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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

Charles Criswell, Levi Johnson, Samuel Camposeco, Adam Ibarra, and California Attorneys for Criminal Justice,

Plaintiffs,

vs.

Michael Boudreaux, in his official capacity as Sheriff of Tulare County,

Defendant.

Case No. 1:20-cv-01048-DAD-SAB

UNOPPOSED NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS

[Filed concurrently with Declarations of Ariel Teshuva and Emi MacLean and Unopposed Proposed Order for Preliminary Approval]

Judge: Hon. Dale A. Drozd
Date: September 7, 2021
Time: 10:00 AM
Crtrm.: 5

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT that on September 7, 2021, or on such date as may be specified by the Court, in the courtroom of the Honorable Dale A. Drozd, United States District Court Judge for the Eastern District of California, located at 2500 Tulare Street, Fresno, CA 93721, Plaintiffs Samuel Camposeco, Adam Ibarra and California Attorneys for Criminal Justice, hereby move for an order: (a) preliminarily approving the terms of the proposed class action settlement as fair, reasonable, and adequate; (b) conditionally certifying the proposed Settlement Class of "[a]ll people who are currently incarcerated in the Tulare County Jails or will be incarcerated in the Tulare County Jails at any point before the Termination Date of the Settlement Agreement"; (c) appointing Plaintiffs Samuel Camposeco and Adam Ibarra as class representatives; (d) appointing the American Civil Liberties Union Foundation of Northern California and Munger, Tolles & Olson LLP as Class Counsel; (e) approving Plaintiffs' plan to provide notice to class members; and (f) setting the date and time for a final fairness hearing. This Motion is unopposed.

This Motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in support thereof, the Declarations of Ariel Teshuva and Emi MacLean and the attached exhibits, all of the papers and pleadings on file in this action, and any further evidence presented to the Court at the time of the hearing.

Respectfully submitted,

DATED: August 10, 2021

MUNGER, TOLLES & OLSON LLP

By: */s/ Ariel T. Teshuva*
ARIEL TESHUVA
Attorneys for Plaintiffs

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I. INTRODUCTION

Plaintiffs filed this class action lawsuit in late July 2020 on behalf of incarcerated persons in the Tulare County Jails ("Jails") to address Defendant Sheriff Michael Boudreaux's deliberate indifference to the risk of COVID-19 and his alleged unconstitutional attorney visitation policy. Plaintiffs alleged that Defendant failed to prevent the spread of COVID-19 in the Jails by failing to implement and indeed obstructing adequate policies and practices like mask-wearing or social distancing. Plaintiffs also alleged that Defendant's attorney-visitation policy, which restricted class counsel from meeting with current or prospective clients, was unconstitutional. Plaintiffs filed a Supplemental Complaint in March 2021 alleging Defendant had failed to respond adequately to a COVID-19 outbreak in the Jails and had imposed an unconstitutional lock-down policy in response to COVID-19.

Since Plaintiffs filed this case, Defendant implemented many of the policies Plaintiffs requested in their pleadings. On July 30, 2020—a day after Plaintiffs filed this lawsuit—Defendant began providing masks to all incarcerated persons. In September 2020, the Court granted Plaintiffs' application for a Temporary Restraining Order ("TRO") and required Defendant to halt his allegedly unconstitutional attorney visitation policy and to adopt constitutionally adequate COVID-19 policies, including a social distancing policy, a mask policy, and a quarantine/isolation policy. And only days after Plaintiffs filed a Supplemental Complaint raising claims about Defendant's COVID-19 out-of-cell time policy, which kept incarcerated persons in their Jail cells for 23.5 to 24 hours per day, Defendant began allowing many persons two hours out-of-cell per day.

After nearly a year of hard-fought litigation, Plaintiffs and Defendant have reached a proposed Settlement Agreement that ensures Defendant will implement, and/or will continue to implement, COVID-19 mitigation policies through at least March 2022. The Settlement Agreement also requires, among other things, additional education about COVID-19 vaccines, increased reporting to Plaintiffs and the public on conditions in the Jails, and an independent expert who will visit the Jails at least three times before December 31, 2021, and make recommendations regarding Defendant's compliance with the agreement.

