 As discussed in Section V.B.4. below, the proposed Settlement largely achieves each of the  
22 remedies requested in the class action.

- 23 • *First*, Eden has agreed to permanently employ measures designed to prevent the  
24 occurrence of the alleged problems at Eden and to disclose to future customers the  
25 risks of damage to outer burial containers.

26  
27 <sup>5</sup> See also OCM Principal Opportunities Fund v. CIBC World Markets Corp. (2007) 157 Cal.App.4th 835, 870, 876  
28 (citing Stout v. Turney (1978) 22 Cal.3d 718, 725).

- 1           • *Second*, under the Settlement, Class Members have the right to rescind their  
2 transactions and receive back 100% of what they paid, including a disinterment  
3 performed free of charge by Eden. Class Members selecting this option are essentially  
4 receiving 100% of what Plaintiffs were seeking in this lawsuit. To date, there have  
5 been approximately 1,600 claims for this disinterment / refund option.
- 6           • *Third*, Class Members who choose to keep their graves at Eden will still be entitled to  
7 receive a cash pro-rata portion of the net settlement fund, even though there was a  
8 legal question whether they could obtain such remedies. [Avenatti Decl., Ex. 1.]

9           **IV. THE VALUE OF THE PERMANENT MEASURES REQUIRED BY THE**  
10           **SETTLEMENT**

11           The value of the permanent measures required by the Settlement is set forth in the declaration  
12 of Dr. David Stewart, who was Plaintiffs' designated expert on market valuation in this lawsuit and is  
13 one of the top experts in his field, regularly testifying as an expert on behalf of the Federal Trade  
14 Commission.<sup>6</sup> Dr. Stewart opines that the permanent measures required by the Settlement are  
15 conservatively valued at over \$45 million to those Class Members who elect to keep their graves at  
16 Eden, and he believes it is likely worth more than that amount. This valuation is based on the *same*  
17 evidence and analysis upon which Plaintiffs' out-of-pocket loss claims were based.

18           As noted above, in this lawsuit, Plaintiffs were seeking out-of-pocket losses based on the  
19 difference between what each Class Member paid and the reasonable market value of what the Class  
20 Members received at the time of sale if problems at the cemetery were disclosed up front. To  
21 determine this amount, Dr. Stewart designed and conducted market surveys of Eden's potential  
22 market of customers (i.e., Jewish cemetery customers in the Los Angeles and Orange County areas).  
23 [Stewart Decl., ¶¶ 15-16.] The questions in Dr. Stewart's survey tested a customer's willingness to  
24 purchase graves at Eden if the cemetery disclosed: (a) the cemetery's employees will at times break  
25 outer burial containers and caskets in order to make new burials fit; and/or (b) the cemetery's

26           <sup>6</sup> Dr. Stewart was the former Deputy Dean of the Marshal School of Business at the University of Southern  
27 California and the Chairperson for USC's Department of Marketing. He is the President Professor of Marketing and  
28 Law at LMU's College of Business Administration. He has extensive experience in concept testing for such major  
companies as Coca-Cola and IBM, to name a few. He regularly testifies as an expert on behalf of the Federal Trade  
Commission. [Stewart Decl., ¶¶ 3-12.]

1 employees will at times break out burial containers and caskets and discard the human remains that  
2 fall out of the broken containers. [Id.] The questions were drafted to assume that the improper burial  
3 practices would continue in the future after the sale. [Id.]

