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14
15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

18 ROBERT HECKER, et al.,
19 Plaintiffs,
20 v.
21 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
22 et al.,
23 Defendants.

Case No. 2:05-CV-02441 LKK DAD
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
JOINT MOTION RE: CONDITIONAL
CERTIFICATION OF SETTLEMENT
CLASS AND PRELIMINARY
APPROVAL OF SETTLEMENT;
APPROVAL OF CLASS NOTICE;
AND SCHEDULING OF FAIRNESS
HEARING**

Judge: Hon. Lawrence K. Karlton

1 The parties submit this memorandum in support of the Joint Motion by the Parties'
2 that the Court enter an order as follows:

- 3 1. To conditionally certify under Fed. R. Civ. P. 23(a) & (b)(2) an injunctive
4 relief settlement class defined as: all present and future California Department of
5 Corrections and Rehabilitation (CDCR) inmates with psychiatric conditions that are
6 disabilities as defined by the Americans with Disabilities Act (ADA) and the
7 Rehabilitation Act and who are allegedly excluded and/or screened out from any prison
8 program, service, or activity on the basis of their assignment to or participation in the
9 Mental Health Service Delivery System (MHSDS), including the Correctional Clinical
10 Case Management System (CCCMS), and the Enhanced Outpatient Program (EOP);
- 11 2. To preliminarily approve the settlement agreement entered into between
12 Plaintiffs, on behalf of themselves and those similarly situated, and Defendants;
- 13 3. To approve the proposed Notice to be distributed to class members under
14 Fed. R. Civ. P. 23(c)(2) & (e)(1); and
- 15 4. To schedule a fairness and final approval hearing.

16 INTRODUCTION

17 The parties seek preliminary approval of a class action settlement agreement that
18 provides substantial equitable relief to a putative class of CDCR inmates who have
19 psychiatric disabilities as defined by the ADA and the Rehabilitation Act of 1973.
20 Following months of negotiations facilitated by the Special Master appointed in *Coleman*
21 *v. Brown*, E.D. Cal. No. 90- cv-0520 LKK DAD, the parties successfully resolved this
22 litigation, thus avoiding the uncertainties, risks, and expense of protracted litigation.

23 The settlement describes substantial revisions to CDCR policies, practices, and
24 procedures that have been and will be implemented in exchange for Plaintiffs' dismissal of
25 the lawsuit. These include revising policies and practices so that four points are not added
26 to the classification scores of inmates requiring mental health care, revising policies and
27 practices so that EOP inmates who have successfully completed programing may have
28 classification points reduced, revising policies affecting inmates who use heat-sensitive

1 psychiatric medication, changes to the Interdisciplinary Treatment Team (IDTT) process to
2 ensure that EOP inmates are not improperly excluded from CDCR programs and services,
3 adding lower security housing for inmates with psychiatric disabilities, allowing inmates
4 with psychiatric disabilities to earn milestone credits, and implementing a ADA grievance
5 procedure. The proposed settlement also provides for monitoring by the *Coleman* Special
6 Master of these agreed-upon policy changes, and the resolution of certain disputes by the
7 *Coleman* Court. The settlement requires CDCR to periodically provide inmate data so that
8 the parties may review the implementation and impact of the various policy and procedure
9 changes described in the settlement agreement. Defendants have already begun to provide
10 such data and reports; these are tremendously valuable in assessing compliance.

11 The parties have not agreed that certain CDCR policies, practices, and procedures
12 have discriminated against or excluded EOP and CCCMS participants from the benefits of
13 the services, programs, and activities operated by CDCR. The settlement agreement
14 provides that the parties will work within the *Coleman* remedial process to resolve whether
15 any action is required on the following claims: privileges for inmates with psychiatric
16 disabilities who experience extended stays at reception centers solely due to a psychiatric
17 disability; access to substance abuse programs for inmates with psychiatric disabilities;
18 access to minimum security facilities and community-based programs for inmates with
19 psychiatric disabilities, and access to reentry hubs for inmates with psychiatric disabilities.
20 Attorneys' fees and costs associated with the resolution of these issues will also be
21 resolved through the *Coleman* process.