The relief in the Settlement Agreement will benefit all persons incarcerated in the Jails. Given the extreme virulence of COVID-19, even if policies directly affect only a certain segment of the Jails' population, everyone in the Jails benefits from more robust COVID-19 protections. This Court already provisionally certified a nearly identical class in connection with its September 2021 temporary restraining order ("TRO"). For reasons similar to those described in that TRO, the proposed Settlement Class readily meets the requirements of Rule 23(a) and can be maintained as a class under Rule 23(b)(2).

The proposed Settlement Agreement is the product of arms' length, non-collusive negotiations, aided by the assistance of a highly qualified, neutral mediator, Magistrate Judge Barbara McAuliffe. The parties reached the Settlement Agreement following extensive discovery and motions practice and after four separate, and lengthy, settlement conferences before Judge McAuliffe. The parties propose a notice campaign for the proposed Settlement Class that will include posting flyers throughout the Jails—a method that earlier succeeded in providing notice to incarcerated individuals of the TRO.

The Court should conditionally certify the proposed Settlement Class and preliminarily approve the proposed Settlement Agreement, which provides meaningful relief for all incarcerated persons in the Jails, and certify the proposed Settlement Class.

II. FACTUAL BACKGROUND

On July 29, 2020, Plaintiffs brought this action on behalf of a prospective class of incarcerated people raising 42 U.S.C. § 1983 claims for violation of the Fourteenth and Eighth Amendments. Chief among Plaintiffs' complaints was that Defendant failed to take basic protections like providing masks to incarcerated persons or adopting a social distancing policy. Plaintiffs also raised constitutional and state law claims for violation of their right to counsel resulting from a visitation policy implemented during the pandemic; Plaintiffs alleged that this policy was implemented in response to their investigation of COVID-19-related conditions in the Jails. Those claims arose from Defendant's attorney-visitation policy that prevented incarcerated people from meeting with class counsel from the ACLU and Defendant's retaliation against those who tried to contact the ACLU. *See generally* ECF No. 11 at 2-11; ECF 26 at 11-18.

On August 12, 2020, Plaintiffs applied for a TRO based on these alleged constitutional violations. *See* ECF No. 11. On September 2, 2020, in a detailed, 49-page decision, the Court held that Plaintiffs had demonstrated a likelihood of success on their claims and issued a TRO on a broad array of issues. ECF No. 26 at 47, *available at Criswell v. Boudreaux*, No. 1:20-CV-01048 DAD (SAB), 2020 WL 5235675 (E.D. Cal. Sept. 2, 2020). The Court ordered Defendant to memorialize a social distancing policy, an isolation, quarantine, and observation policy, and a mask policy. *See id.* at 48. The Court also ordered Defendant to provide additional data regarding Defendant's COVID-19 testing practices and results. *Id.* Finally, the Court ordered Defendant to ensure that incarcerated people were not subject to intimidation or retaliation for speaking with counsel, to immediately cease implementing the Jails' restrictive attorney visitation policy, and to adopt a revised legal visitation policy. *Id.* at 49. As a result, Defendant memorialized the required COVID-19 policies and ceased his restrictive legal visitation policy. *See* ECF Nos. 27-01, 27-02, 27-03.

In connection with the TRO, the Court provisionally certified a class of "all people who are now, or in the future will be, incarcerated in the Tulare County Jails." ECF No. 26 at 47. The Court found the class provisionally met the requirements of Rule 23(a) and "clearly" could be maintained as a class under Rule 23(b)(2), which is reserved for classes that are, as here, seeking only injunctive relief. *Id.* at 27.

On November 3, 2020, Plaintiffs moved for a preliminary injunction on three bases. *See* ECF No. 44. *First*, Defendant's COVID-19 testing data, disclosed pursuant to the TRO, revealed that he had an inadequate testing policy, including by failing to test 95% of symptomatic persons. *Id.* at 1. Plaintiffs requested, among other things, that Defendant test all symptomatic persons and develop an outbreak control plan. *Id.* at 3. *Second*, Defendant had allegedly failed to identify or protect medically vulnerable incarcerated people from the increased risk of severe illness and death they faced from COVID-19. *Id.* at 2. Plaintiffs requested that Defendant identify those individuals and take additional precautions to monitor them for the virus. *Id.* at 3. *Third*, Plaintiffs requested that Defendant adopt a constitutional social distancing policy that let incarcerated persons out of their cells for longer than zero to .5 hours per day. *Id.* at 3.