4 The results of Dr. Stewart's surveys indicated that approximately 91% of Eden's potential  
5 market of customers definitively would not be willing to make purchases at Eden under any  
6 circumstances if those burial problems were disclosed and continuing. [Stewart Decl., ¶ 17.]  
7 Approximately 5.5% of Eden's potential customers would still "consider" making a purchase at the  
8 cemetery if those practices were disclosed, while an additional 3.5% answered "I don't know." [Id.]  
9 Based on these survey results, Dr. Stewart and Plaintiffs' damage expert, Neill Freeman, concluded  
10 that the market price of Eden's plots, goods and services would have dropped by at least 95% if the  
11 cemetery's burial problems were disclosed and continuing. [Id., ¶¶ 17-19.] This is based on the fact  
12 that only approximately 5% of Eden's potential market of customers would be even willing to  
13 consider making a purchase at Eden if those problems were disclosed and continuing. [Id.] It is  
14 undisputed that Eden sold approximately \$99.6 million worth of plots, goods and services to the Class  
15 during the Class Period (February 7, 1985 to September 10, 2009), including approximately  
16 \$52,720,791 worth of in-ground plots. [Id.] Accordingly, Dr. Stewart and Mr. Freeman opined that  
17 the out-of-pocket losses aggregately suffered by the Class were approximately \$94.6 million (95% of  
18 \$99.6 million.) [Id.]

19 Using the *same* evidence and methodology employed to determine the out-of-pocket loss  
20 damages in this lawsuit, Dr. Stewart was able determine that value of the permanent measures  
21 required by the Settlement for those Class Members who do not choose the rescission remedy and  
22 who are instead keeping their graves at the cemetery. [Stewart Decl., ¶ 22.] As noted above, Dr.  
23 Stewart's surveys assumed that the alleged improper burial practices at Eden would continue post-  
24 sale. [Id., ¶ 20.] However, under the current Settlement, the permanent measures are designed to  
25 prevent these alleged problems from occurring in the future. [Id.] Consequently, Dr. Stewart studied  
26 sales of Eden's graves on the secondary market after the announcement of the Settlement and the fact  
27 that it required permanent measures to prevent the alleged problems from occurring in the future. Dr.  
28 Stewart found that the re-sale price of Eden's graves on the secondary market today is ranging from



1 50% to 80% of regular market prices, with most prices in the 60% to 70% range. [Id., ¶ 21.] Dr.  
2 Stewart assumed that buyers in these current sales do not believe that the alleged burial problems at  
3 Eden will be continuing in the future. [Id., ¶¶ 22.]

4 Conservatively taking the lowest re-sale price (50% of regular market prices), Dr. Stewart's  
5 analysis found that the Class, on an aggregate basis, could turn around and sell their plots, goods and  
6 services on the secondary market today for at least 50% of what they paid, so long as the alleged  
7 burial problems are no longer continuing. [Id., ¶ 24.] In other words, the Class paid approximately  
8 \$99.6 million for plots, goods and services during the Class Period, and could re-sell those same  
9 items today for approximately \$49.9 million, so long as the Settlement's permanent measures are in  
10 place to prevent the alleged problems from occurring in the future. [Id.] In comparison, if the burial  
11 problems were continuing, Dr. Stewart's surveys indicate that the Class could only re-sell the plots,  
12 goods, and services for approximately \$5 million in the aggregate. [Id.] This difference between the  
13 amount the Class could re-sell their plots, goods and services today after the cessation of the alleged  
14 burial problems (approximately \$50 million) and the re-sale amount if the problems were continuing  
15 (\$5 million) is the *restored value* provided to the Class as a result of the Settlement's permanent  
16 measures. [Id., ¶¶ 23-24.] Similarly, a person who has a used grave is now getting closer to what  
17 they originally bargained for, i.e., a grave at a cemetery where these types of burial problems will not  
18 occur. [Id.]

19 In sum, based on the *same* analysis, methodology and evidence used to support Plaintiffs'  
20 damage claims, the restored value of the permanent measures required by the Settlement for those  
21 Class Members who elect to keep their graves at Eden is well over \$45 million. [Stewart Decl., ¶ 25.]  
22 As Dr. Stewart notes, "[i]f a Class Member were to argue that the restored value is less than \$45  
23 million, or not quantifiable, then that Class Member would not only be wrong, he/she would be  
24 essentially arguing that he/she did not suffer economic damages in the manner or amount alleged in  
25 this lawsuit. This is because my valuation of the Permanent Corrective Measures is based on the  
26 same evidence and methodology used to establish his/her damage claim." [Id.] Accordingly, adding  
27 this restored value (\$45 million) to the minimum amount Defendants are required pay under the  
28 Settlement (\$35.5 million) yields a total Settlement value of over \$80.5 million.