22 The settlement class defined by the agreement complies with Rule 23 of the Federal
23 Rules of Civil Procedure because, like the *Coleman* class, the class of persons seeking
24 relief through this case potentially numbers in the thousands, and the complaint seeks
25 reform of policies and procedures of general application toward all CDCR inmates with
26 psychiatric disabilities who are part of the MHSDS program. The claims alleged by the
27 named Plaintiffs who remain imprisoned – who have not been paroled during the pendency
28 of the action – are typical of the claims of the class. The named Plaintiffs and their

1 experienced counsel are adequate to represent the class.

2 Further, the proposed settlement agreement is fair, adequate and reasonable. It
3 secures durable relief on numerous core disputes set forth in the operative complaint, and
4 provides a remedial process to monitor implementation of agreed-upon or ordered changes
5 to policies and procedures. The settlement additionally creates a process for negotiating
6 several additional disputes that are not yet resolved. The parties seek certification of a
7 settlement class for equitable relief under Rule 23(b)(2). In addition, the plaintiffs and the
8 putative class members will be given effective notice and will have an opportunity to
9 object consistent with Rule 23(c)(2) and (e).

10 Accordingly, Plaintiffs request that the Court: (i) conditionally certify the proposed
11 settlement class; (ii) preliminarily approve the settlement; (iii) approve the proposed form
12 of the Class Notice and proposed notice plan, including the proposed dates for Class
13 Members to object to the proposed settlement; and (iv) schedule a fairness hearing to
14 consider granting final approval.

15 **RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

16 **Plaintiffs' Complaint; Defendants' Motion to Dismiss; Court's Stay of Litigation.**

17 On December 5, 2005, Plaintiffs filed their complaint, alleging violations of the
18 ADA and the Rehabilitation Act. Plaintiffs filed amended complaints on February 23,
19 2006 and October 20, 2006. The complaint alleges numerous forms of discrimination on
20 the basis of psychiatric disability, including the addition of four points to the classification
21 scores of inmates with psychiatric conditions, the refusal to provide full classification
22 score reductions points to EOP inmates for "successful programming," the exclusion of
23 inmates with psychiatric disabilities from jobs and CDCR programming, the unlawful
24 segregation of inmates using heat-sensitive medications to their cells during heat alerts, the
25 housing of inmates with psychiatric disabilities at higher security levels than their
26 classification scores would otherwise indicate, the exclusion of inmates with psychiatric
27 disabilities from community-based facilities and minimum security placements, and
28 additional forms of disability discrimination. ECF No. 1.

1 On November 17, 2006, Defendants filed a Rule 12(b) and (f) motion to dismiss the
2 case; all briefing on the motion was completed on January 4, 2007. ECF No. 38.

3 The action was stayed by order filed March 15, 2007. ECF No. 71. The stay was
4 issued to obtain and consider “a report and recommendation as to whether the claims
5 raised [in *Hecker*] can be resolved within the remedial phase of [*Coleman*].” *Id.*

6 Following the Court’s referral, the *Coleman* special master and the deputy special master
7 conferred with the parties in *Hecker* by meeting jointly and separately, by telephone and in
8 person. The parties submitted their positions to the special master, and provided additional
9 information and documents. On June 12, 2007, the special master and the deputy special
10 master tendered their report and recommendation, concluding that the parties were unable
11 to “negotiate[e] an agreement to consolidation or merger of the *Hecker* claims into the
12 *Coleman* case at this time.” ECF No. 72.

13 **Renewed Motions to Lift Stay; Renewed Settlement Negotiations; Settlement Agreement.**

14 Plaintiffs filed a renewed motion to lift the stay on September 19, 2012. ECF
15 No. 94. On October 19, 2012, the Court denied Plaintiffs’ motion without prejudice to its
16 renewal, as appropriate, not later than March 1, 2013, and the parties were directed to meet
17 and confer with the *Coleman* Special Master to determine whether any *Hecker* issues could
18 be resolved via the *Coleman* remedial process. ECF No. 102. The parties met and
19 conferred with the *Coleman* Special Master, but again were unable, at that juncture, to
20 reach a resolution. Declaration of Michael W. Bien in Support of Motion for Preliminary
21 Approval of Class Action Settlement (“Bien Decl.”), filed herewith, ¶ 10.

