Dowling Aaron Incorporated
Donald R. Fischbach, Bar No. 053522
dfischbach@dowlingaaron.com
Mark D. Kruthers, Bar No. 179750
mkruthers@dowlingaaron.com
8080 N. Palm Avenue, Third Floor
Fresno, California 93711
Tel: (559) 432-4500

Payne & Fears LLP
C. Darryl Cordero, Bar No. 126689
cdc@paynefears.com
Scott O. Luskin, Bar No. 238082
sol@paynefears.com
Matthew K. Brown, Bar No. 252503
mkb@paynefears.com
Leilani E. Livingston, Bar No. 298896
llj@paynefears.com
1100 Glendon Avenue, Suite 1250
Los Angeles, California 90024
Tel: (310) 689-1750

Marko & Magolnick, P.A
Joel S. Magolnick, Bar No. 776068
magolnick@mm-pa.com
3001 S.W. 3rd Avenue
Miami, Florida 33129
Tel: 305-740-1967

Attorneys for Plaintiff Dakota Medical, Inc., dba Glenoaks Convalescent Hospital

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

DAKOTA MEDICAL, INC., individually, and on behalf of all others similarly situated,

Plaintiff,

v.

REHABCARE GROUP, INC., *et al.*,

Defendants.

Case No.: 1:14-cv-02081-DAD-BAM

Hon. Dale A. Drozd

Declaration of C. Darryl Cordero in Support of Plaintiff's Motions for Final Approval of Class Settlement and Certification of Settlement Class, and for Attorneys' Fees and Reimbursement of Expenses

[Fed. R. Civ. P. 23]

Date: Sept. 7, 2017
Time: 9:30 A.M.
Courtroom: 5

I, C. Darryl Cordero, declare:

1. I am a partner with the law firm of Payne & Fears, LLP, and am lead counsel for Plaintiff Dakota Medical, Inc., dba Glenoaks Convalescent Hospital, in this action. I have personal knowledge of the following facts, and would and could competently testify thereto if called as a witness in this action.

2. This is an action against RehabCare Group, Inc., and Cannon & Associates LLC, dba Polaris Group, for mass junk faxing in violation of the Telephone Consumer Protection Act and related regulations of the Federal Communications Commission. In July and August 2014, Payne & Fears LLP and I were retained by R. Fellen, Inc., dba Sunnyside Convalescent Hospital, and Dakota Medical, Inc., dba Glenoaks Convalescent Hospital, to bring claims against RehabCare and Cannon for alleged violations of the anti-junk fax provisions of the TCPA and FCC regulations.

3. I was primarily responsible for organizing this litigation and preparing the complaint. After litigation commenced in December 2014, as later discussed in this declaration, I have been actively involved in all facets of the case and have been the attorney primarily responsible for communication with Plaintiff/Class Representative Glenoaks Convalescent Hospital.

The Proposed Class Settlement

4. I strongly recommend that the Court give final approval to the proposed settlement. I am convinced from my involvement in the process that the settlement terms are extremely fair and reasonable to the class and are by far the best that could be achieved in settlement. The proposed settlement (Doc. No. 171) would pay $25 million to the class of recipients of broadcast faxes sent between July 17, 2010, and February 4, 2014. Based

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1100 GLENDON AVENUE, SUITE 1250
LOS ANGELES, CALIFORNIA 90024
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on my experience and familiarity with TCPA litigation nationwide, I believe this is the third largest junk fax settlement of all time.

5. In my opinion, the proposed settlement provides substantial benefit to class members. The settlement is unusual among consumer cases, and TCPA cases in particular, by providing automatic distribution of settlement funds to all class members. Class members will be paid proportionate to the number of Polaris Group faxes that were successfully sent to their telephone numbers. In my experience handling TCPA junk fax claims over a decade, the vast majority of such settlements require class members to complete and submit claim forms within a limited time-frame in order to receive payment. In this case, the total recovery averages $1,943 per class member. In my opinion this compares extremely favorably to other TCPA class settlements, even those in which "average" recovery statistics are enhanced by relatively few class members that file claims.