While the Court's preliminary injunction ruling was pending, a kitchen staff member tested positive for COVID-19 and exposed jail residents to the virus—resulting in at least 60 incarcerated people testing positive for the virus. *See* ECF Nos. 52, 53.

On December 22, 2020, the Court denied Plaintiffs' motion for a preliminary injunction without prejudice. ECF No. 55 at 40. The Court did not factor the recent outbreak into its decision. *Id.* at 40 n.18. Regarding testing, the Court found that Defendant's rate of testing symptomatic incarcerated people was "shockingly low," but that Plaintiffs were unlikely to succeed on this claim in light of Defendant's *other* preventative measures taken as a result of the TRO. *Id.* at 35. Regarding medically vulnerable persons, the Court found that Defendant's "chronic care" list substantially overlapped with persons with comorbidities with COVID-19 and that Plaintiffs had not shown Defendant's process of tracking the "chronic care" persons was inadequate. *Id.* at 35-36. Regarding Defendant's out-of-cell time policy, the Court declined to rule on the substance of those claims and suggested that Plaintiffs file a supplemental pleading if they wanted to raise those allegations. *Id.* at 39.

On March 29, 2021, following a noticed motion and the Court's order granting leave, Plaintiffs filed a Supplemental Complaint. *See* ECF No. 63. The Supplemental Complaint alleged that Defendant's "social distancing" policy violated incarcerated persons' constitutional rights to exercise, to be free from cruel and unusual punishment, and to receive procedural due process. *Id.* at 28-29. Plaintiffs also alleged that Defendant's response to the December 2020 outbreak was inadequate, including by Defendant failing to conduct adequate testing to determine the scope of the outbreak.

The parties reached a Settlement Agreement before the Court had the chance to rule on the claims in the Supplemental Complaint. Following four lengthy settlement conferences with Judge McAuliffe, the parties reached a tentative agreement. (*See* Teshuva Decl. ¶ 3.) The four named incarcerated Plaintiffs participated in some or all of the settlement conferences. (*Id.*)

III. TERMS OF SETTLEMENT AGREEMENT

The parties have agreed that the Settlement Class will be defined as follows: "All people who are currently incarcerated in the Tulare County Jails or will be incarcerated in the Tulare

County Jails at any point before the Termination Date of the Settlement Agreement." (Teshuva Decl., Ex. 1 (Settlement Agreement) ¶ 6.2.) This definition mirrors the class definition the Court previously certified in its TRO, with the addition of the Termination Date of the Settlement Agreement. *See* ECF No. 26 at 47.

The terms of the parties' Settlement Agreement for the Proposed Settlement Class are comprehensive and ensure that class members are meaningfully protected from the risk that COVID-19 poses to their health and safety. The settlement has four categories of substantive terms: (1) injunctive relief terms that require Defendant to implement, or continue to implement, a wide variety of policies to guard against COVID-19; (2) terms aimed at monitoring the implementation of the Settlement Agreement, including three expert site visits to the Jails and regular public reporting by Defendant; (3) attorneys' fees and expenses totaling $95,000; and (4) terms that ensure adequate notice of the proposed Settlement Agreement to class members.

a. Injunctive Relief Settlement Terms

Defendant has agreed to implement, and/or to continue to implement, policies to meaningfully protect incarcerated persons in the Jails against the risk of serious illness or injury from COVID-19. Under the Settlement, Defendant is required to do the following:[1]

Masks: Defendant will, and/or will continue to, maintain a mask policy, consistent with, among other things, the policy implemented in response to the Court's TRO. (Agreement ¶ 3.1.)

Social Distancing: Defendant will, and/or will continue to, maintain a social distancing policy consistent with, among other things, the policy implemented in response to the Court's TRO. Defendant will also provide incarcerated persons with access to meaningful amounts and types of reading materials. (*Id.* ¶ 3.2.)

Quarantine/Isolation: Defendant will, and/or will continue to, maintain a quarantine and isolation policy in the Jails for incarcerated persons and staff who test positive for COVID-19 or

[1] The summary of terms here is not complete and paraphrases the terms in the attached Settlement Agreement. *See* Ex. 1. The summary is not intended to supersede or conflict with in any way the terms as written in the Settlement Agreement, whose terms will govern.

who have been exposed to a positive case. This policy will be consistent with, among other things, the policy implemented in response to the Court's TRO. (*Id.* ¶ 3.3.)