22 On March 1, 2013, Plaintiffs filed a renewed motion to lift the stay. ECF No. 103.
23 On April 12, 2013, the Court denied Plaintiffs’ motion “without prejudice to its renewal, as
24 appropriate, not later than September 5, 2013.” ECF No. 107. The Court ordered the
25 parties to continue to meet and confer with the *Coleman* Special Master. *Id.* The Court
26 ordered that any renewed Plaintiffs’ motion to lift the stay be “accompanied by a joint
27 report by the parties and approved by the *Coleman* special master.” *Id.* The parties met
28 and conferred, and memorialized their meet and confer in a Joint Status Report that was

1 approved and reviewed by Special Master Matthew Lopes and filed with the Court on
2 September 5, 2013. ECF No. 108. In that report, the parties noted that with the assistance
3 of the *Coleman* Special Master, they were making progress on certain disputed issues in
4 this case and stipulated that the deadline for Plaintiffs' motion to lift the stay be extended
5 to December 31, 2013. *Id.* The parties continued to make progress in negotiations and
6 later agreed to extend that deadline to lift the stay until June 6, 2014. *See* ECF No. 119.
7 On July 10, 2014, the Court held a status conference, in which the parties informed the
8 Court that they had reached an agreement in principle to resolve the *Hecker* matter, which
9 forms the basis of this motion. Bien Decl. ¶ 12.

10 **SUMMARY OF PROPOSED SETTLEMENT TERMS**

11 As noted above, in October 2012, the Court ordered the parties to meet and confer
12 with the *Coleman* Special Master to determine if the issues raised in *Hecker* could be
13 addressed through the *Coleman* remedial process. The parties continued to meet and
14 confer in 2012 and 2013, and in May and June 2013, the *Coleman* Special Master's team
15 visited a number of CDCR institutions and gathered information regarding the
16 implementation of CDCR policies and procedures that were at issue in the *Hecker* case.
17 Following the Court's October 19, 2012 Order, the parties made significant progress in
18 resolving the issues raised in the *Hecker* case, resulting in the settlement agreement
19 presented here.

20 The settlement agreement memorializes agreed-upon changes in policies and
21 practices, and Defendants have agreed to providing periodic reports and data. The
22 settlement further confirms the parties' agreement that the *Coleman* Special Master may
23 monitor implementation of agreed-upon or ordered changes to CDCR's policies and
24 procedures, and that disputes and concerns regarding these commitments may be
25 addressed within the *Coleman* litigation by the Special Master and the Court using the
26 legal standards set forth in the ADA and the Rehabilitation Act. Further, the proposed
27 settlement agreement lists several areas in which there is no resolution as yet but that the
28 parties agree may be negotiated within the *Coleman* process.

1 The terms of settlement agreement include the following:

2 Removal of Four Points Added to Classification Scores. Many of the *Hecker*
3 Plaintiffs and putative class members had four points added to their classification scores
4 based on their psychiatric disabilities. In 2008, the CDCR issued a memo to end the
5 practice. As of January 2014, CDCR reported that there were no remaining prisoners who
6 still had the additional four points on their classification scores. *See* Exhibit 1 to Bien
7 Declaration (hereinafter “Settlement Agreement”), ¶ 21.a.

8 Cessation of Restrictions on Classification Point Reductions for EOP Inmates for
9 Successful Programming. EOP inmates who are Plaintiffs or putative class members in the
10 *Hecker* case reported that they were denied the opportunity to achieve a yearly four-point
11 classification score reduction for successful programming. The settlement confirms that
12 EOP inmates are now entitled to earn up to a four-point reduction annually for successfully
13 programming. Settlement Agreement, ¶ 21.a.

14 Accommodations Including Meaningful Access to Equivalent Programming for
15 Heat Alert Inmates. Plaintiffs in *Hecker* and many putative class members who use heat-
16 sensitive medications reported that they were typically locked in their cells during heat
17 alerts under *Coleman* Program Guide requirements. As a result of 2013 and 2014
18 settlement discussions, CDCR amended their heat plan policies to provide that prisoners
19 taking heat-sensitive medications must be provided with reasonable accommodations
20 during heat alerts. The settlement agreement confirms that “Defendants have agreed to
21 revise their policies to provide that inmates subject to the heat plan promulgated in
22 *Coleman* shall receive meaningful access to equivalent programming — including out-of-
23 cell time — during heat alert days.” Settlement Agreement, ¶ 21.b.