6. I also recommend final approval because the settlement would produce a substantial, certain recovery for the class and avoid the numerous risks that continued litigation would produce no financial or other practical benefit. As discussed in the accompanying memorandum in support of final approval, settlement avoids several litigation risks, including: (1) the risk that class certification would be defeated or, if granted, later decertified, on any one of several grounds;[1] (2) the risk that Cannon could establish that significant segments of the class provided express permission to receive the "Polaris Group" fax advertisements;[2] (3) the risk that RehabCare could avoid all liability

[1] Both Defendants argued, for instance, that a class shouldn't be certified due to some question whether circuits WestFax used to broadcast the faxes qualified as a "regular telephone line." Defendants sponsored expert testimony from Ray Horak, who contended that Westfax may not have used what he defines as a "regular telephone line" to broadcast the faxes, and contends that this is required to fall within the scope of the TCPA.

[2] In my opinion Cannon had no evidence that the junk faxes sent to Glenoaks were solicited. In response to Glenoaks's requests for admissions, Cannon asserted that Glenoaks had given permission by providing its facsimile telephone number to the California Association of Health Facilities for inclusion in its membership directory. (A true and correct copy of Cannon's

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by establishing that it was not a "sender" of the faxes, and that it was not vicariously liable for Cannon's fax-advertising campaigns;[3] (4) the risk that RehabCare could minimize its liability by arguing that claims concerning about two-thirds of the 78,000 "RehabCare" product faxes were barred by limitations; (5) the risk that Defendants could establish that there was no violation because WestFax didn't use a "regular telephone line" to broadcast the faxes; (6) the risk that Defendants could establish that Glenoaks lacked standing under the Supreme Court's *Spokeo* standard; and (7) the risk that Defendants could prevail on one or more of their constitutional defenses to Glenoaks' claims.

7. In my estimation, however, the financial risks to any ultimate class recovery were at least as great as these risks, if not greater. Cannon was a non-public company owned by Charles Cave. Our investigation revealed that the company had no real assets with which to satisfy a large judgment other than its interest in two liability insurance policies issued by Homeland Insurance Company of New York, which collectively provided $8 million in liability protection to its insureds, including Cannon and RehabCare. I also believe that RehabCare would have been unable to satisfy a $1.2 billion judgment that could have issued if RehabCare were found liable for all 2.4 million transmissions of the Polaris Group faxes.

8. I also recommend final approval of settlement because it provides immediate relief to class members without further litigation delay. I was concerned that even following a successful certification decision, Defendants would likely petition for interlocutory review under Rule 26(f). I believed that there was a not insignificant chance the Ninth Circuit would grant interlocutory review, which could delay ultimate recovery to

"Second Supplemental Response to Plaintiff's Request for Admissions," served Feb. 1, 2016, is attached hereto as Exhibit A.)

[3] At the time of the November 2016 mediation, RehabCare had moved for summary judgment on the ground that the faxes did not offer to sell its products or services, and that Cannon had not acted as its agent in sending the faxes. (*See* Doc. No. 157-3, 162.)

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the class. I also believed that any liability finding at trial would trigger another appeal.

The Motion to Recover Attorneys' Fees and Costs

9. When Sunnyside and Glenoaks retained Payne & Fears to prosecute claims in this case, I knew this would be a substantial undertaking and would involve a great deal of risk that the firm would not recover any fees for its services. I knew that Cannon and RehabCare had been successful in defeating two prior attempts to recover class-wide damages for the Polaris Group faxes. I also knew that accepting these risks would to a large extent displace firm income from work under standard hourly billing arrangements, which is by far the more customary business arrangement for Payne & Fears.[4]

10. After being retained by the clients in the summer of 2014, I organized the legal team to prosecute their claims. I knew from prior experience that the litigation would be vigorously contested by RehabCare and Cannon, and that they would retain highly-capable attorneys for their representation.[5] My goal was to assemble a deep, talented legal team that could match the resources and skills of the expected opposition. After interviewing several experienced Fresno litigators, I ultimately selected Don Fischbach and Mark Kruthers of Dowling Aaron Incorporated to serve as local counsel. I augmented the team with Joel Magolnick, an experienced class attorney I had worked with him prior TCPA litigation. I also organized a team at Payne & Fears, primarily consisting of partners Eric Kennedy and Matt Brown, and associate Philip Lem. (Eric Kennedy left the firm in August 2016 and was replaced by Scott Luskin, a partner at P&F with 12 years'

[4] I estimate that contingency matters amount to no more than five percent of all Payne & Fears client work.

[5] RehabCare ultimately retained the Miami firm of Broad and Cassel and retired federal judge Oliver W. Wanger for its defense. The RehabCare team is headed by Jon Wilson, a veteran litigation and trial attorney. Cannon retained Gordon & Rees LLP, a highly-respected San Francisco firm, for its defense.

