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16 **THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
17 **IN AND FOR CARSON CITY**

18 DIANE DAVIS, JASON LEE ENOX,
19 JEREMY LEE IGOU, and JON WESLEY
TURNER II, on behalf of themselves and all
others similarly situated,

20 Plaintiffs,

21 vs.

22 STATE OF NEVADA; STEVE SISOLAK,
23 Governor, in his official capacity,

24 Defendants.

Case No. 170C002271B

Dept. No. II

**PLAINTIFFS' NOTICE OF MOTION
AND UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT AND APPROVAL OF
CLASS NOTICE PROGRAM;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that Plaintiffs Diane Davis, Jason Lee Enox, Jeremy Lee
3 Igou, and Jon Wesley Turner II, on behalf of themselves and all class members, by and through
4 the undersigned counsel, hereby move this Court at Department No. II of the First Judicial
5 District Court of the State of Nevada in and for Carson City for the entry of an Order granting
6 preliminary approval of the proposed settlement with Defendants State of Nevada and Governor
7 Steve Sisolak. Plaintiffs bring this motion pursuant to Nevada Rule of Civil Procedure (“Rule”)
8 23. The grounds for this motion are that the proposed settlement with Defendants easily falls
9 within the range of possible final approval, contains no obvious deficiencies, and is the result of
10 serious, informed, and non-collusive negotiations. Defendants do not oppose this motion.

11 In addition, Plaintiffs move for approval of their proposed class notice program to provide
12 notice of the proposed settlement to the class members. As discussed more fully below, Plaintiffs’
13 proposed class notice program satisfies Rule 23 and complies with due process. Plaintiffs’ plan
14 provides posting of the notice in the common areas of each detention center in the Rural Counties
15 and individual delivery of the notice to those inmates who do not have access to such areas. The
16 posting notice plan is supplemented by a publication program to notify out-of-custody class
17 members, along with individual distribution of the notice at each class member’s following court
18 appearance. To notify incoming class members, the notice plan provides posting the notice
19 wherever arraignments are held in each of the Rural Counties, with additional copies of the notice
20 available upon request. Taken together, the plan exceeds the requirements of Rule 23 and satisfies
21 any due process concerns and will fairly apprise the class members of the existence of the
22 settlement and their options under it.

23 This motion is based upon this notice of motion and motion, the supporting memorandum
24 of points and authorities, the declaration of Matthew R. Cowan and the exhibits attached thereto,
25 which include the settlement agreement and proposed notice, and the pleadings and documents on
26 file in this action, and all evidence and argument that are properly brought before the Court at or
27 before the hearing on this motion.

28 //

1
2 Dated: July 7, 2020

O'MELVENY & MYERS LLP

3
4 

Matthew R. Cowan

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Diane Davis, Jason Lee Enox, Jeremy Lee Igou, and Jon Wesley Turner II move
4 for an order preliminarily approving the proposed settlement with Defendants State of Nevada
5 and Governor Steve Sisolak (collectively, “Defendants”). The parties reached this settlement only
6 after more than two years of hard-fought litigation and extensive arm’s-length negotiations, and
7 Plaintiffs believe the settlement is in the best interests of the class. *See* Declaration of Matthew R.
8 Cowan (“Cowan Decl.”) ¶ 2. The Court should preliminarily approve the proposed settlement.

9 At the preliminary approval stage, the Court must only determine whether the settlement
10 falls within the range of possible approval and appears to be the product of serious, informed, and
11 non-collusive negotiations; the Court is not asked to make a final determination whether to
12 approve the settlement. Here, the settlement establishes a system for monitoring the provision of
13 indigent defense services in the Rural Counties¹ and reporting attorney workloads. The settlement
14 also requires the Defendants to conduct a Delphi study to identify appropriate attorney workload
15 standards, which the Defendants must comply with and incorporate into the State’s standard
16 indigent defense contract—which the Executive Director of the Department of Indigent Services
17 (the “Executive Director”) must establish under the settlement. Additionally, the County contracts
18 for the provision of indigent defense must be approved by the Executive Director (or a designee)
19 prior to execution. The settlement also requires that the class members be represented by counsel
20 at initial appearances and/or arraignments. Lastly, the settlement requires that Defendants
21 establish a system for issuing client surveys to indigent defendants and incorporating client
22 survey feedback into Defendants’ responsibility for reviewing the manner in which indigent
23 defense services are provided throughout the State. In short, this settlement—if finally
24 approved—will bring an end to this litigation and significantly improve the provision of indigent
25 services in the State. This settlement easily meets the standard for preliminary approval and
26 should be approved.