24 Revised Process to Ensure EOP Participation in CDCR Programs and Services
25 Including Jobs and Education. EOP inmates who are Plaintiffs or putative class members
26 reported that they were excluded from CDCR programs and activities on the basis of their
27 psychiatric disabilities. Under the settlement agreement, “Defendants have agreed to
28 revise the Interdisciplinary Treatment Team (IDTT) process to ensure that the IDTT team

1 evaluates and, if appropriate, clears Enhanced Outpatient Program (EOP) inmates for
2 participation in prison programs and services, including jobs and education.” With the
3 data and reporting requirements, described below, counsel for Plaintiffs will be able to
4 ensure that the revised process is implemented. Settlement Agreement, ¶ 21.c.

5 Additional Level II Housing for EOP Inmates. Discovery and investigation by
6 counsel for the *Hecker* Plaintiffs revealed that many inmates with psychiatric disabilities
7 were housed at higher security levels than were otherwise indicated by their classifications
8 scores. The settlement confirms that Defendants have added additional Level II housing
9 for EOP inmates, including the Substance Abuse Treatment Facility (SATF), a Level II
10 substance abuse program for male EOP inmates, and a Level II male EOP program at
11 Valley State Prison. Further, as described below, Defendants will periodically provide
12 data on this topic. Settlement Agreement, ¶ 21.d.

13 Opportunities for Milestone Credits for Inmates with Psychiatric Disabilities.
14 Milestone credits are sentence credits issued to CDCR prisoners who complete approved
15 rehabilitative programs. Prisoners can earn one to six weeks of credits during each 12
16 month period. Plaintiffs had objected that EOP prisoners did not have access to these
17 credits. As a result of negotiations between the parties in 2013 and 2014, CDCR amended
18 its regulations to provide that prisoners who complete EOP programs will be eligible for
19 milestones credits. The settlement agreement confirms that “Defendants have agreed to
20 make available to inmates with psychiatric disabilities milestone credit earning by granting
21 credits for existing Mental Health Services Delivery System groups, such as anger
22 management and criminal thinking groups. Defendants are also working on new
23 curriculum for additional programs that will earn them milestone credits.” This provision
24 is further subject to periodic data reporting. Settlement Agreement, ¶ 21.e.

25 ADA Grievance and Appeal Procedure for Inmates with Psychiatric Disabilities.
26 *Hecker* Plaintiffs and putative class members reported that they were excluded from using
27 the ADA grievance process, and/or that the standard CDCR grievance process was not
28 effective to resolve alleged discrimination because of psychiatric disabilities. The

1 settlement agreement includes a commitment by Defendants to implement an ADA
2 grievance and appeal procedures available to inmates with psychiatric disabilities,
3 allowing them to request reasonable accommodations. Settlement Agreement, ¶ 21.f.

4 Periodic Reporting by Defendants. Under the settlement agreement, CDCR will
5 periodically report on the following:

- 6 • the numbers of EOP inmates and of CCCMS inmates assigned to jobs,
7 vocational, education, and substance abuse programs at each institution, and the
8 number of non-MHSDS inmates assigned to each category of program;
- 9 • the numbers of EOP and CCCMS inmates housed at a higher security level than
10 their points would require, and the number of non-MHSDS inmates so
11 assigned; and
- 12 • the percentages of EOP and CCCMS inmates earning milestone credits,
13 compared to the percentage of non-MHSDS inmates.

14 Settlement Agreement, ¶¶ 21. c, d, e. The collection and provision of this data will allow
15 Plaintiffs' counsel to ensure that the settlement terms have been or are being implemented.
16 Defendants have already begun to provide such data and reports; these are tremendously
17 valuable in assessing compliance and institution-specific variations in compliance.

18 Monitoring of Implementation and Resolution of Remaining Disputes Within the
19 Coleman Remedial Process; Termination of Hecker Case. The parties agree that disputes
20 regarding agreed-upon or ordered changes to CDCR's policies and procedures
21 memorialized in the settlement agreement may be resolved using the existing *Coleman*
22 remedial process. The parties further agree to work with the *Coleman* Special Master to
23 try to resolve whether any action is appropriate regarding four additional areas of dispute:
24 privileges for inmates with psychiatric disabilities who experience extended stays at
25 reception centers solely due to a psychiatric disability; access to substance abuse programs
26 for inmates with psychiatric disabilities; access to minimum security facilities and
27 community-based programs for inmates with psychiatric disabilities, and access to reentry
28 hubs for inmates with psychiatric disabilities. (Plaintiffs' and putative class members'

1 access to fire/conservation camp will not be resolved under the settlement agreement or
2 through the *Coleman* remedial process.) With monitoring and remedial processes in place,
3 the parties agree that the *Hecker* case may be dismissed with prejudice upon the
4 settlement's final approval. The parties further agree that attorneys' fees and costs related
5 to the claims of disability discrimination against inmates with psychiatric disabilities may
6 be resolved in the *Coleman* process. Settlement Agreement, ¶ 30.