1           **V.     THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

2           Pursuant to Rule 3.769(g) of the California Rules of Court, before final approval, the Court  
3 must conduct an inquiry into the fairness of the proposed settlement. In determining whether to grant  
4 final approval, the Court is simply determining whether the settlement appears to be fair, adequate  
5 and reasonable. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801-02.

6           **A.     The Current Settlement Is Entitled To A Presumption of Fairness.**

7           The court has “broad discretion to determine whether the settlement is fair.” Dunk, 48  
8 Cal.App.4th at 1801. “A presumption of fairness exists where: (1) the settlement is reached through  
9 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court  
10 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors  
11 is small.” Dunk, 48 Cal.App.4th at 1802. All of these factors are satisfied here.

12           *First*, this Settlement was only reached after extensive arms-length negotiations before the  
13 Honorable Louis Meisinger (Ret.). [Avenatti Decl. ¶ 2.]

14           *Second*, the parties conducted extensive investigation and discovery during the four and half  
15 years of litigation, and had already commenced the first month of an estimated four-month class  
16 action jury trial. [Avenatti Decl. ¶ 17.] The legal and factual issues in this lawsuit have been  
17 thoroughly briefed by the parties, such that the parties are fully aware of the risks and benefits of  
18 continued litigation. [Id., ¶ 18.] For a more detailed discussion regarding the amount of discovery,  
19 briefing and work performed on this case, please see Plaintiffs’ Application for Attorneys’ Fees,  
20 Costs and Incentive Awards, Section II.

21           *Third*, Class Counsel is highly experienced in both prosecuting and defending class actions of  
22 this nature. Class Counsel has litigated numerous class action lawsuits involving claims of fraudulent  
23 non-disclosure, which is the primary legal theory in this case. [Avenatti Decl. ¶ 25.] Class Counsel  
24 has also been involved in a number of lawsuits involving cemeteries across the country. [Id.]

25           *Fourth*, the percentage of objectors is infinitesimal. With approximately 25,000 graves  
26 covered by the class action, and approximately 50,836 notices directly mailed to potential Class  
27 Members, there is only one objection currently pending before this Court (not including the Naiman  
28 request to speak at the Final Approval Hearing without any statement regarding his problems with the

1 Settlement, which is not a proper objection under the Court's Preliminary Approval Order). [Jue  
2 Decl., ¶ 10, Ex. C.] Moreover, there have only been 46 Class Members requesting exclusion from the  
3 Settlement, which means that over 99.98% of potential Class Members did not request exclusion  
4 from the Settlement's terms. [Id., ¶ 9.] In sum, the Class's response to the Settlement indicates that  
5 they strongly approve of the Settlement and its terms.

6 **B. The Current Settlement Is "Fair, Adequate and Reasonable."**

7 Beyond the presumption of fairness, the current Settlement is clearly "fair, adequate and  
8 reasonable" under any standard. In making a fairness determination, courts consider a number of  
9 factors, including: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely  
10 duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the  
11 benefits conferred by settlement; (5) the experience and views of counsel; (6) the extent of discovery  
12 completed and the state of the proceedings; and (7) the reaction of Class Members to the proposed  
13 settlement. See Dunk, 48 Cal. App. 4th at 1802. All of these factors are satisfied here.

14 **1. The Strength of Plaintiff's Case**

15 Plaintiffs believe they have a very strong, yet challenging case, which is the reason they were  
16 able to obtain the proposed Settlement. Defendants have and will continue to vigorously contest  
17 liability and damages. Thus, the outcome of the case is by no means certain absent a Settlement.

