

1 BARRETT S. LITT, SBN 45527
 blitt@kmbllaw.com
 2 DAVID S. McLANE, SBN 124952
 dmclane@kmbllaw.com
 3 LINDSAY BATTLES, SBN 262282
 lbattles@kmbllaw.com
 4 KAYE, MCLANE, BEDNARSKI & LITT
 5 975 East Green Street
 Pasadena, California 91106
 6 Telephone: (626) 844-7600
 7 Facsimile: (626) 844-7670

8 MELISSA GOODMAN, SBN 289464
 E-Mail: MGoodman@aclusocal.org
 9 BRENDAN M. HAMME, SBN 285293
 E-Mail: BHamme@aclusocal.org
 10 PETER J. ELIASBERG, SBN 189110
 E-Mail: PEliasberg@aclusocal.org
 11 AMANDA C. GOAD, SBN 297131
 AGoad@aclusocal.org
 12 ADITI FRUITWALA, SBN 300362
 AFruitwala@aclusocal.org
 13 ACLU Foundation of Southern CA
 14 1313 West 8th Street
 Los Angeles, California 90017
 15 Telephone: 213-977-9500
 16 Facsimile: 213-977-5299
 17 Attorneys for Plaintiffs

18 UNITED STATES DISTRICT COURT
 19 CENTRAL DISTRICT OF CALIFORNIA

20 DAN MCKIBBEN, et al.,
 21 Plaintiff,
 22 v.
 23 JOHN MCMAHON, et al.,
 24 Defendants.

Case No. CV-14-2171-JGB-SP
 [Honorable Jesus G. Bernal]

**DECLARATION OF BARRETT S.
 LITT IN SUPPORT OF MOTION
 FOR FINAL APPROVAL OF CLASS
 ACTION SETTLEMENT**

25
 26
 27
 28

1 I, **BARRETT S. LITT**, declare:

2 1. This declaration is submitted in support of Plaintiffs' Motion for Final
3 Approval of Class Action Settlement. The facts set forth herein are within my personal
4 knowledge or knowledge gained from review of the pertinent documents. If called upon,
5 I could and would testify competently thereto. I have previously filed declarations in this
6 case in connection with Plaintiffs' motions for class certification, preliminary approval of
7 settlement and attorneys' fees, whose contents are incorporated by this reference. Where
8 specifically relevant to the current motion, I repeat information provided in earlier
9 declarations.

10 2. Plaintiffs' counsel received extensive document discovery in this case, as
11 well as informal discovery through information provided by the Defendants, and
12 reviewed it to determine to what extent, if at all, Defendants had any policies addressing
13 equal treatment and what the documents revealed about the practices in the ALT. The
14 documents and informal discovery we believe supported Plaintiffs' contentions that GBT
15 inmates 1) were automatically placed in the ALT if they self-identified as GBT; 2) that
16 GBT inmates are at risk for their safety if admitted to the general population as openly
17 GBT inmates because SBCSD did not have adequate plans or programs to ensure their
18 safety; 3) had inadequate PREA protections in place to ensure the safety of PREA-
19 vulnerable, GBT inmates assigned to the general population; 4) were limited in their
20 time-out-of-cell generally to an hour and a half per day when plaintiffs' counsel first
21 investigated the ALT, and received substantially less time out of cell than general
22 population inmates due to the fact they received their time out of cell based on their
23 designation as ALT inmates and not based on their security classification like similarly
24 situated general population inmates; 5) GBT inmates were denied the same work
25 opportunities that were provided to similarly situated (by classification or sentencing
26 status) general population inmates; 6) GBT inmates were denied the same programming
27
28

1 opportunities¹ including in person classes, substance abuse programming and educational
2 classes that were provided to similarly situated (by classification or sentencing status)
3 general population inmates; and 7) a GBT inmates were denied a comparable range of
4 religious services to those available to the general population. While there were factual
5 disagreements on certain specifics, there was not disagreement on the basic fact that, for a
6 long time, time out of cell had been disparate between ALT inmates and similarly
7 situated general population inmates, and that ALT inmates had significantly less
8 programming and work opportunities than did similarly situated general population
9 inmates.

- 10 a. Plaintiffs' counsel reviewed the underlying discovery provided by the
11 Defendants. There were no policies or other documents addressing how
12 SBCSD was to ensure the safety of GBT inmates placed in the general
13 population.
- 14 b. Similarly, there were no policies addressing mechanisms for securing the
15 safety of inmates assessed to be vulnerable under PREA standards.
- 16 c. The documents provided by Defendants established that the norm for
17 general population tier times was 8-12 hours out of cell per day for low
18 level offenders (i.e., those with higher classification scores of 6-7) and were
19 4-6 hours out of cell per day for higher-level offenders (i.e., those with
20 classification scores 3-5).
- 21 d. The documents provided by Defendants established that sentenced general
22 population could work (if qualified) and participate in vocational training,

23 ¹ Programming opportunities include classes in anger management, thinking for change, living
24 skills, parenting skills, substance abuse, an "In Roads" program only available to general
25 population inmates at Glen Helen Detention Center, GED, high school diploma, literacy,
26 automobile mechanics, bakery occupations, culinary/reading enrichment classes, computer
27 skills, HVAC training, fire camp vocational training, employment readiness, and re-entry
28 services.