Testing and Screening: Defendant will, and/or will continue to, maintain a testing policy for incarcerated persons and staff—including screening and testing all incarcerated persons upon entry to the Jails and re-testing at Day 14. (*Id.* ¶ 3.4.)

Contact Tracing: Defendant will, and/or will continue to, contact trace following any introduction of COVID-19 in the Jails. This includes testing and/or quarantining when there is a single exposure or positive test result outside of the intake process. Any exposed staff must quarantine at home. (*Id.* ¶ 3.5.)

Out-of-Cell Time: Defendant will, and/or will continue to, provide at least two hours out-of-cell time per day for persons in the General Population and at least 45 minutes per day for those outside the General Population, including persons who are new to the Jails and must quarantine for two weeks or so. The agreement allows Defendant some discretion to address "exigent safety and security concerns or operational issues that may require reducing such out-of-cell time." (*Id.* ¶ 3.7.)

Attorney Visitation Policy: Defendant will, and/or will continue to, ensure that civil and criminal counsel have the ability to promptly (i.e., within two days of a request) have confidential remote meetings with incarcerated persons and ensure that there is no intimidation of, or retaliation against, incarcerated persons who speak with counsel. (*Id.* ¶ 3.9.)

Vaccines: Defendant will, and/or will continue to, provide the COVID-19 vaccine to all incarcerated persons and staff, including pregnant individuals, and provide a vaccine record upon release from the Jails. Defendant will also continue to offer the seasonal flu vaccine during flu season. (*Id.* ¶ 3.10.)

Vaccine Education: Defendant will, and/or will continue to, provide vaccine educational materials to incarcerated persons and staff, including certain "Amend" materials prepared by the University of California San Francisco. (*See* Exhibit A to the Agreement.) These materials are specifically designed for use in detention facilities like the Jails. In addition, Defendant will and/or will continue to arrange for a public health nurse to visit the Jails once every two weeks to answer

vaccine-related questions and to have Wellpath staff be available at all times to answer vaccine-related questions. Finally, Defendant will, and/or will continue to, comply with County guidelines allowing County employees paid time off for receiving their vaccine or recovering from the vaccine, as long as the program is authorized. (*Id.* ¶ 3.10.)

Medically Vulnerable Individuals: Defendant will, and/or will continue to, track and provide routine physical exams for all "chronic care" incarcerated persons. (*Id.* ¶ 3.11.)

b. Monitoring Terms

The proposed Settlement Agreement includes the following terms aimed at monitoring Defendant's compliance with the Settlement Agreement.

Posting of Information: Defendant will and/or will continue to maintain, and update weekly, a "dashboard" that provides various information about the status of tests and vaccines in the Jails. (Agreement ¶ 3.8.)

Expert Oversight: The parties have agreed that Michael Brady will serve as an independent expert for the Settlement Agreement. Mr. Brady is a nationally recognized expert in the field of jail and prison operations as it relates to the prevention and mitigation of the spread of infectious diseases and public health in the correctional setting from a non-clinical perspective. He will visit the Jails unannounced three times before December 31, 2021 to ensure compliance with the Settlement Agreement. His review will include reviewing grievances and sick-call slips mentioning COVID-19 (or related terms). He will submit reports following each visit and make any recommendations to address any perceived non-compliance in the Jails. Defendant is required to explain, in writing, the reasons for not adopting any of Mr. Brady's recommendations. (*Id.* ¶ 3.12.)

Enforcement: The parties have agreed that this Court will retain jurisdiction for the duration of the Settlement Agreement. (*Id.* ¶¶ 4.1, 4.2.)

c. Attorneys' Fees and Costs

As part of the Settlement Agreement, Defendant has agreed to pay $95,000 in attorneys' fees and costs. (Agreement ¶ 5.1.) Accounting for the fee caps of the Prison Litigation Reform Act

("PLRA"), this sum represents a significant reduction from Plaintiffs' overall fees and expenses. (Teshuva Decl. ¶ 7.)

d. Notice to Settlement Class

The parties have agreed to provide notice of the proposed settlement to class members by posting a notice of preliminary approval throughout the Jail facilities. (Agreement ¶¶ 6.1, 6.4.) Copies of the Settlement Agreement itself will be available in the Jails' law library and upon request. A representative from the ACLU will also be available to answer questions about the agreement. (*Id.* ¶ 3.9.) This method of providing notice was previously employed to give provisional class members notice of the Court's TRO. (Teshuva Decl. ¶ 8.)