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practice experience, including considerable TCPA/junk fax litigation experience.)[6]

11. In the motion for an award of reasonable attorneys' fees and expenses, we have asked the Court to evaluate the requested fees using the percentage-of-the-fund method. Nevertheless, I am providing summary "lodestar" data for work by Payne & Fears LLP attorneys and paralegals in case the Court elects to cross-check the percentage recovery against the collective lodestar of all attorneys on the case.

12. Through July 27, 2017, attorneys at Payne & Fears LLP have devoted more than 4,696 professional hours working on this litigation. (Firm paralegals worked another 707 hours through the same time.) My personal work accounts for over one-fourth of the total firm attorney time—1,244 hours. Both figures are based on data obtained from our firm's billing accounting software, which I believe accurately reflects the time recorded by firm attorneys and paralegals.

13. Calculated at Payne & Fears's current standard hourly rates for national, complex litigation of this type, the dollar equivalent of this time is $2,758,539.[7] A summary schedule of hours worked by P&F firm personnel (as of July 27, 2017) is attached as Exhibit B. Before these figures were compiled, I had reviewed proforma reports of work undertaken by P&F personnel and wrote off 211 recorded hours, with a billable dollar equivalent of about $116,000. The lodestar figure quoted above is net of this write-off.

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[6] I invited Scott Zimmermann, a solo practitioner in Santa Monica, to join the team but he later withdrew in March 2016.

[7] Payne & Fears has a national rate structure, which is used for my work on large, complex matters, typically out of state. For example, these rates are used for reinsurance disputes and insurance recovery litigation in Bermuda and New Jersey. The firm's rates for local, non-complex business litigation that does not require out-of-state travel are about 13 percent lower.

14. All hours I expended, and those expended by other attorneys working with me and under my direction, were in my judgment reasonably expended in connection with the prosecution of this case. Among other things, I and other Payne & Fears attorneys took the following steps to prosecute the case:

a. As discussed above, after being retained by the clients to pursue litigation, I was responsible for organizing the case against RehabCare and Cannon, including assembling the plaintiff legal team.

b. I was the primary drafter of the complaint filed in this case on December 29, 2014.

c. In May 2015, the Supreme Court granted *certiorari* to review the Ninth Circuit's decision in *Gomez v. Campbell-Ewald Co.*, 786 F.3d 871 (9th Cir. 2014), aff'd, 136 S.Ct. 663 (2016). The Ninth Circuit had held that an unaccepted offer of settlement to the named plaintiff does not moot the case and destroy Article III jurisdiction. Other circuit courts, however, had held that an unaccepted settlement offer does moot the case. After the Supreme Court granted certiorari to review this circuit split, I was concerned about the possibility that the Supreme Court might reverse the Ninth Circuit and hold that an unaccepted settlement offer could moot a case, including a class action. Some circuit courts had held, however, that an unaccepted settlement offer does not moot a case if the plaintiff had previously moved for class certification. For this reason, I coordinated the filing of a protective motion for class certification, which was filed May 21, 2015, three days after the Supreme Court had granted certiorari in *Campbell-Ewald*. (*See* Doc. No. 29.)

d. I attended, along with Don Fischbach, an early meeting with RehabCare's defense team at Wanger Jones Helsey on June 18, 2015. RehabCare

PAYNE & FEARS LLP
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1100 GLENDON AVENUE, SUITE 1250
LOS ANGELES, CALIFORNIA 90024
(310) 689-1750

attorneys Oliver Wanger and Jon Wilson were present at the meeting, and Erin Kolmansberger and Melissa Gomberg participated by phone. In the course of this meeting, we discussed a discovery plan and, at Mr. Wilson's suggestion, a potential mediation. As I mentioned in my prior declaration (Doc. No. 172-2), we responded that we would consider mediation after conducting basic discovery in the case.

e. I managed all experts and consultants for Plaintiff Glenoaks: fax transmission and technology expert Robert Biggerstaff; corporate conduct and organization expert Prof. Charles Whitehead of Cornell Law School; and outside financial consultant Robert Sherwin. Throughout the course of the litigation I had numerous consultations with our experts.

f. I took three depositions in the case: Cannon CEO Charles Cave (Los Angeles, May 10, 2016); RehabCare fax transmission expert Ray Horak (Los Angeles, Aug. 30, 2016); and RehabCare computer forensic expert Gavin Manes (Miami, Sept. 14, 2016). I actively participated in the preparation of Prof. Whitehead for his deposition, which was defended by Joel Magolnick. I also assisted Scott Luskin of my office in his preparation for the deposition of Cannon accounting expert Michael Kaplan, which was taken in our office on August 31, 2016.

