

1 PRESTON DuFAUCHARD
California Corporations Commissioner
2 ALAN S. WEINGER
Deputy Commissioner
3 MARLOU de LUNA (CA BAR NO. 162259)
Sr. Corporations Counsel
4 BLAINE A. NOBLETT (CA BAR NO. 235612)
Corporations Counsel
5 320 West 4th Street, Suite 750
Los Angeles, California 90013-1105
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7 Attorneys for the People of the State of California

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

11 THE PEOPLE OF THE STATE OF)
12 CALIFORNIA, by and through the California)
13 Corporations Commissioner,)

CASE NO. BC423184

14 Plaintiff,

SETTLEMENT AGREEMENT

15 v.

Judge: Hon. Mary Ann Murphy
Dept.: 25

16)
17 RECOVER METRICS, LLC, a Delaware)
Limited Liability Company;)
18 THOMAS CREAL, an individual; MARK J.)
19 DOYLE, an individual and DOES 1 through 10,)
inclusive,)

Date Action Filed: October 5, 2009
Trial Date: December 8, 2010

20 Defendants.
21)
22)
23)
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27)
28)

1 IT IS HEREBY AGREED AND STIPULATED between Plaintiff, The People of the State of
2 California, by and through Preston DuFauchard, the California Corporations Commissioner
3 (“Plaintiff” or “Commissioner”), and Defendants Recover Metrics, LLC (“Recover Metrics”) and
4 Thomas Creal (“Creal”) (collectively “Defendants”), that:

5 A. Defendants, and each of them, admit jurisdiction of this Court over them and over the
6 subject matter of this action. Defendants have entered general appearances in this action.

7 Defendants acknowledge that entry of said general appearances are equivalent to personal service of
8 the summons on them pursuant to section 410.50 of the Code of Civil Procedure.

9 B. Defendants, and each of them, admit service of the Summons and of the Complaint
10 filed in this matter.

11 C. Defendants, and each of them, have read the Complaint, this Settlement Agreement
12 (“Agreement”) and the [Proposed] Final Judgment Pursuant to Settlement Agreement (referenced
13 hereafter as “Final Judgment”) in the form attached as Exhibit 1 to the Agreement.

14 D. This Agreement shall be binding on the Plaintiff and its officers, employees, agents,
15 representatives, successors, and attorneys and Defendants and their subsidiaries, officers, employees,
16 agents, representatives, successors, insurers, attorneys, affiliated and related entities, principals,
17 assignors, and assignees. The Commissioner, Recover Metrics, and Creal shall collectively be
18 referred to as the “Parties.”

19 E. Defendants, and each of them, agree and stipulate to waive entry of Findings of Fact
20 and Conclusions of Law under Code of Civil Procedure section 632 and all rights to appeal the entry
21 of the Final Judgment.

22 F. The Commissioner and Defendants agree and stipulate that if any paragraph, clause,
23 or provision of this Agreement or of the Final Judgment entered thereto, or the application thereof, is
24 held invalid or unenforceable, such decision shall affect only the paragraph, clause, or provision so
25 construed or interpreted, and the invalidity shall not affect the provisions or the application of this
26 Agreement, or of the Final Judgment entered thereto, which can be given effect without the invalid
27 provisions or application, and to this end, the provisions of the Agreement and Final Judgment
28 entered thereto, are declared by the Commissioner and by the Defendants to be severable.

1 G. The Commissioner and Defendants agree and stipulate that entry of the Final
2 Judgment pursuant to this Agreement may be made by a judge or by a commissioner of the Superior
3 Court and may be made *ex parte* without notice to any of the Defendants.

4 H. Defendants, and each of them, agree and stipulate that they enter into this Agreement
5 and Final Judgment without coercion, and acknowledge that no promises, threats or assurances have
6 been made by Plaintiff or any officer, or agent thereof, except for those expressly set forth in this
7 Agreement and Final Judgment, to induce the Defendants, and each of them, to enter into this
8 Agreement and Final Judgment.