18 **2. The Risk, Expense, Complexity and Likely Duration of Further Litigation**

19 This lawsuit has been tremendously expensive. Class Counsel has incurred \$4,587,719 in out-  
20 of pocket costs and \$18,785,150 in legal fees, representing approximately 27,798 hours of work a  
21 four and half year period. [Avenatti Decl., ¶ 4; Exs. 3, 4.] The trial in this matter is expected to last  
22 an additional three to four months. Defendants will clearly appeal any verdict against them, resulting  
23 in further substantial delay.

24 There are also significant risks in this litigation due to the complexity of this class action.  
25 There are numerous legal issues that would ultimately need to be resolved by the appellate courts if  
26 Plaintiffs prevailed at the trial court level, including legal questions such as:

- 27 (a) Whether Defendants had a duty to disclose the problems at Eden to *all* potential  
28 customers prior to purchase and interment (as Plaintiffs contend), or whether

1 Defendants only had a duty to disclose problems to those individuals whose graves  
2 were damaged (as Defendants contend);

3 (b) Whether Class Members suffered an injury by being allegedly fraudulently induced to  
4 purchase plots, goods or services at Eden based on Defendants' failure to disclose  
5 alleged problems at the cemetery (as Plaintiffs contend), or whether Class Members  
6 would also need to prove physical damage to their own graves (as Defendants  
7 contend);

8 (c) Whether Class Members who elect to keep their graves at the cemetery are entitled to  
9 obtain any monetary damages absent a showing of physical damage to their own  
10 graves;

11 (d) Whether the Supreme Court's decision in Christensen v. Sup. Ct. (1991) 54 Cal.3d 868  
12 – requiring a “well-founded substantial certainty” that a loved ones' grave is disturbed  
13 in order to obtain emotional distress damages – precludes a claim for economic  
14 damages and fraudulent non-disclosure absent a showing of physical harm to the  
15 grave;

16 (d) Whether the Consumer Legal Remedies Act applies to the sale of cemetery goods and  
17 services; and

18 (e) Whether there is sufficient evidence to demonstrate an alter ego relationship between  
19 Eden and its corporate owners (as Plaintiffs contend), or whether SCI is shielded from  
20 liability by its corporate structure (as Defendants contend.)

21 This is far from an exhaustive list of the complex legal issues in this matter. After weighing these  
22 risks against the substantial benefits provided in this Settlement, Class Counsel believed that going  
23 forward with this Settlement served the best interests of the Class.

### 24 3. The Risks of Maintaining Class Action Status Through Trial.

25 Defendants have indicated they planned to file a motion for de-certification after the close of  
26 Plaintiffs' case at trial. Defendants' various arguments for de-certification can be found in their  
27 opposition to Plaintiffs' Motion for Class Certification, and Defendants' recent motions for  
28 bifurcation. Plaintiffs believe that Defendants' motion for de-certification would likely be rejected.

1 However, the trial judge who would hear Defendants' motion for de-certification (Judge Marmaro) is  
2 different than the judge who approved class certification (Judge Mohr). Even though Judge  
3 Marmaro's rejection of Defendants' motions for bifurcation may provide some indication that he  
4 would likewise reject Defendants' de-certification arguments, the risk of de-certification cannot be  
5 entirely dismissed. Accordingly, Class Counsel factored in this risk when reaching this Settlement.

#### 6 **4. The Benefits Conferred By Settlement.**

7 The benefits conferred by the Settlement for the Class are so substantial that they clearly  
8 outweigh the potential benefits and risks of proceeding with the class action trial. In fact, the  
9 Settlement largely accomplishes all of the goals of this litigation.

