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27 Attorneys for Plaintiffs

NOTE: CHANGES MADE BY THE COURT

28 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA

DAN MCKIBBEN, et al.,
 Plaintiffs,
 vs.
 JOHN MCMAHON, et al.,
 Defendants

Case No. EDCV 14-2171-JGB-SP

[Hon. Jesus G. Bernal]

**PRELIMINARY APPROVAL
ORDER**

1 The parties have submitted this joint Preliminary Approval Order of the
2 Class Settlement for the Court’s review. Upon review and consideration of the
3 Settlement Agreement (Exhibit A hereto) (the “Settlement Agreement”) and the
4 exhibits attached thereto made and entered into by counsel for the parties, who
5 represent that their respective clients have approved the settlement.

6 The Named Plaintiffs/Class Representatives¹ are Pedro Guzman, Nick Ou,
7 Sean Lint, Anthony Oliver, Timothy Walker, Ilich Vargas, William Kennedy,
8 Jonathan, Robertson, Steve Aka Lynn Price, Bryan Bagwell, Christopher
9 Crawford, Frederick Crockan, Taheash White, Michael Aka Madison Hatfield, and
10 Kevin Aka Veronica Pratt.

11 Plaintiffs are former or current (at the time of the filing of the complaint)
12 inmates of jails operated by the San Bernardino County Sheriff’s Department
13 (“SBCSD”). SBCSD maintained and maintains an “Alternative Lifestyle Tank”
14 (hereafter “ALT”) at the West Valley Detention Center (“WVDC”), which houses
15 inmates who self-identify as gay, bisexual, and/or transgender (“GBT inmates”).
16 The WVDC is the only SBCSD jail facility that houses self-identified GBT
17 inmates who were assigned male at birth.

18 The Defendants are the County of San Bernardino, the San Bernardino
19 County Sheriff’s Department, San Bernardino County Sheriff John McMahon,
20 Greg Garland, Jeff Rose, James Mahan and Armando Castillo.

21 Plaintiffs, and the classes they represent, contend that Defendants engage in
22 systematic discrimination and denial of equal treatment against Gay, Bisexual, and
23 Transgender (“GBT”) inmates at the WVDC. Plaintiffs contend, inter alia, that
24 GBT inmates 1) were automatically placed in the ALT if they self-identified as
25 GBT; 2) would have been at risk for their safety if admitted to the general
26

27 _____
28 ¹ Plaintiff Dan McKibben passed away while this lawsuit was pending, and so is not listed as a
Class Representative Plaintiff, although his name is still used as the Case Name.

1 population as openly GBT inmates because SBCSD did not have any plans or
2 programs to ensure their safety; 3) had no or inadequate PREA programs in place
3 to protect GBT inmates or address particular vulnerabilities of GBT inmates placed
4 in the general population; 4) were limited in their time out of cell generally to an
5 hour and a half per day, and often less, in contrast to similarly situated (by
6 classification or sentencing status) general population inmates; 5) were denied the
7 same work opportunities that were provided to similarly situated (by classification
8 or sentencing status) general population inmates; 6) were denied the same
9 programming opportunities² that were provided to similarly situated (by
10 classification or sentencing status) general population inmates; and 7) a
11 comparable range of religious services to those available to the general population.
12 Plaintiffs also contend that certain aspects of this disparate treatment continue to
13 this day. Defendants dispute Plaintiffs' allegations, but the parties have agreed to
14 enter into this Settlement Agreement to avoid the mutual risks of litigation.

15 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

16 **I. PRELIMINARY APPROVAL OF SETTLEMENT**

17 1. This Order incorporates by reference the definitions in the Settlement
18 Agreement, a copy of which is attached to this Order as Exhibit A, and also
19 incorporates Exhibits B through E, thereto. All terms defined therein shall have the
20 same meaning in this Order.

21 2. The Settlement Agreement is hereby preliminarily approved, subject
22 to further consideration thereof at the Fairness Hearing provided for below. The
23 Court finds that the non-reversionary class settlement fund of \$950,000 and its
24 proposed allocation, plus substantial injunctive relief and attorney's fees of
25

26 _____
27 ² Programming opportunities include classes in anger management, thinking for change, living
28 skills, parenting skills, substance abuse, GED, high school diploma, literacy, automobile
mechanics, bakery occupations, culinary/reading enrichment classes, computer skills, HVAC
training, fire camp vocational training, employment readiness, and re-entry services.