The parties have agreed to the language in the Notice, *see* Teshuva Decl., Exhibit 2, *with one exception*: Plaintiffs believe the Notice should include the attorneys' fee term. *See* Fed. R. Civ. P. 23(h) (providing notice of attorneys' fees is required). Defendant believes the Notice should not include the attorneys' fee term. The parties therefore respectfully ask that the Court resolve this minor dispute regarding the appropriate form of notice.

IV. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT CLASS

a. The Court Should Grant Conditional Certification to the Settlement Class

There is a "strong judicial policy" favoring settlement of class actions. *Coburn v. City of Sacramento*, No. 2:19-CV-00888-AC, 2020 WL 7425345, at *3 (E.D. Cal. Dec. 18, 2020) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). A court may certify a settlement class if a plaintiff demonstrates that the class meets all of the prerequisites of Federal Rule of Civil Procedure 23(a) and can be maintained under Rule 23(b). *See* Fed. R. Civ. P. 23; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). For purposes of the TRO, this Court already provisionally certified a class of all people now, or who in the future will be, incarcerated in the Jails. *See* ECF No. 26 at 47. That class is nearly identical to the class proposed here of "all people who are currently incarcerated in the Tulare County Jails or will be incarcerated in the Tulare County Jails at any point before the Termination Date of the Settlement Agreement." The only difference is the time limitation: Only persons who are incarcerated before

March 22, 2022 (the current Termination Date) will be included in the class proposed here. Because the Court has already found that a nearly identical class meets the requirements of Rule 23 for provisional class certification, conditional certification is likewise appropriate.

Rule 23(a) Factors. As the Court ruled in its TRO, a class of "all incarcerated persons in the Jails" meets the requirements under Rule 23(a). *First*, the class is sufficiently numerous and has even increased since the Court's TRO. The Court provisionally certified a class of approximately 1,086 persons. ECF No. 26 at 22. Today the Jails have many more people – around 1,400 as of early August– joinder of whom would be impracticable. (Teshuva Decl. ¶ 9.) Because the Jails have an ever-shifting population, additional people will enter this class when detained.

Second, the Complaint and Supplemental Complaint raise common questions of law and fact relevant to the entire class. As before, all members of the proposed class "are subject to the same practices and lack of policies" relating to COVID-19. *See* ECF. No. 26 at 23. From these common policies arise common questions about the sufficiency of Defendant's response to COVID-19. *See Parsons v. Ryan*, 754 F.3d 657, 684 (9th Cir. 2014) (affirming class certification and noting the "clear line of precedent . . . [that] establishes that when inmates provide sufficient evidence of systemic and centralized policies or practices in a prison system that allegedly expose all inmates in that system to a substantial risk of serious future harm," the commonality requirement of Rule 23(a) is satisfied).

Third, the claims of Plaintiffs Ibarra and Camposeco, who are currently incarcerated in the Jails and have been since the inception of this lawsuit, are indistinguishable from the claims of the Settlement Class; all of their claims arise from the same alleged failures of Defendant to respond adequately to COVID-19.[2] *See* ECF No. 26 at 24-25 (finding that Plaintiffs satisfied the typicality requirement and finding it "telling" that Defendant had not argued that plaintiffs' interests did not align with those of the class).

Fourth, Plaintiffs and their counsel have fairly and adequately protected the interests of the class from the earliest days of this litigation. As before, there is no conflict of interest between

[2] Plaintiffs Levi Johnson and Charles Criswell are no longer incarcerated in the Jails.

Plaintiffs and the class, and Plaintiffs have "vigorously prosecute[d]" this action. ECF No. 26 at 26. Plaintiffs and their counsel, through their diligence and investigation despite an ongoing pandemic, secured temporary injunctive relief in September 2020 that has resulted in changes in the Jails. The Settlement Agreement further memorializes the policies that resulted from this TRO. Even after securing the TRO, Plaintiffs didn't give up trying to secure additional injunctive relief by moving for a preliminary injunction, conducting extensive discovery, filing a motion to compel, and investigating and filing a supplemental pleading raising additional claims and allegations.