27 _____
28 ¹ “Rural Counties” means the following Nevada counties: Churchill, Douglas, Esmeralda, Eureka,
Lander, Lincoln, Lyon, Mineral, Nye, and White Pine.

1 Plaintiffs' proposed notice program should also be approved. The proposed notice
2 program is a robust, multifaceted program that is tailored to the specific nature of the settlement
3 and class at issue in this litigation and delivers plain and easy-to-understand information about the
4 settlements. Specifically, the notice program includes (1) publication notice in local newspapers,
5 (2) publication at arraignment locations, (3) publication in the common areas of detention centers
6 with individual distribution to inmates without access to such areas, and (4) individual
7 distribution at court appearances. Considering that many class members are incarcerated or have
8 not yet qualified for the class, this comprehensive approach provides the class with the best notice
9 practicable under the circumstances and satisfies Rule 23 and due process. Plaintiffs' notice
10 program will fairly apprise potential class members of the existence of the above-referenced
11 settlement and their options in relation to the settlement. Accordingly, the Court should approve
12 Plaintiffs' proposed notice program and establish a schedule for a final settlement approval
13 hearing.

14 **II. FACTUAL BACKGROUND**

15 Plaintiffs, on behalf of themselves and all other indigent defendants in the Rural Counties,
16 filed the above-captioned action (the "Action") against the State of Nevada and Governor Steve
17 Sisolak, challenging, *inter alia*, the constitutionality of Defendants' policies and practices
18 regarding Defendants' system of indigent defense in Nevada's Rural Counties.

19 Plaintiffs filed their First Amended Complaint on October 15, 2018; Defendants filed their
20 Answer to Plaintiffs' First Amended Complaint on November 15, 2018; Plaintiffs filed their
21 Amended Motion for Class Certification on December 14, 2018; Defendants filed their
22 Opposition to Plaintiffs' Amended Motion for Class Certification on April 22, 2019; and
23 Plaintiffs filed their Reply in Support of their Motion for Class Certification on May 24, 2019.
24 Plaintiffs alleged in their complaint and motion for class certification that Defendants' system of
25 delegating the provision of indigent defense services to the Rural Counties fails to provide
26 meaningful representation in all the Rural Counties and thus violates the U.S. and Nevada
27 constitutions. Specifically, the Plaintiffs alleged that the provision of indigent defense services in
28 Nevada had no oversight mechanisms and permitted a contract system that dis-incentivized

1 zealous representation. *See* Mot. for Class Cert. at 6-7; Compl. ¶¶ 123-35, 135-53.

2 On June 3, 2019, the Nevada legislature passed Assembly Bill 81 (“AB 81”),² that
3 (1) acknowledges the State’s obligation to provide effective representation to accused indigent
4 persons at each critical stage of criminal and delinquency proceedings and further acknowledges
5 the State’s obligation to provide the general framework and resources necessary for the provision
6 of indigent defense services³; (2) establishes an independent Board on Indigent Defense Services
7 (“Board”) and Department of Indigent Defense Services (“Department”) charged with oversight
8 and regulation of indigent defense services throughout the State; and (3) was signed into law by
9 the Governor on June 7, 2019 as Chapter 485, Statutes of 2019.

10 This Court granted Plaintiffs’ Motion for Class Certification on June 14, 2019. The
11 certified class consists of all persons who are now or who will be under formal charge before a
12 state court in a Rural County of having committed any offense, the penalty for which includes the
13 possibility of confinement, incarceration, imprisonment, or detention in a correctional facility
14 (regardless of whether actually imposed) and who are unable to pay for an attorney based on their
15 indigence.

16 On April 30, 2020, the Interim Finance Committee (“IFC”) approved certain expenditures
17 for the Department, allowing it to accelerate implementation of AB 81 in the interim period prior
18 to the 2021-2023 biennial budget to both create the framework contemplated for the Department
19 while also addressing certain immediate economic-incentive issues that Plaintiffs contend must be
20 immediately addressed because of the State’s obligation under the Sixth and Fourteenth
21 Amendments to the U.S. Constitution; Article 1, Section 8 of the Nevada Constitution; and
22 AB 81’s acknowledgment that the State remains responsible for ensuring that indigent defense
23 services are properly funded. Following IFC’s approval and all other necessary approvals, the
24 requested funds were made available to the Department.

25 _____
26 ² Codified at Nevada Revised Statutes (“NRS”) § 180.002 *et seq.*

27 ³ *See* NRS § 180.320 2.(a) (the Board shall “[e]stablish minimum standards for the delivery of
28 indigent defense services to ensure that such services meet the constitutional requirements and do
not create any type of economic disincentive or impair the ability of the defense attorney to
provide effective representation”).