g. I worked with Eric Kennedy in preparation for his deposition examinations of RehabCare and web.com.

h. I prepared and defended Glenoaks president Henry LeVine at his deposition (Dec. 23, 2015); Glenoaks interim administrator Charles LeVine at his deposition (Feb. 26, 2016); and Michael Fellen, president of former co-plaintiff Sunnyside Convalescent Hospital, at his deposition (Dec. 18, 2015). I also defended Robert Biggerstaff at the third session of his deposition in Mt. Pleasant, South Carolina, on

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LOS ANGELES, CALIFORNIA 90024
(310) 689-1750

October 20, 2016.

i. As discussed in Matt Brown's declaration (filed contemporaneously), the process of extracting discovery from Defendants was difficult and time-consuming. I coordinated all activity by Glenoaks' legal team to prosecute motions to compel discovery from Defendants through several formal and informal conferences and motions to compel. Among other things, I participated in several telephonic conferences and hearings with Magistrate Judge Sandra M. Snyder in connection with these motions.

j. I had numerous settlement-related discussions with Cannon and RehabCare attorneys throughout the case. After the June 2015 meeting at Wanger Jones Helsey, I had several settlement-related discussions with RehabCare attorney Jon Wilson and Cannon attorney David Jordan. I believe the dialog I began with David starting in June 2016 were instrumental in bringing Homeland Insurance into the settlement process and paved the way for the successful mediation in November 2016.

k. I drafted, with assistance from Scott Luskin, Glenoaks' amended class certification motion, the memorandum in support of that motion, and all supporting documents. (Doc. Nos. 145, 145-1.)

l. I attended the full-day mediation in Los Angeles, California, on May 12, 2016, with the Hon. William J. Cahill (Ret.). I was a primary author of Plaintiffs' mediation statement, along with Eric Kennedy of my firm.

m. I attended both days of the November 2016 mediation with John Bickerman, in Washington, D.C., and was a primary drafter of Glenoaks' statement for that mediation, along with P&F's Scott Luskin. I coordinated all other Plaintiff pre-mediation preparation, including meeting with Glenoaks president Henry LeVine.

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n. Following the mediation, I negotiated the Class Action Settlement Agreement with counsel for both Defendants, primarily Erin Kolmansberger, an attorney for RehabCare Group. As I mentioned in my prior declaration in support of preliminary approval, these were protracted and often difficult negotiations, and required further intervention by the mediator, John Bickerman. In the course of this process, I prepared and exchanged with defense counsel at least 11 drafts of the Class Action Settlement Agreement, numerous emails concerning the draft agreement, and one detailed memorandum concerning the scope of the release. I also had several conversations with Mr. Bickerman in an effort to reach agreement on final terms of the settlement agreement. We were able to do so in mid-March, four months after the November 2016 mediation.

o. I was the primary drafter of all ancillary settlement documents: the short-form class notice, the long-form class notice, the Class Member Information Form (both versions), and the proposed preliminary approval order. I was the primary drafter of the proposed final approval order and judgment, which I negotiated extensively with the RehabCare legal team, primarily Erin Kolmansberger.

p. P&F's Scott Luskin and I prepared the motion for preliminary approval of settlement and all supporting papers (Doc. No. 172, *et seq.*). We have also had primary responsibility for preparing the motion for final approval of settlement, with assistance of other Payne & Fears attorneys.

q. Throughout the litigation, I had ongoing communications with Glenoaks president Henry LeVine concerning case developments, strategy, and settlement initiatives. Many of these communications took place in person at Glenoaks.

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1100 GLENDON AVENUE, SUITE 1250
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(310) 689-1750

Fee Allocations Under Co-Counsel Agreement

15. In the course of this litigation, a written co-counsel agreement was executed among Payne & Fears LLP, Marko & Magolnick, P.A., and Dowling Aaron, Incorporated. The agreement was approved by Glenoaks president Henry LeVine. The agreement allocates any attorneys' fee recovery among the three firms, taking into consideration the origination of the matter by Payne & Fears LLP and the billable dollar equivalent of the firms' work on the case.[8]

16. To illustrate how fees would be allocated under the agreement, I have prepared an interim accounting. Based on P&F's internal accounting records and data provided by DAI and M&M, the fees would be shared in the following percentages if the calculation were performed today: 5.05 percent to Dowling Aaron, Inc., 3.79 percent to Marko & Magolnick, P.A., and 91.16 percent to Payne & Fears LLP. I will prepare and file a final accounting and recommended distribution before the final approval hearing on September 7.

