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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES CRISWELL, et al.,
Plaintiffs,
v.
MICHAEL BOUDREAUX, in his official
capacity as Sheriff of Tulare County,
Defendant.

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

ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND CONDITIONAL CLASS
CERTIFICATION

(Doc. No. 82)

This matter is before the court on plaintiffs’ motion for preliminary approval of a class action settlement and conditional certification of settlement class filed on August 10, 2021.¹ (Doc. No. 82.) Pursuant to General Order No. 617 addressing the public health emergency posed by the COVID-19 pandemic, plaintiffs’ motion was taken under submission on the papers. (Doc.

¹ This court's overwhelming caseload has been well publicized and the long-standing lack of judicial resources in this district long-ago reached crisis proportion. That situation, which has continued unabated for over twenty months now, has left the undersigned presiding over approximately 1,300 civil cases and criminal matters involving 735 defendants at last count. Unfortunately, that situation results in the court not being able to issue orders in submitted civil matters as quickly as the parties desire. Of course, this situation is frustrating to the court, which fully realizes how frustrating it is to the parties and their counsel. However, the sad reality is that this order was issued quite expeditiously in comparison to most civil motions now pending before the undersigned. Counsel may wish to express their views regarding this state of affairs to those in the other branches of government who can remedy the situation.

1 No. 83.) For the reasons explained below, the court will grant preliminary approval of the
2 proposed class action settlement and conditional certification of the settlement class.

3 **BACKGROUND**

4 The court previously summarized plaintiffs’ allegations in its September 2, 2020 order
5 granting plaintiffs’ application for provisional class certification and motion for a temporary
6 restraining order. (Doc. No. 26 (“TRO”).) The court will not repeat that factual background in
7 this order.

8 Pursuant to Federal Rule of Civil Procedure 23, plaintiffs Samuel Camposeco, Adam
9 Ibarra, and California Attorneys for Criminal Justice (“plaintiffs”), individually and on behalf of
10 all others similarly situated, filed the pending unopposed motion for conditional class certification
11 and preliminary approval of their settlement agreement with defendant Michael Boudreaux, in his
12 official capacity as Sheriff of Tulare County.² (Doc. No. 82.)

13 **THE PROPOSED SETTLEMENT**

14 The parties’ proposed settlement (Doc. No. 82-3) has four categories of substantive terms:
15 (1) injunctive relief requiring defendant to implement, or continue to implement, a wide variety of
16 policies to guard against the spread of the COVID-19 virus in the Tulare County Jails (the
17 “Jails”); (2) injunctive relief for monitoring the implementation of the settlement agreement,
18 including providing for three unannounced site visits to the Jails by independent expert, Michael
19 Brady, and regular public reporting by defendant; (3) payment by defendant of plaintiffs’
20 counsel’s attorneys’ fees and expenses totaling \$95,000; and (4) requirements to ensure adequate
21 notice of the proposed settlement agreement to class members. (Doc. Nos. 82 at 10; 82-3.)

22 **LEGAL STANDARD**

23 **A. Rule 23 Settlements**

24 Federal Rule of Civil Procedure 23(e) provides that “[t]he claims, issues, or defenses of a
25 certified class—or a class proposed to be certified for purposes of settlement—may be settled,

26 ² Although the other two named plaintiffs, Levi Johnson and Charles Criswell, signed the
27 settlement agreement, they are no longer incarcerated in the Tulare County Jails and thus do not
28 seek to represent the class in connection with the parties’ proposed settlement. (See Doc. Nos. 82
at 14, n.2; 82-3 at 13.)

1 voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e).

2 The following procedures apply to the court’s review of a proposed settlement:

3 The parties must provide the court with information sufficient to
4 enable it to determine whether to give notice of the proposal to the
class.

