

## **SETTLEMENT AGREEMENT**

**This Settlement Agreement (“Agreement”) is made and entered into this \_\_\_\_ day of \_\_\_\_, 2018 between the Commission on Judicial Performance (the “Commission”) and Elaine M. Howle and the California State Auditor’s Office (the “State Auditor”). (This Agreement sometimes refers to the Commission and State Auditor collectively as “the Parties,” and one or the other individually as a “Party.”)**

**WHEREAS, on August 10, 2016, the Joint Legislative Audit Committee directed the State Auditor to conduct an audit of the Commission;**

**WHEREAS, the Commission filed in San Francisco Superior Court a petition for writ of mandate relating to portions of the audit;**

**WHEREAS, on December 21, 2017, the Superior Court granted the Commission’s requested writ;**

**WHEREAS, the State Auditor timely appealed;**

**WHEREAS, the State Auditor’s appeal is now fully briefed, and the Court of Appeal, First District, Division 4 has granted the State Auditor’s motion for calendar preference;**

**WHEREAS, it is important to the State Auditor that the Superior Court decision be reversed on the merits, and that such reversal not be based on any contention that the case is moot, because if allowed to stand, the State Auditor believes that Superior Court decision will threaten the State Auditor’s ability to fulfill its statutory responsibilities to audit other government agencies;**

**WHEREAS, on June 15, 2018 and July 3, 2018, the Parties participated in court-ordered appellate mediation under the guidance of Justice Peter Siggins;**

The Parties now agree to settle all claims between them on the following terms and conditions:

1. **Support for Statutory Amendment.** The Commission and State Auditor will both support a bill to amend Government Code section 8545 (the "Bill"). The Bill will add to section 8545 a new subdivision, which shall read as follows:

e) Any paper, correspondence, record, document, or information the disclosure of which is restricted by constitutional provision, statute, or rule from release to the public.

The proposed amendment will also state: "This amendment is declaratory of existing law, as provided in Government Code sections 8545.1 and 8545.2."

2. **Joint Motion for Stipulated Reversal.**

- a. Once the bill has been signed by the Governor and chaptered, the Commission and State Auditor will prepare and file in the Court of Appeal a joint application for stipulated reversal, in accordance with Code of Civil Procedure section 128, subdivision (a)(8) and First District Local Rule 4, on the merits (and not on the ground of mootness) of the writ of mandate issued against the State Auditor by the San Francisco Superior Court in *Commission on Judicial Performance v. Elaine Howle, et.al.*, San Francisco Superior Court Case No. CPF-16-515308 and Court of Appeal No. A153547.
- b. The application shall be accompanied by authorities demonstrating that the Superior Court's issuance of the writ was in error. The application shall state the Commission's position as follows: "the Commission has stipulated to the requested reversal and has no opposition to that reversal, pursuant to the Agreement of the parties. The Commission otherwise provides no comment on the arguments presented

herein by the State Auditor.” The Commission shall not otherwise communicate to the Court concerning the application for stipulated reversal.

3. **Amendment to Commission Rule 102.** After the Court of Appeal issues a reversal on the merits, the Commission will implement, on an expedited basis, an amendment to Rule 102 of the Commission on Judicial Performance. The amended language of Rule 102 will authorize disclosure of information to the State Auditor in connection with any audit mandated by statute or requested by the Legislature. The rule proposal will be predicated on the legislative change set forth in paragraph 1, and shall not be effective until the writ of mandate has been reversed as described in paragraph 2.
  
4. **Examination of Confidential Documents.** Upon adoption of an amendment to CJP Rule 102 allowing the State Auditor to do so, the Commission will allow the State Auditor to examine all relevant Commission documents during the course of the State Auditor’s audit of the Commission. This includes examination of documents that are confidential, pursuant to statutes allowing such examination, and requiring the State Auditor to maintain the confidentiality of such documents. If the State Auditor so requests, the Commission will begin providing non-disputed information not subject to the current CJP Rule 102 to the State Auditor at any time after this Agreement is signed by both Parties.
  
5. **Joint Public Statement.** If the Court of Appeal grants the motion for stipulated reversal on the merits, the Commission and State Auditor will issue within seven calendar days of the Court’s order a joint public statement announcing that the litigation has been settled to the satisfaction of both Parties and in the best interests of the public. The Parties will negotiate the specific language of this statement at a later date.