9 I. Defendants, and each of them, agree and stipulate to pay to the Commissioner funds
10 recovered/collected/received on behalf of or received from the Commissioner (“Funds”), totaling
11 four hundred seventy-six thousand eight hundred thirty dollars and thirty-one cents (\$476,830.31).
12 Defendants shall pay the Funds by way of cashier’s checks in five (5) installments, as follows:

- 13 1. \$50,000.00 by February 28, 2011
- 14 2. \$50,000.00 by May 30, 2011
- 15 3. \$100,000.00 by November 30, 2011
- 16 4. \$100,000.00 by May 30, 2012
- 17 5. \$176,830.31 by November 30, 2012

18 In the event the payment due date falls on a weekend or holiday, the payment shall be due the
19 next business day. Defendants shall mail the cashier’s checks to the attention of Marlou de Luna
20 and address of the Department of Corporations at 320 W. 4th Street, Suite 750, Los Angeles,
21 California 90013.

22 J. In the event that Defendants fail to timely make any payment installment under this
23 Agreement, Defendants shall be in default of this Agreement. Upon default, Plaintiff may enforce
24 Paragraph K. of this Agreement and/or may avail itself of any other rights it has against Defendants
25 under the Agreement or under applicable law based on Defendants' default, provided that Plaintiff
26 must first give Defendants seven (7) business days written notice of the default. Such notice of
27 default shall be filed with the court and mailed to Defendants and their counsel, Asha Dhillon, at
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1 their last known addresses. However, if the late payment is received before the seven-day notice of
2 default period has completely run, that payment shall be deemed timely.

3 K. If Defendants are in default as set forth in Paragraph J., above, Paragraph I. shall be
4 void and Recover Metrics and Creal shall be jointly and severally liable to Plaintiff for a judgment
5 in the amount of five hundred four thousand one hundred thirteen dollars and eighty cents
6 (\$504,113.80), immediately due and payable, less any amounts received in payment, together with
7 interest thereon at the legal rate per annum pursuant to Code of Civil Procedure section 685.010,
8 until said amounts are paid in full. The Commissioner may seek to enforce this Final Judgment
9 without any further notice to Defendants.

10 L. The Commissioner and Defendants agree and stipulate that each party shall bear their
11 own expenses and costs, including attorneys' fees, incurred in connection with the investigation of
12 matters relating to the Complaint in the above-entitled case and the preparation of the Complaint,
13 this Agreement, and the Final Judgment.

14 M. The Parties understand that the terms of this Agreement are contractual and not mere
15 recitals. It is executed without reliance upon any oral representation of the Parties or their attorneys,
16 or any other person or entity not expressly set forth herein, or upon the failure of any party or any
17 other person or entity to make any statement, representation or disclosure of anything whatsoever.
18 The Parties have included this clause: (1) to preclude any claim that any party was in any way
19 fraudulently induced to execute this Agreement and Final Judgment; and (2) to preclude the
20 introduction of parol evidence to vary, interpret, supplement, or contradict the terms of this
21 Agreement and Final Judgment.

22 N. In that the Parties have had the opportunity to draft, review and edit the language of
23 this Agreement and the Final Judgment, no presumption for or against any party arising out of
24 drafting all or any part of this Agreement or the Final Judgment will be applied in any action relating
25 to or arising out of this Agreement or of the Final Judgment. Accordingly, the Parties hereby waive
26 the benefit of Civil Code section 1654 and any successor statute.

27 O. Nothing in the Agreement or the Final Judgment in this matter shall preclude any
28 other federal, state or county agency from initiating any other prosecution based upon the allegations

1 contained in the Complaint in the above-entitled case or based on any other acts by the Defendants
2 which may violate state or federal law.

3 P. Nothing in the Agreement or the Final Judgment in this matter shall preclude the
4 Commissioner, or his agents or employees, to the extent authorized by law from assisting or
5 cooperating with any investigation and/or action brought by any other federal, state or county
6 agency. Further, nothing in the Agreement or in the Final Judgment in this matter shall bind or
7 otherwise prevent any other federal, state or county agency from the performance of its duties.

