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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 B.K. by her next friend Margaret Tinsley, et
10 al.,

11 Plaintiffs,

12 v.

13 Michael Faust, et al.,

14 Defendants.

No. CV-15-00185-PHX-ROS

ORDER

15 The parties have filed a Joint Motion for Preliminary Approval of the Parties'
16 Settlement Agreement. (Doc. 529.) This case was set for a bench trial to begin on August
17 25, 2020. On August 10, 2020, the parties filed a notice of settlement. (Doc. 521.) The
18 Court held a telephonic hearing on August 11, 2020, at which the parties recited the basic
19 principles of the settlement agreement. The Court raised concerns that the agreement was
20 too vague regarding Defendants' timeline for compliance with the terms of the agreement
21 and consequences for any potential breach of the agreement, and ordered a Mediator be
22 selected. (Doc. 523.) The parties revised the settlement agreement to include a termination
23 date, and the Court reviewed the revised settlement agreement and raised additional
24 concerns. (Docs. 526, 528.) The revised settlement agreement ("Settlement Agreement")
25 attached to the parties' Motion for Preliminary Approval as Exhibit 6 addresses the
26 concerns the Court had previously raised.

27 **BACKGROUND**

28 This Order (the "Preliminary Approval Order") incorporates by reference the

1 summaries of the litigation and the Settlement Agreement in the Motion for Preliminary
2 Approval, and the definitions in the Settlement Agreement. In brief, this lawsuit was
3 initiated by Plaintiffs on behalf of children in Arizona state foster care custody in February
4 2015. Defendants are the Director of the Arizona Department of Child Safety (“DCS”)
5 and the Director of the Arizona Health Care Cost Containment System (“AHCCCS”), in
6 their official capacities. Plaintiffs “alleged systemic failures with respect to behavioral
7 health services, physical and dental health services, the availability of appropriate family
8 placements, and the timeliness of investigations of abuse and neglect exposed foster
9 children to an unreasonable risk of harm and violated their federal statutory rights.” (Doc.
10 529 at 1.) Plaintiffs sought class certification and declaratory and injunctive relief under 42
11 U.S.C. § 1983.

12 In September 2017, the Court certified the General Class,¹ the Non-Kinship
13 Subclass,² and the Medicaid Subclass.³ (Doc. 363.) Defendants appealed class certification,
14 and the Ninth Circuit stayed discovery for over 15 months and affirmed the certification of
15 the General Class and the Non-Kinship Subclass, but reversed the certification of the
16 Medicaid Subclass. (Doc. 418.) Defendants petitioned for certiorari, which was denied.
17 (Doc. 492.) On remand, the Court recertified the Medicaid Subclass in October 2019. (Doc.
18 461.) Defendants petitioned the Ninth Circuit for permission to file a second interlocutory
19 appeal, but were denied. (Doc. 493.)

20 Over the course of the litigation, the parties engaged in extensive discovery and
21 multiple rounds of expert discovery. After producing and analyzing over 1.5 million
22 documents and 48 expert reports, the parties were prepared to use over 1400 exhibits, 13
23 expert witnesses, and dozens of other witnesses at trial. (Doc. 529 at 3–4, Doc. 529-3 at ¶
24 10, Doc. 514.) Two weeks before trial, the parties reached a settlement. (Doc. 521.)

26 ¹ All children who are or will be in the legal custody of DCS due to a report or suspicion
27 of abuse or neglect.

27 ² All members in the General Class who are not placed in the care of an adult relative or
28 person who has a significant relationship with the child.

28 ³ All members of the General Class who are entitled to early and periodic screening,
diagnostic, and treatment services under the federal Medicaid statute.

ANALYSIS

At the preliminary approval stage, a court “must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.” Manual for Complex Litigation, Fourth § 21.632 (2020).

I. Preliminary Settlement Approval

Under Rule 23(e), before approving a proposed settlement, the Court must evaluate the proposed settlement for fairness, reasonableness, and adequacy. Fed. R. Civ. P. 23(e)(2). At the preliminary approval stage, the Court need consider “only whether the settlement agreement ‘appears to be the product of serious, informed, non-collusive negotiations,’ is fair, . . . has no obvious deficiency,” and “falls within the range of possible approval.” *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 363 (D. Ariz. 2009) (quoting *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)). The Ninth Circuit in particular “put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, and ha[s] never prescribed a particular formula by which that outcome must be tested.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (citations omitted).