- a. Prior to the joint public statement, the Parties and their counsel may respond to public inquiries by stating that settlement discussions are ongoing and/or that the Auditor's appeal remains pending.
  - b. After the joint public statement has been issued, nothing in this Agreement shall prevent the Parties from separately commenting in the course of their official duties on the effect of the stipulated reversal. However, neither Party shall claim that they "prevailed" on the appeal or that the reversal was anything other than a stipulated result reached after settlement discussions.
6. **Non-Disparagement.** Neither the Commission nor the State Auditor will make disparaging public remarks about the opposing party concerning this litigation, the conduct of the litigation, or the settlement thereof. Nothing in this Agreement shall preclude the State Auditor from publishing the results of its audit of the Commission in accordance with professional standards and the directives of the audit. Nothing in this Agreement shall prevent the Commission from commenting on the results of the audit.
7. **Promotional Materials.** The Parties' respective counsel will not advertise, or make any public statement after the date of this agreement, that the stipulated reversal was a "victory," or that counsel represented a Party in this litigation that prevailed in superior court or in the court of appeal.
8. **Scope of Audit.** The State Auditor will implement the Audit Scope and Objectives set forth in the Auditor's August 10, 2016, Analysis of Audit Request as follows:

Audit Objective 2 requires only that audit staff identify the standards and processes the Commission has in place for making determinations and report on how the Commission ensures that its standards and processes are followed consistently. The State Auditor's Office will not engage in

reweighing evidence or second-guessing the propriety of the Commission's determinations based on the facts presented to it. The weighing of evidence and the making of determinations based on such evidence squarely falls within the Commission's exercise of discretion as a judicial entity.

Audit Objective 5 requires only that audit staff identify and report on the Commission's processes for evaluating certain evidence. In doing so, audit staff may compare the Commission's processes with processes used by other entities, but staff will not engage in evaluating whether the Commission made correct or incorrect determinations in particular cases, as that would be beyond the scope of the audit.

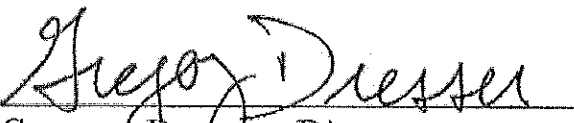
Audit Objective 12 calls for the audit team to gather information about the outcomes of cases that were pending before the Commission, such as the number of cases processed and the amount of time it took for those cases to be processed. Such gathering of information in no way passes judgment on the Commission's exercise of discretion in the handling of these cases, but merely makes available to the public information about the "work product" being produced by the Commission in return for the funding it receives from the Legislature.

9. **No Costs of Audit.** The State Auditor will not seek recovery from the Commission of the costs of the audit. This provision shall not preclude any other agency (such as the Department of Finance) from seeking such costs.
  
10. **Termination of Agreement.** If the events described in paragraphs 1, 2, and 3 above do not occur by September 4, 2018, and if the Commission does not allow the full audit (including examination of all documents deemed "confidential" by the Commission) to begin by September 4, 2018, this Agreement shall terminate. In that event, the pending litigation will resume and the State Auditor's appeal will then be set for oral argument,

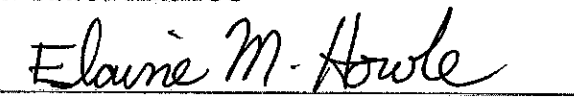
pursuant to the court's grant of calendar preference for the appeal. In that event, neither party will make reference to the Bill or the proposed amendment to Rule 102, or to any party's support for the Bill or proposed amendment to Rule 102, in any pleadings, at oral argument, or in any future proceeding in this litigation.

11. **Attorneys' Fees and Costs.** Each of the Parties shall bear its own attorneys' fees and costs incurred in connection with this litigation.
12. **No Admission.** This Agreement is a compromise reached by the Parties and shall not constitute an admission by either of them concerning any fact or legal argument. In the event this Agreement is not consummated or fails pursuant to its own terms, neither party shall refer to or use in any way the fact of this agreement, the negotiations leading up to it, or any actions taken in furtherance of it, as evidence or argument in support of any position in this or any subsequent litigation.
13. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties concerning the settlement of this litigation.
14. **Execution.** This Agreement may be executed in counterparts.

Dated: July 17, 2018

  
Gregory Dresser, Director-  
Chief Counsel  
Commission on Judicial  
Performance

Dated: 7/17/2018

  
Elaine M. Howle  
California State Auditor