1 Without any admission of fault or wrongdoing, and without conceding or otherwise
2 expressing any position on any legal issue or argument previously raised in this Action, the
3 parties wish to settle the Action and all disputes arising therein as among them, in order to avoid
4 the cost, difficulty, and uncertainty associated with further litigation while implementing AB 81
5 to improve indigent defense in the Rural Counties for the certified class. Defendants deny
6 Plaintiffs' allegations in this Action. Defendants specifically deny that the State has failed to carry
7 out any constitutional duty whatsoever in relation to the claims and allegations asserted in this
8 Action, and further deny that any act, omission, law, or policy of the State has caused or will
9 cause any harm to Plaintiffs or those whose rights they claim to protect in this Action.

10 In that context, the parties have engaged in extensive settlement negotiations with the
11 Defendants. Cowan Decl. ¶ 4. The parties held multiple meetings by phone and in-person as well
12 as exchanged information and settlement proposals. *Id.* The proposed settlement was arrived at
13 only after both sides had the opportunity to be fully informed of litigation risks and the relative
14 strengths and weaknesses of their positions. *Id.* The proposed settlement will resolve this case
15 short of trial and ensure prospectively that the class receives representation that is both effective
16 and in compliance with all relevant professional and ethical standards at every critical stage.
17 Specifically, the parties agree that such effective representation shall include timely and frequent
18 client communication; meaningful representation of indigent defendants at initial appearances,
19 bail and bail reduction hearings, and preliminary hearings; timely review of discovery; sufficient
20 case investigation in order to determine the relative strengths and weaknesses of the state's case;
21 retention of qualified experts whenever necessary to provide effective representation; robust
22 pretrial motion practice; timely and thorough preparation for trial; timely and thorough
23 preparation for sentencing; and competent direct appeal advocacy. *See id.*, Ex. 1, Settlement
24 Agreement.

25 Plaintiffs assert that the class continues to be harmed by the status quo. Plaintiffs and
26 Defendants agree that there is an urgent need to forgo additional litigation so that the terms of the
27 settlement can be implemented and help improve indigent defense in the Rural Counties. The
28 parties also agree that the terms of the proposed settlement are in the public interest and the

1 interests of the class and that the proposed settlement upon the order of the Court is the most
2 appropriate means of resolving this action. Additionally, the parties agree that the Department of
3 Indigent Defense Services, created by AB 81, is best suited to implement, on behalf of
4 Defendants, certain obligations arising under the proposed settlement.

5 **III. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE**
6 **SETTLEMENT**

7 Preliminary approval is the first step in the class action settlement process. *Newberg on*
8 *Class Actions* § 13:10 (5th ed.). At the preliminary approval stage, the Court is not asked to make
9 a final determination as to whether or not to approve the settlements. *G.F. v. Contra Costa Cty.*,
10 2015 WL 4606078, at *8–9 (N.D. Cal. July 30, 2015)⁴. Rather, the Court needs only to “make a
11 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms
12 and must direct the preparation of notice of the certification, proposed settlement, and date of the
13 final fairness hearing.” Manual for Complex Litigation, Fourth, § 21.632; *see also In re*
14 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). “In other words,
15 preliminary approval of a settlement has both a procedural and a substantive component.” *In re*
16 *Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079.

17 Here, the settlement meets the standards for preliminary approval because it is the result
18 of a fair process and is substantively reasonable and adequate. The Court should grant preliminary
19 approval of the proposed settlement.

20 **A. The Proposed Settlement Is the Result of a Fair Process**

21 A proposed settlement is procedurally fair where it “appears to be the product of serious,
22 informed, non-collusive negotiations.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079.
23 Courts have found that this factor favors preliminary approval where there are “[e]xperienced
24 counsel on both sides, each with a comprehensive understanding of the strengths and weaknesses
25

26 ⁴ In Nevada, “[f]ederal cases interpreting the Federal Rules of Civil Procedure ‘are strong
27 persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon
28 their federal counterparts.’” *See Exec. Mgmt. vs Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002)
(quoting *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119 (1990)).

1 of each party's respective claims and defenses" and the parties "negotiated th[e] settlement over
2 an extended period of time." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080.