10 *First*, the Settlement provides significant and *permanent* measures which: (a) were  
11 recommended by Plaintiffs' cemetery experts as the steps necessary to minimize the risk of Eden  
12 damaging further graves at the cemetery; (b) establish specific notice, repair and replacement  
13 requirements in the event damage occurs or is discovered in the future; (c) require the conspicuous  
14 disclosure to potential customers of the risk of damage to outer burial containers prior to purchase  
15 and interment; and (d) re-sanctifies the cemetery under Jewish law. Plaintiffs achieved virtually  
16 every objective of their claims for injunctive relief, short of having the cemetery taken over by a  
17 receiver (an outcome that Plaintiffs acknowledge would be difficult to obtain under California law  
18 and which they were unable to obtain during the preliminary injunction trial). As discussed in  
19 Section IV above, these permanent measures will help restore at least \$45 million in value to those  
20 Class Members who elect to keep their graves at Eden. In addition, these permanent measures will  
21 benefit non-Class Members, including individuals who purchased graves outside of the Class Period,  
22 and future purchasers who will now be apprised of the risks of purchasing graves at Eden.

23 *Second*, all of the claims in this class action are based on the theory that the Class was  
24 fraudulently induced to make purchases at Eden as result of Defendants' failure to disclose the  
25 problems at the cemetery. As noted above, under California law, when a party is fraudulently  
26 induced to enter into a transaction, the defrauded party has the option of rescinding the transaction  
27 (i.e. getting their money back and returning what they purchased). Alliance 10 Cal.4th at 1240.  
28 Here, under this Settlement, Class Members have the option of rescinding their transactions with

1 Eden and receiving 100% of their money back. If this requires a disinterment, Eden is further  
2 required to conduct the disinterment free of charge (the cemetery normally charges \$1,900).  
3 Accordingly, this Settlement provides nearly *full relief* for Class Members who want to rescind their  
4 transactions based on Defendants' alleged fraudulent non-disclosures. It is obviously rare for parties  
5 to obtain everything they are requesting in a Settlement; and, yet, in this Settlement, Class Members  
6 electing the rescission remedy are obtaining essentially full relief. As noted above, approximately  
7 1,600 Class Members have elected this option to date. [Jue Decl., ¶ 8.]

8 *Third*, for those Class Members who have elected to keep their graves at Eden, the Settlement  
9 provides that they will receive their pro-rata share of the net settlement fund, even though there was a  
10 serious legal question as to whether they could receive any monetary damages absent proof that their  
11 own grave was harmed.

12 In sum, the Settlement largely achieves what Plaintiffs could achieve at trial, without the risks  
13 and inherent delays of an adverse jury verdict, trial court decision or appellate decision.

#### 14 **5. The Experience and Views of Counsel**

15 Although recommendations of counsel proposing the settlement are not conclusive, the Court  
16 can properly take them into account, particularly if they have been involved in litigation for some  
17 period of time, appear to be competent, have experience with this type of litigation, and discovery has  
18 commenced. See 2 H. Newberg, Newberg on Class Actions § 11.47 (2d ed. 1985). Indeed, courts do  
19 not substitute their judgment for that of the proponents, especially when experienced counsel familiar  
20 with the litigation have reached a settlement. See, e.g., Hammon v. Barry, 752 F. Supp. 1087 (D.D.C.  
21 1990) (citing Newberg on Class Actions, § 11.44). Rather, courts presume the absence of fraud or  
22 collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there  
23 is a presumption that negotiations were conducted in good faith. See Newberg on Class Actions §  
24 11.51; In re Chicken Antitrust Litig., 560 F. Supp. 957 (N.D. Cal. 1980).

25 Here, the experience and views of counsel warrant a finding by the Court that the settlement is  
26 fair, adequate and reasonable. Class Counsel is qualified and experienced in litigation similar to the  
27 instant action. Class Counsel has also extensively litigated this case, to the point that they were one  
28

1 month into a four-month class action jury trial. They are fully aware of the potential benefits and  
2 risks of settling versus proceeding with the trial.

