

AGREEMENT TO DEFEND PUBLIC OFFICER OR EMPLOYEE, RESERVATION OF RIGHTS AND NON WAIVER AGREEMENT

1 WHEREAS, the undersigned public officer or employee is a party defendant in the
2 following action:

3 NAME OF CASE: Michael Hernandez Gonzalez v Mims, et al.

4 ACTION NO: 1:15-CV-01200-BAM (PC)

COURT: Eastern District Court of
California

5 WHEREAS, the undersigned officer or employee claims that the said action
6 referenced above arose out of acts or omissions which, if they occurred at all, occurred within
7 the course and scope of the officer's or employee's employment with the County of Fresno or of
8 a Judicial District thereof and were not the result of fraud, corruption or malice; and

9 WHEREAS, the undersigned officer or employee has requested that the County of
10 Fresno undertake his/her defense in said action pursuant to Article 4 (commencing with section
11 825), Chapter 1, Part 2, Division 2.6 of Title 1 of the Government Code and said County is
12 willing to conduct said defense subject to a reservation of its rights/non waiver agreement to the
13 full extent permitted in said provision of the Government Code.

14 Matters Covered Under this Reservation of Rights:

- 15 • Ordinary negligence which occurred within the course and scope of your
16 employment.

17 Matters NOT COVERED by the County of Fresno under this Reservation of
18 Rights/Non-Waiver Agreement:

- 19 • Any actions outside the course and scope of your employment.
- 20 • Any actions within the course and scope of your employment that were/are
21 reckless, grossly negligent, willful, wanton, fraudulent, oppressive,
22 malicious, arbitrary or capricious.
- 23 • Punitive damages (which are not currently alleged in this case)

24 Pursuant to this agreement, the County of Fresno may take the following actions if
25 the facts of this case warrant:

- 26 1. Seek a declaration of rights and duties regarding its defense and/or
27 indemnity obligations;

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2. Withdraw our defense and seek reimbursement for defense fees incurred in defending claims with no potential for coverage;
3. Seek reimbursement for any judgement or settlement paid by County of Fresno on the ground that the sums were not paid in connection with covered claims;
4. The right to have separate verdict form at trial for non-covered claims;
5. The right to amend this agreement at a later time.

Please bear in mind that the County of Fresno is not in any way asserting the allegations against you have merit. The County of Fresno is simply stating that the claims, or a portion of them, may not be covered.

PLEASE NOTE: the Public Officer or Employee signing this document has the right to seek advice of outside counsel/independent counsel at any time.

I, William Y. Nemoto, have read the above information and have had an opportunity to ask questions. I am requesting that the County of Fresno undertake my defense in the above-entitled action subject to a RESERVATION OF RIGHTS. I understand that I have the continuing right to seek advice of outside/independent counsel at any time and will advise the County of Fresno as soon as possible should I want to do so.

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EXHIBIT "A"
ARTICLE 4. INDEMNIFICATION OF PUBLIC EMPLOYEES

825. Duty of public entity to pay judgement, compromise, or settlement.

(a) Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity. Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

As used in this subdivision with respect to an entity of state government, "a decision of the governing body" means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim. The provisions of subdivision (a) of Section 965.6 shall apply to the payment of any claim pursuant to this subdivision.

The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or pursuant to any other law or authority.

(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 of Title 42 of the United States Code.

(f) (1) Except as provided in paragraph (2), a public entity shall not pay a judgment, compromise, or settlement arising from a claim or action against an elected official, if the claim or action is based on conduct by the elected official by way of tortiously intervening or attempting to intervene in, or by way of tortiously influencing or attempting to influence the outcome of, any judicial action or proceeding for the benefit of a particular party by contacting the trial judge or any commissioner, court-appointed arbitrator, court-appointed mediator, or court-appointed special referee assigned to the matter, or the court clerk, bailiff, or marshal after an action has been filed, unless he or she was counsel of record acting lawfully within the scope of his or her employment on behalf of that party. Notwithstanding Section 825.6, if a public entity conducted the defense of an elected official against such a claim or action and the elected official is found liable by the trier of fact, the court shall order the elected official to pay to the public entity the cost of that defense.

(2) If an elected official is held liable for monetary damages in the action, the plaintiff shall first seek recovery of the judgment against the assets of the elected official. If the elected official's assets are insufficient to satisfy the total judgment, as determined by the court, the public entity may pay the deficiency if the public entity is authorized by law to pay that judgment.

(3) To the extent the public entity pays any portion of the judgment or is entitled to reimbursement of defense costs pursuant to paragraph (1), the public entity shall pursue all available creditor's remedies against the elected official, including garnishment, until that party has fully reimbursed the public entity.

(4) This subdivision shall not apply to any criminal or civil enforcement action brought in the name of the people of the State of California by an elected district attorney, city attorney, or attorney general.

825.2. (a) Subject to subdivision (b), if an employee or former employee of a public entity pays any claim or judgment against him, or any portion thereof, that the public entity is required to pay under Section 825, he is entitled to recover the amount of such payment from the public entity.

(b) If the public entity did not conduct his defense against the action or claim, or if the public entity conducted such defense pursuant to an agreement with him reserving the rights of the public entity against him, an employee or former employee of a public entity may recover from the public entity under subdivision (a) only if he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice or that he willfully failed or refused to conduct the defense of the claim or action in good faith or to reasonably cooperate in good faith in the defense conducted by the public entity.

(c) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

825.4. Except as provided in Section 825.6, if a public entity pays any claim or judgment against itself or against an employee or former employee of the public entity, or any portion thereof, for an injury arising out of an act or omission of the employee or former employee of the public entity, he is not liable to indemnify the public entity.

825.6. (a) (1) Except as provided in subdivision (b), if a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or former employee the amount of that payment if he or she acted or failed to act because of actual fraud, corruption, or actual malice, or willfully failed or refused to conduct the defense of the claim or action in good faith. Except as provided in paragraph (2) or (3), a public entity may not recover any payments made upon a judgment or claim against an employee or former employee if the public entity conducted his or her defense against the action or claim.

(2) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted his or her defense against the claim or action pursuant to an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of the payment from him or her unless he or she establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his or her employment as an employee of the public entity and the public entity fails to establish that he or she acted or failed to act because of actual fraud, corruption, or actual malice or that he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.

(3) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted the defense against the claim or action in the absence of an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of that payment from him or her if he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.

(b) (1) Upon a felony conviction for a violation of Section 1195 of this code, or of Section 68, 86, 93, 165, 504, or 518 of the Penal Code, by an elected official or former elected official of a public entity for an act or omission of that person while in office, the elected official or former elected official shall forfeit any rights to defense or indemnification under Section 825 with respect to a claim for damages for an injury arising from that act or omission.

(2) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an elected official or former elected official of the public entity, for an injury arising out of an act or omission of the elected official or former elected official of the public entity, which act or omission constituted a felony violation of Section 1195 of this code, or of Section 68, 86, 93, 165, 504, or 518 of the Penal Code, the public entity shall recover from the elected official or former elected official the amount of that payment upon the felony conviction of the elected official or former elected official for that act or omission. Upon that conviction, the public entity shall also recover from the elected official the costs of any defense to a civil action filed against the elected official for that act or omission.

(c) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.