3 Here, both parties are represented by highly skilled counsel who are knowledgeable of the
4 law and have extensive experience with complex lawsuits. Cowan Decl. ¶ 6. Additionally, the
5 settlement is the result of serious and informed negotiations considering the likelihood of success
6 in this litigation. Throughout this litigation, Defendants have vigorously contested this case,
7 challenging Plaintiffs' legal theories of liability, whether the facts support liability, and the
8 remedies for which Defendants may be liable. *Id.* ¶ 5. In other words, at the time of reaching this
9 settlement, Plaintiffs and Defendants were well-informed about the facts, remedies, and defenses
10 relevant to this litigation.

11 Moreover, Plaintiffs and Defendants have been heavily litigating this case for more than
12 two years and have been negotiating a settlement over the extended period of time of 6 months.
13 *Id.* ¶ 4. There has also been no collusion between the parties. *Id.* ¶ 7.

14 The procedural fairness throughout the settlement process warrants preliminary approval
15 of the proposed settlement.

16 **B. The Proposed Settlement Is Reasonable and Adequate**

17 The substance of a proposed settlement is reasonable and adequate where it (1) has no
18 obvious deficiencies; (2) does not improperly grant preferential treatment to class representatives
19 or segments of the class; and (3) falls within the range of possible approval." *In re Tableware*
20 *Antitrust Litig.*, 484 F. Supp. 2d at 1079. The proposed settlement here meets all of these
21 elements:

22 ***No obvious deficiencies in the settlement.*** There are no deficiencies, let alone obvious
23 deficiencies, in the settlement. Indeed, the proposed settlement includes measures to remedy *all*
24 alleged deficiencies in the State's provision of indigent defense services to the Rural Counties
25 that Plaintiffs identified in their complaint. For example, the settlement provides meaningful
26 oversight mechanisms to monitor the provision of indigent defense services and requires the
27 Defendants to construct a standardized contract that incorporates workload standards to
28 incentivize zealous representation. Compl. ¶¶ 123-24, 135.

No preferential treatment. The proposed settlement provides *no* preferential treatment to any class representative or any segment of the class. Under the settlement, all class members will be equally entitled to receive indigent defense services that are subject to the reform mechanisms proposed in the settlement. Accordingly, this element weighs in favor of preliminary approval.

Settlement falls within the range of possible approval. “To evaluate adequacy, courts primarily consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080. As already stated above, the settlement took into consideration that, throughout this litigation, Defendants have vigorously contested this case and challenged Plaintiffs’ legal theories of liability and the facts underlying such liability. *See* Subsection III.A. Moreover, the settlement lays out measures to remedy each of the State’s deficiencies that Plaintiffs identified in their complaint. For these reasons, the proposed settlement falls within the range of possible approval and should be preliminarily approved.

* * *

Because the proposed settlement is both the result of a fair process and is substantively reasonable and adequate, the Court should grant preliminary approval of the proposed settlement.

IV. THE COURT SHOULD APPROVE PLAINTIFFS' NOTICE PROGRAM

Rule 23 requires that notice be given “to all members of the class in such manner as the court directs.” *See* Rule 23; see also Fed. R. Civ. P. 23(e)(1) (“The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.”). Notice of a proposed settlement is adequate and satisfies Rule 23 and due process if it “fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.” *Walsh v. CorerPower Yoga LLC*, No. 16-cv-05610-MEJ, 2017 U.S. Dist. LEXIS 20974 (N.D. Cal. Feb. 14, 2017) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974)); *see also* Newberg on Class Actions § 8:15 (5th ed.) (“[N]otice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”) (internal quotation marks omitted); Manual for Complex Litigation, Fourth, § 21.311, at 289

1 (Class notice must afford potential class members the ability to “make an informed decision about
2 their participation [in the litigation].”).

3 Here, Plaintiffs’ proposed notice program meets the requirements of both Rule 23 and due
4 process and should be approved.

5 **A. Notice Program Elements**

6 **1. In-Custody Class Members**

7 To notify class members who are in custody, the notice program includes posting the
8 notice in the common areas of all the detention centers in the rural counties, namely, Churchill
9 County Detention Center, Douglas County Jail, Esmeralda County Jail, Eureka County
10 Detentions Facility, Lander County Jail, Lincoln County Detention Center, Lyon County Jail,
11 Mineral County Detention Facility, Nye County Detention Center, Pershing County Jail, and
12 White Pine County Jail. County officials will be requested by the parties to personally deliver the
13 notice to the class members who are in custody at these facilities and unable to access the
14 common areas.

15 **2. Out-of-Custody Class Members**

16 To notify out-of-custody class members, the notice program includes print advertisements
17 in local newspapers that distribute to the rural counties, namely, the Las Vegas Review-Journal,
18 Las Vegas Sun, Reno Gazette-Journal, Elko Daily Free Press, Battle Mountain Bugle, Lahontan
19 Valley News, Nevada Legal Press, Pahrump Valley Times, the Record-Courier, and Tonopah
20 Times-Bonanza.