1 \$1,100,000 are within the range of what would constitute a fair, reasonable, and
2 adequate settlement in the best interests of the Class as a whole, and that the terms
3 of the Settlement Agreement otherwise satisfy the Federal Rules of Civil
4 Procedure 23(e) and due process requirements.

5 **II. DEADLINES FOR NOTICE, FILING OBJECTIONS AND OPT-**
6 **OUTS, AND DATE OF FAIRNESS HEARING**

- 7 3. The Court has set the following dates for purposes of this class action:
- 8 (a) Final class identifying information will be provided to the Class
9 Administrator no later than September 10, 2018;
- 10 (b) Mailing Class and Settlement Notice to Class: Must be postmarked by
11 October 15, 2018 [four weeks from latest date of approval order of
12 September 17, 2018, for this scheduled to apply];
- 13 (c) Publication of summary notice by other methods: Must be effected by
14 no later than October 22, 2018 [one week later];
- 15 (d) Filing of Plaintiffs' Motion for Award of Attorneys' Fees and Costs:
16 Must be filed by November 12, 2018 [eight (8) weeks after mailing of
17 class notice];
- 18 (e) Filing of Class Members' Objections to any aspect of the Settlement
19 (including Plaintiffs' Motion for Award of Attorneys' Fees and
20 Costs): Must be filed by January 7, 2019 [sixteen (16) weeks after
21 mailing of class notice];
- 22 (f) Deadline to opt-out: Must be postmarked or received by January 7,
23 2019 [sixteen (16) weeks after mailing of class notice];
- 24 (g) Deadline for filing class claims: Must be postmarked or received by
25 January 7, 2019 [sixteen (16) weeks after mailing of class notice];
- 26 (h) Opposition or Reply to Objections (including to objections to award
27 of attorneys' fees and costs): Must be filed by January 28, 2019 [three
28 (3) weeks after last day to object, opt out, file claims];

- 1 (i) Proposed Final Approval Order: Must be filed by January 28, 2019
- 2 (j) [three (3) weeks after last day to object, opt out, file claims]; and
- 3 (k) Final Approval Hearing: February 11, 2019 [two (2) weeks after filing
- 4 of responses to objections and proposed Final Approval Order] at 9
- 5 a.m. in Courtroom 1 of the United States District Court for the Central
- 6 District of California, Eastern Division located at 3470 12th Street,
- 7 Riverside, California 92501.

8 4. The Court requires a separate motion for final approval of the
9 settlement and for attorneys' fees. Parties must file these motions by January 14,
10 2019.

11 5. In the event that the class notice is not mailed and initially published
12 within the time specified herein, the subsequent dates contained herein will be
13 deferred for the number of additional days before such notice occurs without the
14 need for additional Court approval. However, the Court must approve any change
15 of the date of the Final Approval Hearing.

16 6. In the event that the number of Opt Outs exceeds ten (10) but is less
17 than twenty-five (25), i.e., where the number of Opt Outs is between 11-24, the
18 parties agree that, Defendants will receive a credit against the Class Damages
19 Fund based on the amount that each Opt Out was due under the initial class
20 distribution formula (explained in ¶ 8 of the Settlement Agreement) when applied
21 to the Damages Class and as calculated by Plaintiffs' counsel, i.e., the amount due
22 that class member if all class members filed claims. (To the extent that the final
23 distribution formula results in different allocations because not all class members
24 filed claims, the credit would be based on the initial distribution formula, not the
25 formula adjusted to the claims made.) This credit is only available if the number of
26 Opt Outs exceeds ten.

27 7. If the number of Opt Outs amounts to 25 or more or if any Named
28 Plaintiff opts out, Defendants shall have the option of using the same credit

1 formula as set out in the previous paragraph where the number of Opt Outs is
2 between 11-24, or of rescinding the Agreement.

3 **III. INJUNCTIVE AND DAMAGES CLASSES**

4 8. The Court has simultaneously with the entry of this order
5 conditionally granted Plaintiffs' motion to certify classes under F.R.Civ.P. Rule
6 23(b)(2) and (b)(3) as follows.

7 (a) **Rule 23(b)(2) Injunctive Relief Class:** individuals who currently are,
8 or in the future will be, GBT inmates housed in the San Bernardino
9 County jails, including but not limited to those housed in the ALT.

10 (b) **Rule 23(b)(3) Damages Class:** individuals who, between October
11 22, 2012, and March 31, 2018, were GBT inmates housed in the
12 Alternative Lifestyles Tank (hereafter "ALT") of the San Bernardino
13 County jail facility known as West Valley Detention Center
14 ("WVDC").