5 The court must direct notice in a reasonable manner to all class
6 members who would be bound by the proposal

7 If the proposal would bind class members, the court may approve it
8 only after a hearing and on finding that it is fair, reasonable, and
adequate

9 The parties seeking approval must file a statement identifying any
agreement made in connection with the proposal.

10

11 Any class member may object to the proposal if it requires court
12 approval under this subdivision (e).

13 *Id.*

14 “Courts have long recognized that settlement class actions present unique due process
15 concerns for absent class members.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,
16 946 (9th Cir. 2011) (internal quotation marks and citations omitted). To protect the rights of
17 absent class members, Rule 23(e) requires that the court approve all class action settlements “only
18 after a fairness hearing and a determination that the settlement is fair, reasonable, and adequate.”
19 *Bluetooth*, 654 F.3d at 946. When parties seek approval of a settlement agreement negotiated
20 before formal class certification, “there is an even greater potential for a breach of fiduciary duty
21 owed the class during settlement.” *Id.* In such circumstances, “settlement approval requires a
22 higher standard of fairness” and a “more exacting review” so as “to ensure that class
23 representatives and their counsel do not secure a disproportionate benefit at the expense of the
24 unnamed plaintiffs who class counsel had a duty to represent.” *Lane v. Facebook, Inc.*, 696 F.3d
25 811, 819 (9th Cir. 2012) (internal quotation marks and citations omitted).

26 In addition, when parties seek class certification only for purposes of settlement, Rule 23
27 “demand[s] undiluted, even heightened, attention” to the certification requirements. *Amchem*
28 *Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The district court must examine the propriety

1 of certification under Rule 23 both at this preliminary stage and at a later fairness hearing. *See*,
2 *e.g.*, *Ogbuehi v. Comcast*, 303 F.R.D. 337, 344 (E.D. Cal. Oct. 2, 2014).

3 Review of a proposed class action settlement ordinarily proceeds in three stages. *See*
4 *Manual for Complex Litigation* (4th) § 21.632. First, the court conducts a preliminary fairness
5 evaluation and, if applicable, considers class certification. *Id.* (noting that if the parties move for
6 both class certification and preliminary approval, the certification hearing and preliminary
7 fairness evaluation can usually be combined). Second, if the court makes a preliminary
8 determination on the fairness, reasonableness, and adequacy of the settlement terms, the parties
9 are directed to prepare the notice of certification and proposed settlement to the class members.
10 *Id.* Third, the court holds a final fairness hearing to determine whether to approve the settlement.
11 *Id.*; *see also Narouz v. Charter Commc 'ns, LLC*, 591 F.3d 1261, 1267 (9th Cir. 2010).

12 Here, the parties move for preliminary class certification and preliminary approval of their
13 class action settlement. Though Rule 23 does not explicitly provide for such a procedure, federal
14 courts generally grant preliminary approval if “the proposed settlement appears to be the product
15 of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly
16 grant preferential treatment to class representatives or segments of the class, and falls within the
17 range of possible approval.” *Lounibos v. Keypoint Gov’t Sols. Inc.*, No. 12-cv-00636-JST, 2014
18 WL 558675, at *5 (N.D. Cal. Feb. 10, 2014) (quoting *In re Tableware Antitrust Litig.*, 484 F.
19 Supp. 2d 1078, 1079 (N.D. Cal. 2007)); *see also Newberg on Class Actions* § 13:13 (5th ed.
20 2011). While it is not a court’s province to “reach any ultimate conclusions on the contested
21 issues of fact and law which underlie the merits of the dispute,” a court should weigh, among
22 other factors, the strength of a plaintiff’s case; the risk, expense, complexity, and likely duration
23 of further litigation; the extent of discovery completed; and the value of the settlement offer.
24 *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (citation omitted).

25 ANALYSIS

26 A. Conditional Class Certification for Settlement Purposes

27 In issuing the TRO on September 2, 2020, the court granted preliminary certification of
28 the proposed class under Rule 23 and found that plaintiffs had satisfied Rule 23(a)’s requirements

1 of numerosity, commonality, typicality, and adequacy of representation and Rule 23(b)(2)'s
2 requirements.³ (Doc. No. 26 at 26); *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718,
3 730 (9th Cir. 2007); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). The
4 court will not revisit its analysis in this regard because the parties' proposed settlement class is
5 materially identical to the class that the court conditionally certified for the purposes of the TRO.
6 (See Doc. No. 82 at 13–14.) The only difference is the time limitation: only persons who are
7 incarcerated before March 31, 2022 (the current Termination Date) are included in the settlement
8 class. (Doc. Nos. 83 at 23–14; 82-3 at 3.) Accordingly, the court will grant conditional
9 certification of the settlement class as defined by the parties in their settlement agreement, as
10 follows: “All people who are currently incarcerated in the Tulare County Jails or will be
11 incarcerated in the Tulare County Jails at any point before the Termination Date of the Settlement
12 Agreement.” (See Doc. No. 82 at 9–10.)