17. The three firms have agreed to remit 3.33 percent of their respective shares to Frank F. Owen, a Florida attorney, subject to Court approval. This goodwill payment, which was approved by Glenoaks, is in recognition of the fact that Mr. Owen indirectly assisted me in originating this matter. (In 2013, Mr. Owen forwarded "Polaris Group" faxes that had been sent to his client, Pines Nursing Home (77), Inc., of Miami, and suggested class litigation to challenge the legality of the fax advertisements under the TCPA.)

[8] The agreements, unlike our lodestar calculations, include work on the attorneys' fees motion and the incentive award motion. Time is generally valued at the firms' hourly rates, with the exception that time of Dowling Aaron Incorporated through December 31, 2016, is "uprated" to $550/hr. for Donald Fischbach and $450/hr. for Mark Kroger, with both rates increasing after December 31, 2016, commensurate with any increases in my rate.

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1100 GLENDON AVENUE, SUITE 1250
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(310) 689-1750

My Professional Training and Experience

18. I am attorney with 34 years' litigation experience. After graduating from Harvard Law School in 1981, I served as law clerk to the Hon. Harry Lee Hudspeth, United States District Judge for the Western District of Texas. After completing my clerkship, I was admitted to practice in the State of California in October 1983. Since then, I have been admitted to practice before the United States Supreme Court, the United States Court of Appeals, Second Circuit, the United States Court of Appeals, Ninth Circuit, this Court, all other federal district courts in the state of California, the United States District Court for the Eastern District of Wisconsin, and the United States District Court for the Northern District of Illinois. I have been lead counsel in litigation throughout the country and coordinating counsel for reinsurance litigation in Bermuda.

19. My practice has concentrated on complex business litigation, usually with large amounts in controversy. I have represented clients in significant matters, including antitrust, RICO, complex contract disputes, insurance coverage and bad faith, insurance program disputes, business torts, and Medicaid reimbursement. I have also successfully prosecuted several class actions, including numerous TCPA cases. The following are some of the recent TCPA cases I have prosecuted as lead counsel:

a. Between 2011 and 2015 I prosecuted TCPA claims against Interline Brands in the United States District Court for the Northern District of Illinois. (*Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11 CV 4462.) In March 2015, the Hon. Amy J. St. Eve approved a $40 million class settlement I had negotiated with co-counsel. I believe based on my experience prosecuting TCPA cases that Interline Brands was the largest recovery for junk fax violations of the act in the 25-year history of the law. (The TCPA was enacted in 1991.)

b. Also in 2015 I received court approval (Hon. David O. Carter) of a $10 million class recovery I negotiated in the TOMY litigation in the Central District of California (*Craftwood II v. TOMY International, Inc.*).

c. Another recent case I prosecuted was the PharMerica TCPA class litigation in the Southern District of Florida (*Pines Nursing Home (77), Inc.* v. *PharMerica Corp.*). On November 12, 2015, Chief Judge K. Michael Moore granted final approval to the $15 million settlement. Joel Magolnick, a member of our legal team in this case, was part of the plaintiff team in PharMerica.

20. I have also served as lead counsel in several other complex cases, including class actions. The following are examples:

a. I was counsel to a large group of California hospitals that successfully challenged the application of Medicaid reimbursement rules by the State Department of Health Services. (*Goleta Valley Cmty. Hosp., et al., v. State Dep't of Health Servs.,* U.S. Dist. Ct, Cent. Dist. Cal.) The case included complex issues involving the Medicaid Act, FICFA regulations under that act, other federal mandates, and regulations promulgated by the State Department of Health Services. I briefed and argued to successful summary judgment for the hospitals, in which the court ruled that the state's application of its Medi-Cal reimbursement rules violated federal law and the state Medicaid plan. The ruling achieved a substantial victory for California hospitals by increasing their Medi-Cal reimbursement.

b. I was also lead counsel for a certified class of over 600 California hospitals in a RICO and breach-of-contract case in this Court (Hon. William B. Shubb) against Farmers Group, Inc., and its affiliated companies and insurance exchanges. (*Loma Linda Univ. Med. Ctr. v. Farmers Group, Inc., et al.,* U.S. Dist. Ct., East. Dist. Cal.) The

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LOS ANGELES, CALIFORNIA 90024
(310) 689-1750

case presented difficult and complex insurance accounting, claim administration, and regulatory issues. In 2000, after six years of litigation, including a phase I trial and a full arbitration hearing, I negotiated a $51 million class settlement. The settlement produced an average recovery of $80,000 for each class member, with some class members receiving in excess of $500,000.