15 9. Damages Class Members have a right to opt out of the settlement.
16 Injunctive Class Members cannot opt out of the injunctive relief portion of the
17 settlement.

18 10. The Parties have identified exclusively from San Bernardino County
19 Jail records Damages Class Members based on who was housed in the ALT during
20 the damages period. Only persons so identified are Damages Class members.

21 11. The basic term of the settlement as it relates to Damages Class
22 Members is that the County of San Bernardino will provide payment of a total of
23 \$950,000. From that amount, the following awards will be made by the Class
24 Administrator, subject to court approval:

25 (a) Incentive awards to the 15 Named Plaintiffs, if and to the extent
26 approved by the Court, in the amount of \$60,500.³

27
28 ³ Although Dan McKibben was a Named Plaintiff, he is now deceased, and is therefore being treated purely as a class member and is not included as a Class Representative.

1 (b) Payments of the third-party class settlement administration costs,
2 which are estimated at \$40,000 or less.

3 (c) Certain litigation costs, specifically the consultant/expert and
4 mediation fees advanced by Plaintiffs' counsel, estimated at
5 approximately \$37,000. (Other litigation costs will be absorbed by
6 counsel and included in the Attorney's Fees and Costs Award.)

7 12. The remainder of the Class Fund shall be distributed to the class
8 members (including Named Plaintiffs/Class Representatives) under a formula
9 contained in Paragraphs 5-10 of the Settlement Agreement (Exhibit A hereto).
10 The formula is based on awarding a certain number of points for each day a
11 Damages Class Member spent in the ALT. Because conditions varied over time,
12 and the alleged severity of what Damages Class Members experienced varied by
13 both time and virtue of what opportunities they would have received when
14 compared to comparably classified general population inmates, points vary by
15 which category an inmate fit into in any given day. Only one set of points apply to
16 a given day. (See the Settlement Agreement for an itemization of the categories.)

17 13. Once daily points are assigned to all Damages Class Members, the
18 points will be totaled, and a total point value will be calculated for the class as a
19 whole and for each individual class member. Each class member's recovery will
20 then be determinable based on that class member's percentage of the total points.
21 It is likely that not all class members will make Timely Claims. Accordingly, a
22 claiming class member's percentage of the available funds will be determined
23 based on that class member's total points in relation to the total points for those
24 who made timely claims. (The Settlement Agreement provides how to determine
25 what claims are timely.)

26 14. Despite the foregoing, no class member who qualifies for payment
27 will receive less than a total of \$40 or more than a total of \$10,000. The purpose of
28 this Minimum/Maximum provision is to ensure that every qualifying Damages

1 Class member receives some meaningful compensation, and to ensure that outliers
2 who have outsized claims do not distort the meaningfulness of the recovery to the
3 remaining class members. None of the \$950,000 Damages Class Fund shall revert
4 to the County. Any funds claimed but not cashed by a Class Member within one
5 year of payment shall be paid to an agreed-upon *cy pres* organization.

6 15. In addition, the parties have agreed to the entry of an injunction,
7 whose terms are set forth in Exhibit D to the Proposed Preliminary Approval
8 Order.

9 16. Finally, the Settlement Agreement provides that the County of San
10 Bernardino shall pay Attorney's Fees and Costs in the amount of \$1,100,000 as
11 compensation for statutory fees and certain costs pursuant to 42 U.S.C. § 1988.
12 (The costs included in this award shall include all costs incurred except for
13 mediation costs, consultant/expert costs and Class Administration costs.) This fee
14 shall be the subject of a separate Motion for Attorney's Fees to be heard at the
15 Final Approval Hearing, to be analyzed under the standards for an award of fees
16 and costs to a prevailing plaintiff under 42 U.S.C. § 1988 and Civil Code §
17 52.1(h). The Class Notice will advise class members of this motion and their right
18 to object to it (as well as to other terms of the settlement).

19 **IV. CLASS ADMINISTRATOR**

20 17. The Court approves the retention of JND Legal Administration
21 ("JND") as Class Administrator, to administer the distribution of the Class and
22 Settlement Notice and publication of the Class and Settlement Notice, and to
23 distribute the proceeds of the settlement to all eligible Class Members pursuant to
24 the Plan set out in the Settlement Agreement (Exhibit A) should the Court grant
25 final approval. Exhibit E (the Class Administrator bid) includes the qualifications
26 of JND, which establishes to the Court's satisfaction the qualifications of JND to
27 act as the Class Administrator.