7 LEGAL ANALYSIS

8 I. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

9 Federal Rule of Civil Procedure 23(a) permits a case to be maintained as a class
10 action if:

11 (1) the class is so numerous that joinder of all members is impracticable,
12 (2) there are questions of law or fact common to the class, (3) the claims or
13 defenses of the representative parties are typical of the claims or defenses of
the class, and (4) the representative parties will fairly and adequately protect
the interests of the class.

14 *Id.* To demonstrate that class certification is proper, plaintiffs must show that all four of
15 these threshold requirements, and one of the three provisions of Rule 23(b), are satisfied.
16 *Id.*; see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 162-63 (1974); *In Re Mego Fin.*
17 *Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). Here, the proposed settlement
18 class — all present and future CDCR inmates with psychiatric conditions that are
19 disabilities as defined by the ADA and the Rehabilitation Act and who are allegedly
20 excluded and/or screened out from any prison program, service, or activity on the basis of
21 their assignment to or participation in the MHSDS program, including the CCCMS and
22 EOP — meets all requirements and should be certified. The settlement class, all of whom
23 are also members of the *Coleman* class, benefits from having its ADA and Rehabilitation
24 Act claims enforced through the existing *Coleman* remedial process.

25 **Numerosity.** Joinder of all members of the proposed class is plainly impracticable.
26 The latest data show that more than 33,000 CDCR inmates are part of the mental health
27 case load, or more than 28 percent of the inmate population. A subset of that population,
28 possibly numbering in the thousands, is alleged to have been excluded and/or screened out

1 from a prison program, service, or activity on the basis of their psychiatric disability.
2 *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (finding numerosity satisfied
3 for a class of “thousands,” noting Rule 23(a)(1) requires only “substantial” numbers)
4 (citations omitted); *Schwarm v. Craighead*, 233 F.R.D. 655, 660 (E.D. Cal. 2006) (“[A]
5 class consisting of one thousand members clearly satisfies the numerosity requirement”)
6 (citation omitted). Certification is particularly appropriate where, as here, individual class
7 members have significant mental disabilities and are disproportionately poor. *Amone v.*
8 *Aveiro*, 226 F.R.D. 677, 684 (D. Haw. 2005) (finding joinder impracticable where
9 proposed class comprised of “individuals whose financial circumstances may prevent them
10 from pursuing individual litigation [and] who are unlikely to know that a cause of action
11 exists”); *Tenants Associated for a Better Spaulding v. U.S. Dep’t of Hous. and Urban Dev.*,
12 97 F.R.D. 726, 729 (N.D. Ill. 1983) (“As the plaintiff class members are or were residents
13 of federally-subsidized housing, there is a very real possibility that few, if any, of the class
14 members are in the financial position to individually pursue this action.”); *Matyasovszky v.*
15 *Hous. Auth. of City of Bridgeport*, 226 F.R.D. 35, 40 (D. Conn. 2005) (finding numerosity,
16 particularly given circumstances of class, whose members were “low income, disabled,
17 and in some cases, homeless individuals”); *Arenson v. Whitehall Convalescent and*
18 *Nursing Home, Inc.*, 164 F.R.D. 659, 663 (N.D. Ill. 1996) (certifying class where
19 individuals “who are residents of a nursing home may also lack the ability to pursue their
20 claims individually”).

21 **Common Questions of Law or Fact.** “All questions of fact and law need not be
22 common to satisfy the rule. The existence of shared legal issues with divergent factual
23 predicates is sufficient, as is a common core of salient facts coupled with disparate legal
24 remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
25 1998). Here, the class shares common questions of law or fact, as the action challenges
26 system-wide policies or practices affecting inmates with psychiatric disabilities. *L.H. v.*
27 *Schwarzenegger*, No. CIV S-06-2042 LKK/GGH, 2007 WL 662463, at *11 (commonality
28 is satisfied where “plaintiffs’ grievances share a common question of law or of fact”)

1 (citing *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)). Common issues
2 predominate over any other question of law or fact.