Payne & Fears Expenses

21. Payne & Fears LLP incurred costs to prosecute this case in the amount of $123,108.80, which are reflected in the table below. These costs were contemporaneously recorded in the firm's accounting system on an ongoing basis. With the exception a few small charges (e.g., in-house photocopies), all costs reflect amounts the firm was charged by an outside vendor or other third party (experts and consultants, mediator charges, travel expenses, etc.). The firm regularly charges such costs to other clients, and our hourly rates reflect an expectation of their recoupment. I believe that the costs were necessary and appropriate to properly represent Glenoaks and the settlement class. They include:

Item	Amount
Delivery Services	5.330.28
Deposition Transcripts	11.586.23
Experts and consultants	61.265.95
Filing Fees and Court Costs	384.00
Hearing Transcripts	5.358.40
Mediator Charges	20.095.84
Photocopies (in-house)	1.180.40
Photocopies (outside)	34.34
Private Investigator	157.50
Subpoena fees	64.50
Telephone	255.53
Travel Expenses	17.395.83
Total	**123.108.80**

22. I would like to provide some further explanation for the most significant expenses.

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(310) 689-1750

a. ***Mediation charges*** **($20,095.84).** There were two mediations in this case. The first was with the Hon. William J. Cahill (Ret.) of JAMS in May 2016, and the second was with John Bickerman in November 2016. Payne & Fears paid $3,783.34 to JAMS and paid $16,312.50 to Bickerman Dispute Resolution.

b. ***Experts and Consultants*** **($61,265.95).** Payne & Fears retained several experts and consultants, and was responsible for paying for depositions of three experts retained by Defendants. We retained Robert Biggerstaff to prepare an expert report of the Polaris Group fax transmissions based on WestFax transmission records, Cannon fax telephone number lists, and related data. Mr. Biggerstaff charged $18,400 for his services. We retained Prof. Charles Whitehead of Cornell Law School, a noted corporate affairs and conduct expert, to testify about control and alter ego issues surrounding the Cannon relationship with RehabCare. P&F paid Prof. Whitehead $27,787.50 for his work. We have also consulted with Richard Sherwin, a corporate finance expert, concerning RehabCare's financial condition. Mr. Sherwin's invoice for this work is $7,363.75. In addition, we paid three experts retained by Defendants for their time at deposition: Ray Horak ($3,694.70), Michael Kaplan ($1,940), and Gavin Manes ($2,080).

c. ***Deposition transcripts*** **($11,586.23).** These are court-reporter and transcript charges for 12 of the 13 depositions taken in the case. My firm paid $11,586.23 for court reporter and transcript charges for all depositions except Charles Whitehead (which was paid by Marko & Magolnick).

d. ***Travel expenses*** **($17,395.83).** I took six out of town trips in connection with the case, including three trips to Fresno, one trip to Mt. Pleasant, South Carolina (Robert Biggerstaff deposition, third session), and one trip to Miami (Manes deposition). Eric Kennedy of my office traveled to Fresno for deposition preparation; to Louisville for depositions of RehabCare (James Ballard and Joseph Miller); to Jacksonville for

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deposition of third-party witness Linda Shutterly, corporate designee for Web.com; to Denver for the WestFax deposition; and to South Carolina for the first session of the Biggerstaff deposition. Daniel Lula of our firm traveled to South Carolina for the second session of the Biggerstaff deposition. The total P&F travel expenses break down as follows: airfare ($7,935.72); ground transportation ($1,368.70); mileage ($372.55); parking ($315.82); lodging ($5,681.31); meals ($1,709.27); and tolls ($12.46).

e. In addition to these expenses, we are asking the Court to approve a reserve in the amount of $1,200 to cover future expenses. To the extent the reserve is not exhausted by expenses, it would be added back to the settlement fund.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 1, 2017, at Los Angeles, California.

/s/ C. Darryl Cordero
C. Darryl Cordero

PAYNE & FEARS LLP
ATTORNEYS AT LAW
1100 GLENDON AVENUE, SUITE 1250
LOS ANGELES, CALIFORNIA 90024
(310) 689-1750