Named Plaintiffs Ibarra and Camposeco are both currently incarcerated in the Jails, and hence have perfectly aligned interests with other members of the proposed class – all of whom seek protection from COVID-19. Throughout the course of this litigation, the named Plaintiffs advised Plaintiffs' counsel in real time on the conditions in the Jails. Because of their active participation in the litigation itself, Plaintiffs were valuable contributors to the settlement discussions.

Plaintiffs' counsel from the ACLU and Munger, Tolles & Olson LLP are also experienced litigators with specialized experience involving COVID-19 in detention facilities. (*See* Teshuva Decl. ¶ 6; MacLean Decl. ¶¶ 2-3.) The Court should re-appoint them as Class Counsel for the proposed Settlement Class.

Rule 23(b)(2). The class can also be maintained under Rule 23(b)(2), which requires plaintiffs to show that defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Court has already found that a nearly identical class of persons "clearly" met this standard, citing Plaintiffs' argument that they were seeking "uniform injunctive relief" and Defendant's actions were "generally applicable to the class." ECF No. 26 at 26-27. Setting aside the request for attorneys' fees, the proposed Settlement Agreement seeks exclusively injunctive relief that will apply "generally to the class." *Martinez v. Reams*, No. 20-CV-00977-PAB-SKC, 2020 WL 7319081, at *7 (D. Colo. Dec. 11, 2020) (certifying class alleging deliberate indifference by a Sheriff relating to COVID-19 when injunction would

"provide relief to all class members and [] would not need to be specifically tailored to each class member"). The Settlement Class thus meets the requirements of Rule 23(b)(2), and the Court should conditionally certify this class.

b. The Relief Provided by the Settlement Is Fair, Reasonable, and Adequate

The Court should grant final approval of a class action settlement if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). At the preliminary approval stage, as here, the Court "need only determine whether the proposed settlement is within the range of possible approval.'" *Murillo v. Pacific Gas & Elec. Co*., 266 F.R.D. 468, 479 (E.D. Cal. 2010) (quotations omitted). Under the 2018 amendments to Rule 23, courts are directed to consider the following factors to determine whether a class action settlement is potentially fair: (1) class representatives and class counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) all class members are treated equitably; and (4) the relief is adequate given (a) the costs, risks and delays of trial and appeal; (b) the effectiveness of distributing class relief; (c) the terms of proposed attorney's fees; and (d) the terms of the Settlement Agreement. Fed. R. Civ. P. 23(e)(2).

Considering these factors, the Settlement Agreement is fair, reasonable, and adequate and should be preliminarily approved. The terms of the Settlement Agreement provide comprehensive protection against the threat of COVID-19 to all persons in incarcerated in the Jails until March 31, 2022. And if COVID-19 rears its ugly head again through variants or lack of vaccination or some other cause past March 2022, the parties may agree, or Plaintiffs can petition this Court, to extend the Settlement Agreement's term. (Agreement ¶ 2.2.)

i. Class Representatives and Class Counsel Have Adequately Represented the Class

The analysis of whether Plaintiffs and their counsel have adequately represented the class is "redundant of the requirements of Rule 23(a)(4)," so will not be repeated here. *See Mejia v. Walgreen Co.*, No. 2:19-CV-00218 WBS AC, 2020 WL 6887749, at *9 (E.D. Cal. Nov. 24, 2020). If the Court finds the proposed class satisfies Rule 23(a)(4), this factor under Rule 23(e)(2)(A) is also met. *See id.*