3 **Typicality.** The named class representatives who remain incarcerated have claims
4 typical of the class, as they are EOP or CCCMS inmates who are subject or who have been
5 subject to the challenged policies or procedures. Thus, each is part of the class and
6 possesses “the same interest and suffer the same injury as the class members.” *General*
7 *Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *East Tex. Motor Freight*
8 *Sys. v. Rodriguez*, 431 U.S. 395 (1977); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
9 1020 (9th Cir. 1998) (claims are “typical” if “reasonably co-extensive” and “they need not
10 be substantively identical”).

11 **Adequacy.** The named Plaintiffs and their counsel are adequate. The named
12 Plaintiffs’ claims for injunctive relief are aligned with the interests of other class members
13 who are being or will be subjected to the same policies and practices, and the named
14 plaintiffs have no interests antagonistic to the proposed class. *Walters v. Reno*, 145 F.3d
15 1032, 1046 (9th Cir. 1998) (affirming finding of adequate representation where named
16 plaintiffs “interested and involved in obtaining relief” for entire class); *Access Now, Inc. v.*
17 *Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 528 (S.D. Fla. 2000) (certification
18 appropriate where named plaintiffs sought injunction against accessibility barriers on
19 behalf of similarly disabled persons); *Hilton v. Wright*, 235 F.R.D. 40, 52 (N.D.N.Y. 2006)
20 (finding claims of named prisoner plaintiffs “consistent and complementary to” those of
21 proposed class, all of whom had been refused medical treatment based on state prison
22 policy). Courts rarely decline class certification in cases such as this one, where no
23 individual damages are sought. *See, e.g., Access Now, Inc.*, 197 F.R.D. at 528 (“[B]ecause
24 there are no individual monetary damages sought, the interests of the representative
25 Plaintiffs do not actually or potentially conflict with those of the Class.”). Class counsel
26 will fairly and adequately represent the interests of the class as they have done in the
27 *Coleman* matter.

28 **Rule 23(b)(2).** Finally, the proposed settlement class meets the requirements of

1 Rule 23(b)(2) because the issues resolved via the parties' settlement "apply generally to
2 the class." Fed. R. Civ. P. 23(b)(2). As a matter seeking injunctive relief only regarding
3 system-wide policies or practices, this matter is well-suited for certification under Rule
4 23(b)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases
5 against parties charged with unlawful, class-based discrimination are prime examples" of
6 Rule 23(b)(2) cases); *Taylor v. Hous. Auth. of New Haven*, 257 F.R.D. 23, 32 (D. Conn.
7 2009) ("Where, as here, plaintiffs allege discriminatory and unlawful systemic or policy-
8 level actions, certification under Rule 23(b)(2) is proper."). Indeed, subdivision (b)(2) was
9 added to Rule 23 in 1966 "primarily to facilitate the bringing of class actions in the civil
10 rights area." Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d*, § 1775,
11 p. 470 (1986).

12 **II. THE PROPOSED SETTLEMENT AGREEMENT SHOULD BE GRANTED**
13 **PRELIMINARY APPROVAL**

14 Preliminary approval is an initial assessment of the fairness of the proposed
15 settlement made by a court on the basis of written submissions and presentations from the
16 settling parties. Newberg on Class Actions summarizes the preliminary approval criteria
17 as follows:

18 If the preliminary evaluation of the proposed settlement does not disclose
19 grounds to doubt its fairness or other obvious deficiencies, such as unduly
20 preferential treatment of class representatives or of segments of the class, or
21 excessive compensation for attorneys, and appears to fall within the range of
22 possible approval, the court should direct that notice under Rule 23(e) be
23 given to the class members of a formal fairness hearing, at which arguments
24 and evidence may be presented in support of and in opposition to the
25 settlement.

23 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:25 (4th Ed. 2002)
24 ("Preliminary Court Approval") (quoting *Manual for Complex Litigation (Third)* § 30.41
25 at 237 (1995)).