3 **6. The Extent of Discovery Completed and the State of the Proceedings**

4 Again, discovery has been fully completed in this action, the trial has commenced, and the  
5 legal issues have been extensively briefed. As the Court well knows, trials in class actions are almost  
6 unheard of. Class Counsel is fully aware of potential benefits and risks of this case, and is confident  
7 that this Settlement is in the best interests of the Class.

8 **VI. IN ITS CLASS CERTIFICATION ORDER, THE COURT LIMITED THE CLASS**  
9 **DEFINITION TO TRANSACTIONS BETWEEN FEBRUARY 7, 1985 AND**  
10 **SEPTEMBER 10, 2009.**

11 As noted above, there is only one Class Member (Susan Frydrych) out of 25,000 Class  
12 Members currently objecting to the Settlement, and her objection relates solely to the request for  
13 attorneys' fees.<sup>7</sup> [Jue Decl., Ex. E.] In fact, this lone objector specifically notes that she is "not  
14 objecting to the Settlement as a whole" and is only objecting to the requested attorneys' fees. [Id.]  
15 As such, her objection will be addressed in Plaintiffs' Application for Attorneys' Fees, Costs and  
16 Incentive Awards filed concurrently herewith.

17 In addition, there was a letter sent by a non-Class Member (Elaine Mandler) complaining that  
18 the Class Period does not include sales transactions and burials that occurred prior to February 7,  
19 1985.<sup>8</sup> In other words, she is not objecting to the benefits of the Settlement, she simply wishes she  
20 was eligible to receive those benefits. However, Defendants did not own the cemetery until February  
21 7, 1985, and the Court (Judge Mohr presiding) refused to certify pre-1985 claims for class treatment  
22 for the reasons discussed in Section III above (regarding the reasons the Court refused to certify the  
23 emotional distress claims). [Avenatti Decl., Ex 7 (May 4, 2012 Class Cert. Order) at 3:1-7, 19:22 –  
24 21:13.] The fraud, UCL and CLRA claims at issue in the class action required proof that Defendants  
25 had exclusive knowledge of the problems at Eden in order to establish that Defendants' had a duty to

26 <sup>7</sup> This does not include the letter from Joseph Naiman, who indicated he would like to speak at the Final Approval  
27 Hearing because he does not "agree with the structure of the settlement." [Jue Decl., Ex. E.] However, he does not state  
28 the grounds for his objection as required by this Court's Preliminary Approval Order and, thus, any objection is deemed  
waived. [Avenatti Decl., Ex. 2 (Prelim. Approv. Order) at ¶¶ 17-18.]

<sup>8</sup> This was also a complaint in a few other objections that were subsequently withdrawn after it was explained why the  
Court limited the Class Period to February 7, 1985 to September 10, 2009.

1 disclose the problems to prospective customers. Goodman v. Kennedy (1976) 18 Cal.3d 355, 346-47  
2 (duty to disclose by non-fiduciary requires proof that the defendants had exclusive knowledge of the  
3 non-disclosed fact); Collins v. eMachines, Inc. (2012) 220 Cal.App.4th 249, 255-59 (same).  
4 Consequently, the claims at issue in this class action could not logically include transactions prior to  
5 Defendants acquiring the cemetery in February 7, 1985, which is why the Court limited the beginning  
6 of the Class Period to February 7, 1985.


7 Accordingly, Mrs. Mandler does not have standing to object to the Settlement because she is  
8 not a class member. [Avenatti Decl., Ex. 2 (Prelim. Approv. Order) at ¶¶ 17-18 (requiring objections  
9 to be filed by Class Members.)]

10 **VII. CONCLUSION**

11 For the foregoing reasons, Plaintiffs respectfully request the Court grant Final Approval of the  
12 Settlement.

13  
14 Dated: May 9, 2014

EAGAN AVENATTI, LLP

15  
16 By:   
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