28 18. The Class Administrator shall preserve all written communications

1 from Class Members in response to the Class and Settlement Notice at least until
2 December 31, 2021, or pursuant to further order of the Court. All written
3 communications received by the Class Administrator from Class Members relating
4 to the Settlement Agreement shall be available at all reasonable times for
5 inspection and copying by Counsel for the Parties, and copies shall be regularly
6 provided to Counsel for the Parties.

7 19. The Class Administrator shall be compensated from the \$950,000
8 Class Damages Fund for its services in connection with notice and administration
9 and for the costs of giving mailed and published notice, and the other services it
10 performs, pursuant to such orders as the Court may enter from time to time.

11 20. Within two weeks after this Preliminary Approval Order is signed by
12 the Court, the County of San Bernardino shall deposit or cause to be deposited into
13 an account designated by the Class Administrator by check sent by overnight mail
14 an amount of same day available funds equal to the amount requested by the Class
15 Administrator to cover the costs of notice as provided herein, and will provide
16 additional funds for its administrative work pursuant to the terms of its accepted
17 bid, a copy of which is attached as Exhibit E. Prior to entry of the Final Order of
18 Approval of Settlement, the Class Administrator will not accrue any costs not
19 itemized in Exhibit E unless agreed to by the Plaintiffs' counsel and approved by
20 the Court. If the Court does not enter the Final Order of Approval and Settlement,
21 then all such funds paid to the Class Administrator, to the extent they are available
22 after payment of all accrued class administration expenses, shall be returned to
23 Defendants.

24 21. If this settlement does not go through for any reason, a new settlement
25 is not reached, the case goes to trial, and Plaintiffs are not successful in their
26 prosecution of the case, Defendants shall not seek reimbursement from Plaintiffs
27 of class administration funds paid under this settlement.
28

1 **V. CLASS COUNSEL**

2 22. Barrett S. Litt, David McLane and Lindsay Battles of Kaye, McLane,
3 Bednarski & Litt, and Melissa Goodman, Amanda Goad, Brendan Hamme and
4 Aditi Fruitwala of the ACLU Foundation of Southern California are hereby
5 confirmed as counsel for the Class Representatives and the Class (“Class
6 Counsel”).

7 23. Class Counsel are authorized to act on behalf of the Class with respect
8 to all acts or consents required by or which may be given pursuant to the
9 Settlement, and such other acts reasonably necessary to consummate the
10 Settlement.

11 24. At the Fairness Hearing, Class Counsel shall make an application for
12 Attorney’s Fees and certain litigation costs to be paid by Defendants separate from
13 the Class Damages Fund (the “Motion for Attorneys’ Fees and Costs”). Plaintiffs’
14 counsel’s costs of expert/consultant and mediation fees, and the costs of class
15 notice and administration will be paid from the Class Damages Fund.

16 **VI. CLASS AND SETTLEMENT NOTICE**

17 25. Class Counsel shall provide the Class and Settlement Notice to the
18 Class Administrator for distribution according to the schedule set forth above.
19 Such notice shall be in substantially the form as proposed in Exhibit B to the
20 Settlement Agreement and shall be sent by United States mail to the class
21 members at their last known address; returned mail shall be subject to follow up
22 mailings after appropriate searches of the available databases. In addition, email
23 notice shall be sent to those Damages Class Members can be obtained by standard
24 searches. No notice by publication shall be required because such notice has not
25 proven effective at reaching class members, and the resources are better spent on
26 attempting to reach class members through electronic email. See revisions to
27 F.R.Civ.P 23 (c)(2)(B) effective December 2018 (acknowledging that notice “may
28 be by ... electronic means, or other appropriate means” in addition to or in lieu of

1 United States mail).

2 26. Defendants represent that they have already provided the name,
3 address, social security number, date of birth, driver's license information, and any
4 other identifying information of Damages Class Members, to Plaintiffs' counsel,
5 who will transmit it to the Class Administrator. Such information shall be
6 confidential and may not be disclosed to anyone except counsel of record, the
7 Class Administrator, and designated representatives of Defendants. Should the
8 Defendants discover at any time any additional information containing relevant
9 class information, they shall promptly provide it to Plaintiffs' counsel and the
10 Class Administrator.