ii. The Proposal Was Negotiated at Arm's Length

The negotiation process was "fair and full of adversarial vigor," reflecting an arms' length negotiation. *City of Colton v. American Promotional Events, Inc.*, 281 F. Supp. 3d 1009, 1012 (C.D. Cal. 2017) (*quoting U.S. v. Chevron U.S.A.., Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005)). Settlement discussions began in October 2020, when Plaintiffs were about to file their preliminary injunction motion. Following extensive discovery from Defendant, settlement discussions re-commenced in the Spring 2021, which also marked the widespread arrival of COVID-19 vaccines that helped lower the overall risk of COVID-19. After four separate settlement conferences with Judge McAuliffe, the parties finally arrived at the proposed Settlement Agreement. During these discussions, the parties discussed (and debated) variations of approximately thirty-four separate substantive injunctive-relief terms. (*See* Teshuva Decl. ¶ 3.) Given the extended, and robust, settlement discussions, the proposed Settlement Agreement was negotiated at "arm's length." *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 942 (N.D. Cal. 2013) (settlement achieved by a retired federal magistrate judge following "months of active, adversarial, litigation" was fair and adequate); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (approving settlement negotiated at "arm's length" when, as here, "[e]xperienced counsel on both sides, each with a comprehensive understanding of the strengths and weaknesses of each party's respective claims and defenses, negotiated this settlement over an extended period of time").

iii. All Class Members Are Treated Equitably under the Settlement.

All members of the Settlement Class, including future class members who may arrive at the Jails, receive the same benefit from the Settlement Agreement: better protection from the risks posed by COVID-19. By including "all" incarcerated persons in the Jails in the class definition, the Settlement Agreement ensures that every current or future incarcerated person through March 2022 benefits equally from the Agreement's terms.

Even the terms that may not directly apply to all class members benefit the class as a whole. For example, the Settlement Agreement requires Defendant to conduct routine wellness checks for persons with "chronic care" needs who also have comorbidities with COVID-19.

(Settlement Agreement ¶ 3.11.) Protecting medically vulnerable persons in the Jails benefits everyone in the Jails because it helps reduce the overall risk of COVID-19.

iv. Relief is Adequate Given the Costs, Risks, and Delay of Trial and Appeal.

For reasons already noted, Plaintiffs believe they will obtain adequate relief through this Agreement, particularly given the potential costs, risks, and delay associated with trial and appeal. Despite the clear successes Plaintiffs obtained for class members, they recognize that they did not win every motion before this Court and that a trial date may not be set until after the COVID-19 pandemic is over. In particular, the changing landscape of the pandemic and availability of three safe and effective vaccines make future litigation uncertain. Against this backdrop, the Settlement Agreement is reasonable. *See Coburn v. City of Sacramento*, No. 2:19-CV-00888-AC, 2020 WL 7425345, at *6 (E.D. Cal. Dec. 18, 2020) (approving class settlement when plaintiffs sufficiently explained "potential impediments to full recovery," including the prospects of losing at trial or on appeal).

The Settlement Agreement ensures that, after this case is dismissed, Defendant will commit to implement, or continue to implement, COVID-19 mitigation tactics. Among other things, Defendant has agreed to implement, and/or continue to implement, testing at intake, followed by a quarantine period, to mitigate the risk that the virus enters the Jails. Through the settlement's required routine reporting of test results and vaccines, Plaintiffs' counsel can continue to play a "watchdog" role for the Jails as the pandemic ebbs or progresses. Defendant has also agreed to arrange and pay for three site visits to the Jails by an independent expert who is an expert in the prevention of infectious diseases like COVID-19 in detention facilities. In short, the Settlement Agreement mitigates the need for further litigation on Defendant's COVID-19 policies and helps protect class members from the virus (or any unknown variants) for the next critical period of time.

c. Distributing Class Relief Will be Effective.

The Settlement Agreement accounts for policies or policy changes that will be provided to *all* members of the proposed Settlement Class without any further action on their part. All current

members of the proposed Settlement Class have already received many of the policy changes memorialized in the Settlement Agreement—such as additional out-of-cell time and less restrictive access-to-counsel policies. Any future members of the Settlement Class—i.e., those who are newly detained between the Court's final approval order and March 31, 2022—will receive the same benefits flowing from the COVID-19 policies and practices memorialized in the Settlement Agreement.

d. The Proposed Attorneys' Fees Are Reasonable Under the Circumstances.

Courts require that "fee awards be reasonable in the circumstances." *Rodriguez v. W. Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009). When evaluating reasonableness, "[f]oremost among these considerations . . . is the benefit obtained for the class." *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 942 (9th Cir. 2011). Plaintiffs' counsel vigorously advocated for all current and future members of the Settlement Class throughout the COVID-19 pandemic. Plaintiffs never sought money damages throughout the litigation; their focus has been exclusively on obtaining injunctive relief. One hallmark of success is that, to Plaintiffs' knowledge, no incarcerated individual was hospitalized from COVID-19 from July 29, 2020 (when the case was filed) through the present.