13 **B. Preliminary Approval of the Class Action Settlement**

14 Plaintiffs also seek preliminary approval of their class action settlement. Under Rule
15 23(e), a court may approve a class action settlement only if the settlement is a fair, reasonable,
16 and adequate resolution of a *bone fide* dispute. *Bluetooth*, 654 F.3d at 956. “[P]reliminary
17 approval of a settlement has both a procedural and substantive component.” *Tableware Antitrust*
18 *Litig.*, 484 F. Supp. 2d at 1079 (citation omitted). In particular, preliminary approval of a
19 settlement and notice to the proposed class is appropriate if: (1) the proposed settlement appears
20 to be the product of serious, informed, non-collusive negotiations; and (2) the settlement falls

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22 ³ Rule 23(b)(2) requires plaintiffs to show that defendant “has acted or refused to act on grounds
23 that apply generally to the class, so that final injunctive relief or corresponding declaratory relief
24 is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Courts are not required
25 “to examine the viability or bases of class members’ claims for declaratory and injunctive relief,
26 but only to look at whether class members seek uniform relief from a practice applicable to all of
27 them.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (noting that Rule 23(b)(2)
28 requirements are met when “class members complain of a pattern or practice that is generally
applicable to the class as a whole”) (citing *Walters*, 145 F.3d at 1047). The court previously
found that plaintiffs satisfied these requirements because they seek uniform injunctive relief and
defendant’s actions in responding to COVID-19 allegedly violate the rights of all putative class
members and are generally applicable to the class. (Doc. No. 26 at 26–27.)

1 within the range of possible approval, has no obvious deficiencies, and does not improperly grant
2 preferential treatment to class representatives or segments of the class. *Id.*

3 1. Procedural Fairness

4 The court must first consider whether the process by which the parties arrived at the
5 settlement is the product of arm's length bargaining, rather than collusion or fraud. *See Millan v.*
6 *Cascade Water Servs., Inc.*, 310 F.R.D. 593, 613 (E.D. Cal. 2015). A settlement is presumed fair
7 if it "follow[s] sufficient discovery and genuine arms-length negotiation." *Adoma v. Univ. of*
8 *Phx., Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (citation omitted). In addition, participation
9 in mediation "tends to support the conclusion that the settlement process was not collusive."
10 *Palacios*, 2015 WL 4078135, at *8 (citation omitted).

11 Here, the negotiation process was "fair and full of adversarial vigor," reflecting an arm's
12 length negotiation. *See City of Colton v. American Promotional Events, Inc.*, 281 F. Supp. 3d
13 1009, 1012 (C.D. Cal. 2017) (quoting *U.S. v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1111
14 (N.D. Cal. 2005)). Settlement discussions began in October 2020, when plaintiffs were preparing
15 to file their motion for a preliminary injunction, which they filed on November 3, 2020. (Doc.
16 Nos. 82 at 17; 44.) According to plaintiffs, following extensive discovery produced by defendant,
17 settlement discussions re-commenced in spring 2021. (Doc. No. 82 at 17.) "After four separate
18 settlement conferences with Judge McAuliffe, the parties finally arrived at the proposed
19 Settlement Agreement. During these discussions, the parties discussed (and debated) variations
20 of approximately thirty-four separate substantive injunctive-relief terms." (*Id.*) The court agrees
21 in light of this history that "[g]iven the extended, and robust, settlement discussions, the proposed
22 Settlement Agreement was negotiated at 'arm's length.'" (*Id.*) Accordingly, the undersigned
23 concludes that the parties' negotiations were extensive, involved, and non-collusive, lending
24 credence to the fairness of the settlement and supporting the granting of plaintiffs' motion for
25 preliminary approval of the class action settlement.