21 Additionally, every judge in the Rural Counties will be provided with copies of the notice
22 and will be requested by the parties to distribute the notice to every criminal defendant appearing
23 in court.

24 **3. Incoming Class Members**

25 To notify incoming class members, the notice program includes posting the notice in a
26 visible location in every location where arraignments are held in each of the Rural Counties.
27 Additional copies of the notice will also be available to provide to any individual upon request.
28

1 **B. Plaintiffs' Proposed Notice Program Comports with the Requirements of**
2 **Rule 23 and Due Process**

3 While Rule 23 requires that reasonable efforts be made to reach all class members, it does
4 not require that each individual actually receive notice. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th
5 Cir. 1994). A class settlement notice satisfies due process if it contains a summary sufficient to
6 “apprise interested parties of the pendency of the action and to afford them an opportunity to
7 present their objections.” *UAW v. GMC*, 497 F.3d 615, 629 (6th Cir. 2007) (quoting *Mullane v.*
8 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). A settlement notice need only be a
9 summary, not a complete source of information. *See, e.g., Petrovic v. AMOCO Oil Co.*, 200 F.3d
10 1140, 1153 (8th Cir. 1999); *In re “Agent Orange” Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145,
11 170 (2d Cir. 1987); *Mangione v. First USA Bank*, 206 F.R.D. 222, 233 (S.D. Ill. 2001).

12 Plaintiffs’ proposed notice program meets these standards. More specifically, the notice
13 program has many components that make it a thorough, multilayered notice approach designed to
14 reach as many class members—across multiple circumstances—as possible. This approach is
15 adequate and reasonable under the circumstances. *Ross v. Trex Co.*, 2013 U.S. Dist. LEXIS
16 29081, at *6 (N.D. Cal. Mar. 4, 2013) (“Courts have consistently recognized that due process
17 does not require that every class member receive actual notice Due Process does not entitle a
18 class member to ‘actual notice,’ but rather to the best notice practicable, reasonably calculated
19 under the circumstances to apprise him of the pendency of the class action and give him a chance
20 to be heard.”); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216,
21 231 (D.N.J. 1997) (“Courts have consistently recognized that due process does not require that
22 every class member receive actual notice so long as the court reasonably selected a means likely
23 to apprise interested parties.”); *Bissonette v. Enter. Leasing Companywest*, No. 10-CV-00326-
24 LRH-WGC, 2014 U.S. Dist. LEXIS 132634 (D. Nev. Sept. 22, 2014) (“Under this ‘best notice
25 practicable’ standard, courts retain considerable discretion to tailor notice to the relevant
26 circumstances . . .”).

27 Additionally, the contents of the notices themselves are provided in plain language that is
28 understandable to the class. Cowan Decl., Ex. 2. The proposed notice includes (1) the case name

1 and case number; (2) a description of the case; (3) a description of the class; (4) a description of
2 the settlement agreement; (5) the name of Plaintiffs' counsel; (6) the final approval hearing date;
3 (7) information about the final approval hearing; (8) information about the deadline for filing
4 objections to the settlement agreements; (9) the consequences of the settlement; and (10) and how
5 to obtain further information about the case and the proposed settlement agreement. *Id.* The
6 notice includes all of the information required to afford the class members an opportunity to
7 object to the proposed settlement.

8 **C. The Court Should Establish a Schedule for the Notice Program and Final**
9 **Approval of the Settlement**

10 If the Court grants preliminary approval of the settlement and approves the class notice
11 program, a schedule should be established for the completion of the notice program, objections
12 and requests for exclusion, and for final approval of the settlement. Plaintiffs propose the
13 following schedule:

| Event | Time |
|----------------------------------------------------------------|----------------------|
| Publication and Individual Delivery at Court Appearances Begin | 30 days after Order |
| Publication and Individual Delivery at Court Appearances End | 60 days after Order |
| Exclusion and Objection Deadline | 80 days after Order |
| Motion for Final Approval and Response to Objections (if any) | 110 days after Order |
| Reply in Support of Motion for Final Approval | 130 days after Order |
| Final Approval Hearing | 150 days after Order |

23 **V. CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order
25 preliminarily approving the proposed settlement with Defendants and approving Plaintiffs' class
26 notice program.

27 //

28 //

1
2 Dated: July 7, 2020

O'MELVENY & MYERS LLP

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