26 The purpose of the preliminary approval process is to determine whether the
27 proposed settlement is within the range of reasonableness and thus whether notice to the
28 Class of the terms and conditions and the scheduling of a formal fairness hearing is

1 worthwhile. *Id.*; *see also Young v. Polo Retail, LLC*, 2006 WL 3050861, at *5 (N.D. Cal.
2 Oct. 25, 2006) (same). There is an “initial presumption of fairness when a proposed class
3 settlement was negotiated at arm’s length by counsel for the class.” *Murillo v. Texas A&M*
4 *Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. 1996). Other factors courts consider in
5 assessing a settlement proposal include: (1) the strength of the plaintiff’s case; (2) the risk,
6 expense, complexity, and likely duration of further litigation; (3) the risk of maintaining
7 class action status throughout the trial; (4) the amount offered in settlement; (5) the extent
8 of discovery completed and the stage of the proceedings; (6) the experience and views of
9 counsel; (7) the presence of a government participant; and (8) the reaction of the class
10 members to the proposed settlement. *Hanlon*, 150 F.3d at 1026; *see also In re Oracle Sec.*
11 *Litig.*, 829 F. Supp. 1176, 1179 (N.D. Cal. 1993). The district court must explore these
12 factors comprehensively to survive appellate review but “the decision to approve or reject
13 a settlement is committed to the sound discretion of the trial judge.” *Hanlon*, 150 F.3d at
14 1026.

15 Furthermore, courts must give “proper deference to the private consensual decision
16 of the parties.” *Id.* at 1027. Settlement is the preferred means of dispute resolution,
17 particularly in complex class litigation. *Officers for Justice v. Civil Serv. Comm’n*, 688
18 F.2d 615, 625 (9th Cir. 1982) (class action suit challenging allegedly discriminatory
19 employment practices by a police department). “[T]he court’s intrusion upon what is
20 otherwise a private consensual agreement negotiated between the parties to a lawsuit must
21 be limited to the extent necessary to reach a reasoned judgment that the agreement is not
22 the product of fraud or overreaching by, or collusion between, the negotiating parties, and
23 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
24 *Hanlon*, 150 F.3d at 1027. Thus, a district court’s decision to approve a class action
25 settlement may be reversed “only upon a strong showing that the district court’s decision
26 was a clear abuse of discretion.” *Id.*

27 Here, the settlement agreement should be approved because it provides substantial
28 equitable relief to class members, and will ensure compliance by incorporating the existing

1 remedial process available in the *Coleman* case. Further, the outcome of the litigation is
2 uncertain. If the case had not settled, the Court would have heard Defendants’ pending
3 motion to dismiss. In addition to opposing that motion, Plaintiffs were prepared to file a
4 motion for class certification. While the requirements for certification are met here,
5 Plaintiffs faced burdens due to the changes in CDCR policies and in the status of named
6 Plaintiffs that have occurred during the multi-year stay on litigation issued by the Court.
7 Proceeding through pre-trial motions, trial, and appeal would impose risks and costs, and
8 would substantially delay the implementation of mutually agreed remedies in this matter.
9 Given the relief achieved and the risks involved in further litigation, the negotiated
10 settlement represents a fundamentally “fair, reasonable and adequate” resolution of the
11 disputed issues and should be preliminarily approved. *See* Fed. R. Civ. Pro. 23(e)(2).

12 **III. THE PARTIES’ STIPULATED ORDER SHOULD BE ENTERED BY THE**
13 **COURT**

14 Because the parties have reached a fair, reasonable and adequate settlement, one
15 providing substantial equitable relief to a class of thousands, the Court should enter the
16 requested stipulated order. Specifically, the Court should order conditional certification of
17 an injunctive relief settlement class and preliminary approval of the settlement agreement.
18 Further, the Court should approve the parties’ proposed notice, and should schedule a
19 hearing on final approval. These matters are set forth in the parties’ proposed stipulated
20 order. The proposed order provides that Defendants will certify that notice has been be
21 posted in locations accessible to all CDCR prisoners with thirty days of the entry of the
22 Order, and that copies of the full settlement agreement will be available in each CDCR

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1 library. The Order also provides for a sixty day period of notice for class members to
2 provide comment to the Court in advance of a hearing for final approval.

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DATED: August 5, 2014

Respectfully submitted,
ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Michael W. Bien
Michael W. Bien

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DATED: August 5, 2014

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