26 2. Substantive Fairness

27 The court should grant final approval of a class action settlement if it is "fair, reasonable,
28 and adequate." Fed. R. Civ. P. 23(e)(2). At the preliminary approval stage, as here, the court

1 “need only determine whether the proposed settlement is within the range of possible approval.”
2 *Murillo v. Pacific Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010) (quotations omitted).
3 Under the 2018 amendments to Rule 23, courts are directed to consider the following factors in
4 determining whether a class action settlement is potentially fair: (1) class representatives and
5 class counsel have adequately represented the class; (2) the proposal was negotiated at arm’s
6 length; (3) all class members are treated equitably; and (4) the relief is adequate given (a) the
7 costs, risks, and delays of trial and appeal; (b) the effectiveness of distributing class relief; (c) the
8 terms of proposed attorney’s fees; and (d) the terms of the settlement agreement. Fed. R. Civ. P.
9 23(e)(2). The court has considered these factors and finds that the proposed settlement agreement
10 in this case is fair, reasonable, and adequate and should be preliminarily approved. For the
11 reasons explained above and outlined in the September 2, 2020 TRO, the class representatives
12 and class counsel have adequately represented the class and the settlement was negotiated at
13 arm’s length. Moreover, all class members are treated equitably under the settlement agreement
14 in that they all receive the same benefit: increased protection against the risks of COVID-19 in
15 the Jails. The terms of the settlement agreement provide comprehensive protection against the
16 threat of COVID-19 to all persons incarcerated in the Jails through March 31, 2022. (Doc. No.
17 82-3 at 3.) These terms are both fair and can be easily distributed to all class members. If the
18 COVID-19 pandemic grows worse or fails to subside, the parties may agree to extend the
19 settlement agreement’s term, or plaintiffs can petition this court for such an extension, as
20 provided for in the settlement agreement. (*Id.*) What is more, a trial date in this case may not be
21 set until after the COVID-19 pandemic is over, and thus the relief is suitable given the risk of that
22 delay.

23 Lastly, as to the settlement agreement’s attorneys’ fees provision, when a negotiated class
24 action settlement includes an award of attorneys’ fees, the fee award must be evaluated in the
25 overall context of the settlement. *Knisley v. Network Assocs.*, 312 F.3d 1123, 1126 (9th Cir.
26 2002). At the same time, the court “ha[s] an independent obligation to ensure that the award, like
27 the settlement itself, is reasonable, even if the parties have already agreed to an amount.”
28 *Bluetooth*, 654 F.3d at 941. As part of the settlement agreement, defendant has agreed to pay

1 \$95,000.00 in attorneys' fees and costs to plaintiffs' counsel. (Doc. No. 82 at 12.) Accounting
2 for the fee caps of the Prison Litigation Reform Act ("PLRA"), this sum represents a significant
3 reduction from plaintiffs' actual accrued fees and expenses. (See Doc. No. 82-2 at 3.) The parties
4 have negotiated fees and costs without the need for further motion practice and the court is
5 satisfied for the purposes of preliminary approval that the proposed attorneys' fee award is
6 reasonable under the circumstances of this case.

7 **C. Proposed Class Notice and Administration**

8 For proposed settlements under Rule 23, "the court must direct notice in a reasonable
9 manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); see
10 also *Hanlon*, 150 F.3d at 1025 ("Adequate notice is critical to court approval of a class settlement
11 under Rule 23(e)."). For a class certified under Rule 23(b)(2), the court may direct appropriate
12 notice to the class. Fed. R. Civ. P. 23(c)(2)(A).

13 A class action settlement notice "is satisfactory if it generally describes the terms of the
14 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
15 forward and be heard." *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)
16 (internal quotation marks and citations omitted).