1 and pre-sentenced general population inmates could act as volunteer
2 workers (sometimes referred to as “trustees”), but there were no work or
3 trustee positions for GBT inmates held in the ALT (except that, after
4 complaints by Pedro Guzman, they created the one and only job for GBT
5 inmates in the ALT, which had no vocational training component unlike
6 work positions for general population inmates).

7 e. The documents provided by Defendants established that ALT inmates
8 uniformly were unable to avail themselves of the various programs,
9 including substance abuse classes (Alcoholics Anonymous and Narcotics
10 Anonymous), GED classes, high school diploma classes, educational
11 classes, the in-person format of “INROADS” program courses offered to
12 inmates at the Glen Helen Detention Center, all of which were available to
13 similarly situated general population inmates.

14 f. The documents provided by Defendants established that general population
15 inmates had a variety of religious services available to them in contrast to
16 the limited ones available to GBT inmates in the ALT.

17 Defense counsel provided informal supplemental discovery addressing issues in
18 the litigation and providing information about general population conditions as well as
19 conditions in the ALT, as well as numerous policy materials.

20 3. The parties held three in person settlement conferences before the Hon.
21 Carla Woehrle (Ret.), as well as numerous discussions among or between counsel for the
22 parties and Judge Woehrle. In addition, counsel for the parties met on several occasions
23 to reach agreement on the Injunctive Relief terms. From early in the case, the parties
24 entered into settlement negotiations with the assistance of Hon. Carla Woehrle (Ret.), as
25 well as numerous discussions among or between counsel for each side and Judge
26 Woehrle. Numerous mediation sessions were held, both with Magistrate Judge Woehrle
27 and directly between the parties. Agreements were reached in phases – first injunctive
28

1 relief, then the damages class fund and finally attorney's fees (which were the subject of
2 a mediator's proposal). Judge Woehrle was involved at each stage.

3 4. In addition, counsel for the parties met on several occasions to reach
4 agreement on the Injunctive Relief terms. Agreements were reached in phases – first
5 injunctive relief, then the damages class fund and finally attorney's fees (which were the
6 subject of a mediator's proposal). Judge Woehrle was involved at each stage. After
7 extensive arms-length negotiations, the parties reached a settlement, which is contingent
8 on this Court's approval. That settlement was the product of a mediator's proposal made
9 by Judge Woehrle.

10 5. The agreed upon attorney's fees of \$1,100,000 (including certain costs) were
11 independently negotiated with the assistance of Judge Woehrle. Plaintiffs' lodestar
12 amounted to approximately \$2.5 Million or more **before** the work involved in conferring
13 with the class representatives, finalizing the settlement agreement and filing all the
14 necessary pleadings. Even if the hours were discounted by 10% for duplication of effort,
15 and rates were cut 20%, the lodestar would approach \$2 Million when all the work is
16 completed. Thus, the attorneys agreed to a very substantial discount beyond any
17 reasonable assessment of a reasonable fee award and did so to advance the interests of the
18 class, particularly the injunctive relief class, due to what Plaintiffs' counsel considered a
19 model injunctive relief remedy. See Motion for Attorneys' Fees and accompanying
20 exhibits for further details. Doc. 86.

21 6. The proposal for incentive awards was at Class Counsel's initiative, and no
22 discussion or agreement regarding incentive awards occurred with the Named Plaintiffs
23 until the proposed settlement was reached, and the proposed incentive awards to each
24 Named Plaintiff reflects counsel's assessment (after discussion with each of the class
25 representatives) of the contribution of various individual Class Representatives. While
26 there is a larger than normal number of class representatives, that is due to Class
27 Counsel's judgment that there were several categories of class representatives needed in
28 order to include people in custody with standing to seek injunctive relief, as well as

1 people not in custody in order to have damages class representatives who were not
2 subject to PLRA restrictions. It was also Class Counsel's judgment that they needed a
3 larger than usual number of class representatives due to the variety of deprivations at
4 which the Complaint was aimed (e.g., drug treatment, mental health treatment, education,
5 work opportunities, religious programming), for each of which it was important to have a
6 class representative who personally experienced that deprivation, as well as to encompass
7 the perspectives of both gay/bisexual men and transgender women who spent time in the
8 ALT. These figures are well within the range of acceptable incentive payments to class
9 representatives for which the Court has discretion in recognition of work done on behalf
10 of the class and in consideration of the risk undertaken in bringing the action.

11 Here, all Plaintiffs were (either at the time of the filing of the complaint or
12 previously) in San Bernardino custody. Those who were presently in custody obviously
13 took a risk of retaliation, and those not in custody were still at risk of re-arrest and
14 retaliation in that event. All Named Plaintiffs put their names out in the public arena.
15 Plaintiffs' counsel spent dozens of hours interviewing primarily class representatives (and
16 secondarily other class members) while they were in custody, potentially increasing their
17 risk and their personal participation in the litigation.