8 Q. **Release by Commissioner:** Except for any and all rights and obligations created by
9 this Agreement and any documents provided for in this Agreement (including but not limited to the
10 Final Judgment), the Commissioner releases and discharges any and all complaints, suits, damages,
11 debts, causes of action, violations, breaches, penalties, fines, actions, proceedings, demands and all
12 other claims of any kind or nature whatsoever against Recover Metrics and Creal, their agents and
13 their employees. This release includes all claims of any kind or nature whatsoever, known or
14 unknown, existing or which could have existed, from the beginning of time to the date of this
15 Agreement.

16 R. **Release by Recover Metrics and Creal:** Except for any and all rights and
17 obligations created by this Agreement (including but not limited to the Final Judgment), Recover
18 Metrics and Creal release and discharge any and all complaints, suits, damages, debts, causes of
19 action, violations, breaches, penalties, fines, actions, proceedings, demands and all other claims of
20 any kind or nature whatsoever against the Commissioner, its agents and its employees. This release
21 includes all claims of any kind or nature whatsoever, known or unknown, existing or which could
22 have existed, from the beginning of time to the date of this Agreement.

23 S. **Waiver of Civil Code section 1542:** In agreeing to the releases and other terms set
24 forth herein, each party has been represented by and consulted with counsel and performed such
25 investigation and inquiry deemed necessary by such party. Moreover, each party to this Agreement
26 represents, warrants, and covenants that such party executes this Agreement without any
27 representation, express or implied, of any kind from any other party to this Agreement, except as
28 specifically expressed in this Agreement. It is understood that there is a risk that, subsequent to the

1 execution and delivery of this Agreement, losses, damages, violations or other matters might be
2 discovered or incurred which are unknown or unanticipated, for whatever reason, at the time of the
3 execution and delivery of this Agreement. It is nonetheless specifically agreed that the releases
4 herein are fully and completely effective regardless of any present lack of knowledge on the part of
5 any party. Each party to this agreement voluntarily, intentionally and expressly waives the benefits
6 and provisions of section 1542 of the Civil Code, and any similar law of any state or territory of the
7 United States of America or other jurisdiction. Specifically, section 1542 of the Civil Code provides
8 as follows:

9 "A general release does not extend to claims which the creditor does not
10 know or suspect to exist in his or her favor at the time of executing the
11 release, which if known by him or her must have materially affected his
12 or her settlement with the debtor."

12 T. A fax signature or e-mail scanned signature of this Agreement shall be as effective as
13 an original ink signature.

14 U. Each signatory hereto covenants that he/she possesses the necessary capacity and
15 authority to sign and enter into this Agreement.

16 V. The Commissioner and Defendants stipulate and agree that this Agreement and Final
17 Judgment may be executed in one or more separate counterparts, each of which when so executed,
18 shall be deemed an original. Such counterparts shall together constitute and be one and the same
19 instrument.

20 W. The Commissioner and Defendants stipulate and agree that this Court shall retain
21 jurisdiction of this action in order to implement and enforce the terms of this Agreement and Final
22 Judgment and to entertain any suitable application or motion for additional relief or modification of
23 any order made herein within the jurisdiction of the Court.

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Dated: 10/28/10

California Corporations Commissioner
PRESTON DuFAUCHARD

By: _____
Alan S. Weinger
Deputy Commissioner

Dated: 10/27/10

RECOVER METRICS, LLC

By: _____
Thomas Creal

Dated: 10/27/10

THOMAS CREAL, an individual

By: _____
Thomas Creal

APPROVED AS TO FORM:

Dated: 10/28/10

By: _____
Marlou de Luna
Sr. Corporations Counsel
Attorney for Plaintiff

Dated: 10/28/10

By: _____
Asha Dhillon
Law Offices of Asha Dhillon
Attorney for RECOVER METRICS, LLC
and THOMAS CREAL