17 The parties have agreed to provide notice of the proposed settlement to class members by
18 posting a notice of preliminary approval throughout the Jail facilities. (Doc. No. 82-3 at 9–10.)
19 Notice of preliminary approval will be distributed in both English and Spanish. (*Id.* at 9.) Copies
20 of the settlement agreement itself will be available in the Jails' law library and upon request. (*Id.*
21 at 10.) Also, within seven (7) days of the court's order granting preliminary approval of the
22 settlement agreement, plaintiffs will post the notice of preliminary approval on the ACLU's
23 website. (*Id.*) This method of providing notice was previously employed by the parties to give
24 notice of the court's TRO to the provisionally certified class. (*Id.*)

25 The parties have agreed to the language to be employed in the notice, with one exception:
26 plaintiffs believe the notice should include the attorneys' fee terms, citing Rule 23(h) in support
27 of their position in this regard. (Doc. No. 82 at 13.) Defendant believes the notice should not
28 include the attorneys' fee terms. (*Id.*) In the pending motion, the parties do not elaborate on their

1 respective arguments on this issue. In light of Rule 23(h)'s requirement that "[n]otice of the
 2 [attorneys' fee] motion must be served on all parties and, for motions by class counsel, directed to
 3 class members in a reasonable manner," the court agrees with plaintiffs and will order that the
 4 notice shall include the terms of the attorneys' fee provision. With that addition, the court finds
 5 the notice proposed by the parties to meet the standards under Rule 23(c)(2)(A). Moreover,
 6 because class members consist of only incarcerated persons who are or will be incarcerated in the
 7 Jails, there is no need for additional public-facing methods of notice, nor is there need for notice
 8 by mail.

9 **D. Implementation Schedule**

10 The court approves the following implementation schedule, which is based on the parties'
 11 proposed settlement agreement. (*See* Doc. No. 82-3.) The court will also set a hearing date of
 12 November 29, 2021 at 1:30 p.m. for the motion for final approval of the parties' settlement
 13 agreement.

Event	Date
Deadline for defendant to post the Notice of Preliminary Approval in a prominent location in each of the approximately 27 modules/pods/sub-units within each jail facility, along with the infirmary and law library.	No later than seven (7) days after entry of this order granting preliminary approval of the parties' settlement agreement ("the Preliminary Approval Order").
Deadline for plaintiffs to post the Notice of Preliminary Approval on the ACLU's website.	No later than seven (7) days after entry of the Preliminary Approval Order.
Deadline to file any objections.	No later than twenty (20) days following posting of the Notice of Preliminary Approval.
Filing deadline for plaintiffs' motion for final approval of the class action settlement.	At least 28 days before the final approval hearing, in accordance with Local Rule 230(b).
Final Approval Hearing	Monday, November 29, 2021 at 1:30 p.m.

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CONCLUSION

For the reasons explained above:

1. Plaintiffs’ motion for preliminary approval of the parties’ class action settlement and for conditional certification of the settlement class (Doc. No. 82) is granted;
2. Plaintiff’s counsel Munger, Tolles & Olson LLP and the American Civil Liberties Union of Northern California are appointed as class counsel;
3. Plaintiffs Samuel Camposeco and Adam Ibarra are appointed as class representatives;
4. The proposed notice and proposed plan of distributing notice are approved in accordance with Federal Rule of Civil Procedure 23;
5. If final approval of the settlement agreement is not granted, or the effective date does not occur, then (1) all parties will proceed as if the settlement agreement had not been executed and the related orders and judgment had not been entered and (2) all releases given will be null and void. In such an event, this court’s orders regarding the settlement agreement, including this preliminary approval order, shall not be used or referred to in litigation for any purpose;
6. The proposed settlement is approved on a preliminary basis in the manner detailed above;
7. The hearing for final approval of the proposed settlement is set for November 29, 2021 at 1:30 p.m. before the undersigned in Courtroom 5, with the motion for final approval of class action settlement to be filed at least 28 days in advance of the final approval hearing, in accordance with Local Rule 230(b); and
8. The settlement implementation schedule set forth above is adopted.

IT IS SO ORDERED.

Dated: September 29, 2021


UNITED STATES DISTRICT JUDGE