Given Plaintiffs' successes throughout the case, an award of $95,000 is a reasonable sum for their counsel's time and expense. The agreed-upon award reflects a substantial discount from what Plaintiffs' counsel would have sought and would have reasonably expected to be awarded as part of a fees motion in a successful civil rights litigation. In total, attorneys and other timekeepers for Plaintiffs spent approximately 4,590 hours litigating this matter. (Teshuva Decl. ¶ 7; MacLean Decl. ¶ 5.) Accounting for attorneys' time only (not any other timekeepers), and taking into account the fee caps of the PLRA,[3] Plaintiffs' would otherwise be entitled to approximately

[3] The hourly rate in prison civil litigations is set by statute. *See* 42 U.S.C. § 1997e (hourly rate shall not than 150% of the hourly rate established under 18 U.S.C. § 3006A). The current judicial council hourly rates for work in 2020 is $152 and $155 for work in 2021. Criminal Justice Act Guidelines, Ch. 2, § 230.16 Hourly Rates and Effective Dates in Non-Capital Cases, https://www.uscourts.gov/rulespolicies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_16. Multiplying those figures by 150% equals $228 and $232.5, respectively.

$800,000 in fees. Plaintiffs also spent approximately $53,000 in expenses. (Teshuva Decl. ¶ 7.) As such, a sum of $95,000 is well within the range of reasonable fees that courts approve in civil rights cases like these. *See Garcia v. Los Angeles Cty. Sheriff's Dep't*, No. CV 09-8943 MMM (SHX), 2015 WL 13646906, at *19 (C.D. Cal. Sept. 14, 2015) (approving as reasonable a fee award that constituted a 24.45% reduction from the loadstar).

V. THE PROCESS FOR DISTRIBUTION OF CLASS NOTICE IS REASONABLY CALCULATED TO REACH CLASS MEMBERS.

This case sought solely injunctive relief and was provisionally certified under Rule 23(b)(2). The court may direct notice to the class "in a reasonable manner." Fed. R. Civ. P. 23(e)(1)(B); *see Garcia*, 2015 WL 13646906, at *7 (court has discretion for a Rule 23(b)(2) class on "whether notice . . . is required, and to what extent). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Rodriguez v. W. Publishing Corp.*, 563 F.3d 948, 962 (9th Cir. 2009). The proposed notice accomplishes this.

The proposed Settlement Class consists of individuals incarcerated in the Jails now or before the Settlement Agreement ends in March 2022. Notice is specifically targeted to this group, who will always reside in the Jails. Notice will consist of posters placed in numerous places throughout the Jails, including their living quarters or "units," that are reasonably calculated to ensure incarcerated persons will see them during their out-of-cell time. Copies of the Settlement Agreement will be available in the law libraries or upon request. Plaintiffs' counsel will be available to answer any questions about the settlement. The parties previously employed this method of Notice to publicize information about the TRO in this case. (Teshuva Decl. ¶ 8.)

Because class members consist of only incarcerated persons who are or will be *in* the Jails, the parties do not believe there is a need for additional public-facing methods of notice (e.g., newspapers, websites, etc.). Notice by mail is not required given the nature of the class in question—the members of which are, by definition, a captive audience in the Jails. *See Garcia*, 2015 WL 13646906, at *7 (notice by mail in case against LA Sheriff's office not required).

Consistent with the requirements of Rule 23(c)(2)(B), the Notice itself explains in clear and simple terms (i) the nature of the action, (ii) the class definition, (iii) a summary of the claims and issues, (iv) that a class member may appear through an attorney, (vi) the time and manner for objecting,[4] along with (vi) a summary of the settlement, and (vii) the date of any fairness hearing, and (viii), how they can find further information about the settlement. *See* Exhibit 2. As discussed, the Parties request the Court resolve their minor dispute about whether to include reference to the attorneys' fees in the Notice.

VI. CONCLUSION

Plaintiffs respectfully request that the Court grant this Motion and enter the proposed unopposed Preliminary Approval Order.

DATED: August 10, 2021

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[4] Rule 23 "provides no opportunity for (b)(1) or (b)(2) class members to opt out." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011); *see also Garcia*, 2015 WL 13646906, at *7 (no right to opt out for (b)(2) class).