11 27. At least seven days before the Fairness Hearing, Class Counsel and/or
12 the Class Administrator shall serve and file a sworn statement by the Class
13 Administrator attesting to compliance with the provisions of this Order governing
14 Class and Settlement Notice. This shall include a list of all people who have opted
15 out of the class.

16 28. The Court approves the Class and Settlement Notice attached as
17 Exhibit B.

18 29. The Court approves the Claim Form attached as Exhibit C.

19 30. The Court approves the Class Administrator Bid attached as Exhibit
20 E.

21 31. The Court finds that the notice required by the foregoing provisions of
22 this Order is the best notice practicable under the circumstances and shall
23 constitute due and sufficient notice of the Settlement and the Fairness Hearing to
24 all Class Members and other persons affected by and/or entitled to participate in
25 the settlement, in full compliance with the notice requirements of Rule 23 Federal
26 Rules of Civil Procedure and due process.

27 **VII. THE FAIRNESS HEARING**

28 32. A Fairness Hearing shall be held on February 11, 2019 to consider: (a)

1 the fairness, reasonableness, and adequacy of the Settlement; (b) whether a Final
2 Order of Approval and Settlement should be entered in its current or some
3 modified form; and (c) the application by Class Counsel for attorneys' fees and
4 expenses (the "Fee Motion").

5 33. At least four weeks prior to the Fairness Hearing, Plaintiffs shall move
6 for final approval and submit a proposed Final Approval Order, which shall be
7 approved by Defendants. That proposed order will contain the final provisions the
8 Parties seek the Court to finally approve and the Parties' proposed court orders
9 related to any objections that have been filed.

10 34. The date and time of the Fairness Hearing shall be set forth in the
11 Class and Settlement Notice but shall be subject to adjournment by the Court
12 without further notice to the Class Members other than that which may be posted
13 at the Court and on the Court's web site.

14 35. Any Class Member who objects to the approval of the Settlement
15 Agreement, the Fee Motion, the Named Plaintiffs' incentive awards or the
16 proposed allocation of damages among class members may appear at the Fairness
17 Hearing and show cause why any one of the foregoing should not be approved as
18 fair, reasonable, and adequate, and why the Final Order of Approval and
19 Settlement should not be entered, except that no such Class Member may appear at
20 the Fairness Hearing unless the Class Member, no later than January 7, 2019 [the
21 date to file objections to the Settlement] (a) files with the Clerk of the Court a
22 notice of such person's intention to appear, a statement that indicates the basis and
23 grounds for such person's objection to the Settlement Agreement, the Fee Petition,
24 the Named Plaintiffs' incentive awards or the proposed allocation of damages
25 among class members, and all documentation, papers, or briefs in support of such
26 objection; and by the same date (b) serves upon all Counsel to the Parties (as listed
27 in the Class Notice), either in person or by mail, copies of such notice of intention
28 to appear, statement of objections and all documentation, papers, or briefs that

1 such person files with the Court. The required documentation shall include the
2 information requested on the Claim Form. Final determination of whether any
3 such objector is a Class Member who has standing to object shall be determined
4 solely from the Defendants' records, from which the list of Class Members has
5 been compiled. In the absence of the timely filing and timely service of the notice
6 of intention to appear and all other materials required by this paragraph, any
7 objection shall be deemed untimely and denied.

8 36. Pending final approval of the Settlement Agreement, no Class
9 Member shall, either directly, representatively, or in any other capacity,
10 commence, prosecute against any Defendant or participate in any action or
11 proceeding in any court or tribunal asserting any of the matters, claims, or causes
12 of action that are to be released by the Settlement Agreement upon final approval.

13 37. In the event of final approval of the Settlement Agreement, all
14 Damages Class Members (except those who have opted out) shall be forever
15 enjoined and barred from asserting any of the matters, claims or causes of action
16 released by the Settlement Agreement, and all such Class Members shall be
17 deemed to have forever released any and all such matters, claims and causes of
18 action as provided for in the Settlement Agreement.

19 **VIII. OTHER PROVISIONS**

20 38. In the event the Settlement is not finally approved or is otherwise
21 terminated in accordance with the provisions of the Settlement Agreement, the
22 Settlement and all proceedings had in connection therewith shall be null and void,
23 except insofar as expressly provided to the contrary in the Settlement Agreement,
24 and without prejudice to the status quo ante rights of Plaintiffs, Defendants, and
25 Class Members.

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27 DATED: September 21, 2018

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JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

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SUBMITTED BY:
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