18 7. The settlement and injunctive relief agreement provide that policies will be
19 agreed to between the parties, with the court retaining jurisdiction to resolve differences
20 if they cannot be agreed to. Settlement Agreement, ¶ 15; Injunctive Relief Agreement §
21 9.1. The parties have agreed that Defendants will begin implementing the Order as soon
22 as the Order of Approval is entered. Regarding the policies to be developed, the parties
23 have also agreed San Bernardino will provide draft policies within 60 days of the
24 effective date of the settlement (which is the date the order is entered since there are no
25 objections, at least to date, and thus no potential appeal). After receipt of the proposed
26 policies, plaintiffs will respond in writing within 45 days. The parties will then meet on
27 one or more occasions in an effort to resolve any differences of opinion. If there remain
28 unresolved issues after six months from the effective date of the settlement, they shall be

1 brought to the court's attention by a joint status report setting out the issues and each
2 side's position (along with any relevant documents). The status report shall request a
3 hearing date for the court to resolve the outstanding issues. These provisions are
4 contained in the proposed Final Approval Order.

5 8. Although we sent out more requests for bids, we obtained bids from two
6 experienced class action administrators – KCC and JND Legal Administration. (Others
7 declined.) Both are experienced administrators, and I have used both in other cases. The
8 more cost-effective bid came from JND, which we chose as the Administrator. The class
9 notice advised the class that the maximum estimated cost of the class administration,
10 including everything, was \$40,000 (which, based on the information we have received
11 from JND, is their final request). When added to the proposed \$60,500 in incentive
12 awards and the estimated \$36,304.49 for expert/ consulting and mediation costs, the
13 Class Damages Fund amounts to approximately \$813,195.51 for distribution under the
14 class formula, an average (mean) payout of in the range of \$1200-1300 if all class
15 members filed claims. (How much for individual class members will of course vary
16 depending on the length and timing of custody and other factors.) This figure assumes
17 that every class member files a claim, which experience shows does not happen. In my
18 experience in settling several jail class actions, a claims rate of 20% is generally
19 considered good. In this case, the claims rate is in the 25% range. This means that the
20 average (mean) payout to claiming class members is in the \$4000-\$5000 range, which
21 compares very favorably with jail strip search and over-detention settlements.

22 9. In general, smaller class sizes such as this result in higher average
23 settlements than larger ones. Even factoring that in, this is a favorable settlement. For
24 example, the *Williams* and *Craft* over-detention and strip search settlements mentioned in
25 my previous declarations resulted in an average payout of under \$1000 for illegal over-
26 detentions and/or strip searches. The *Barnes* settlement, also mentioned in my previously
27 filed declarations, is not yet fully tallied, but will likely result for illegal over-detentions
28 and strip searches in an average recovery of \$2000-\$2500 for class members. The protest

1 cases mentioned in my previously filed declarations (*MIWON* and *Aichele*) generally
2 resulted in higher average returns, but that was for smaller classes and included
3 compensation for illegal arrests, and the illegal refusal to release people (none of whom
4 were ever charged) on their Own Recognizance.

5 10. Plaintiffs' counsel consider the recovery for the class good but not
6 exceptional. Assuming an average recovery of approximately \$3000 for claiming class
7 members, this is nearly the amount of minimum statutory damages under California Civil
8 Code § 52.1. While, if Plaintiffs were to prevail, class members would be entitled to
9 damages, it is difficult to assess a likely recovery at trial; it is difficult to assess how
10 many class members would come forward if individual damages trials were required; and
11 there would be extensive litigation over the applicability of Civil Code § 52.1. As
12 mentioned above, Plaintiffs' counsel conclude that this settlement compares well with
13 other jail class action settlements.

14 11. There are some late claims. Plaintiffs' counsel was contacted by one of the
15 class representatives currently in custody in Los Angeles County Jail; this class
16 representative learned that there were some class members there who did not receive the
17 class notice. It is our understanding that they will be filing late claims, and there may be
18 some others as well. Plaintiffs' counsel recommend that they be accepted through the
19 date of the Final Approval Hearing given the relatively high recovery per class member
20 and the fact that at least some of these claimants only recently learned of the settlement.

21 12. Plaintiffs filed the motion for attorneys' fees on September 18, 2017, as
22 required by this Court's Preliminary Approval Order. That motion provided lodestar
23 cross-check information through August 31, 2017. Substantial additional work has
24 occurred since then and is ongoing. Since Plaintiffs have agreed to a flat fee far below
25 lodestar, there is no need to provide a full summary. Plaintiffs estimate that the additional
26 fees beyond those contained in the motion for fees will ultimately add between \$100,000-
27 \$125,000 to the lodestar.

28 I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 18, 2019, at Pasadena, California.

/s/ Barrett S. Litt _____
Barrett S. Litt

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28