A. Serious, Informed, Non-Collusive Negotiations

The parties have litigated this case vigorously and in good faith for over five years, including extensive and disputed discovery, two interlocutory appeals to the Ninth Circuit, and a petition for certiorari in the Supreme Court. Dozens of expert reports were drafted and served, and the parties argued in depth the merits of Plaintiffs’ experts’ opinions in lengthy Daubert briefings. (Docs. 480–484, 489–490, 529-3 at ¶ 10.) The parties filed hundreds of pages of proposed findings of fact and conclusions of law. (Docs. 510, 512, 515.) And Plaintiffs filed a detailed pre-trial brief on the merits of their substantive due process claims. (Doc. 517.) By the time the parties reached settlement, the highly experienced counsel representing each side demonstrated a thorough understanding of the strengths and weaknesses of each claim. Class Counsel and the Class Representatives have

1 adequately represented the class throughout the length of the case, and adequately
2 represented the class for the purpose of entering into and implementing the Settlement
3 Agreement.

4 Furthermore, the parties had previously attempted settlement twice, but failed to
5 reach agreement, and this Settlement Agreement was the product of months of intense
6 arm's length negotiation, involving both lawyers and principals, and multiple rounds of
7 proposed settlement language. (Doc. 529 at 10, Doc. 529-3 at ¶¶11–12.) The Settlement
8 Agreement appears to be the product of serious, informed, non-collusive negotiations.

9 **B. Fairness, Obvious Deficiency, and Range of Possible Approval**

10 The Court must also consider whether the proposed settlement is fair, has no
11 obvious deficiency, and falls within the range of possible approval. Horton, 266 F.R.D. at
12 363. The Settlement Agreement contains no obvious deficiencies that would prevent
13 preliminary approval. Defendants have committed to making significant improvements to
14 the availability of behavioral health services, the timeliness of health care delivery, and the
15 availability of family foster care placement, among other improvements, and have
16 committed to performance measures that will show whether children are actually receiving
17 the services they are entitled to. This relief is adequate. The commitments to collect more
18 data, and to monitor the workload of the caseworkers who are essential to the smooth
19 functioning of the foster care system, are particularly positive signs, as the Court had
20 previously noted the lack of detailed and current data and ordered Defendants to “be
21 prepared to explain the changes in DCS reporting practices over the course of the litigation,
22 including why certain performance measures are no longer tracked,” at trial. (Doc. 499 at
23 11.) The Settlement Agreement, which will improve statewide policy and practice in a
24 manner that will benefit all class members equitably relative to each other, is fair. Finally,
25 the Settlement Agreement now includes a termination date and clear enforcement
26 mechanisms, including explicit remedies for violations, and thus falls within the range of
27 possible approval.

28 Because the “parties negotiated the amount of attorneys’ fees [to be] awarded class

1 counsel as a term of the settlement agreement[,] . . . the merits settlement [is conditioned]
2 upon judicial approval of the agreed-upon fees.” Staton v. Boeing Co., 327 F.3d 938, 969
3 (9th Cir. 2003). The Court, reviewing the attorneys’ fee provisions, must “adequately
4 police[.]” the “inherent tensions among class representation, defendants[’] interests in
5 minimizing the cost of the total settlement package, and class counsel’s interest in fees.”
6 Id. at 972 n.22. The rate structure of \$630/hour for partners and lead counsel; \$390/hour
7 for senior associates; \$325/hour for junior associates; and \$125/hour for paralegals and
8 support staff, while high for the Phoenix legal market, is appropriate for this labor-
9 intensive, complex case that included two Ninth Circuit appeals and a Supreme Court
10 certiorari petition.⁴ Furthermore, the negotiated agreement, reached through arms-length
11 negotiations, to settle all Plaintiff’s claims for attorneys’ fees and expenses, including any
12 claim under 42 U.S.C. § 1988, for \$6,500,000, preliminarily appears to be a reduction of
13 approximately 50% from the total fees and costs accrued, and to be consistent with recent
14 fee awards approved in analogous foster care reform class actions. The cap of \$150,000
15 per year for fees accrued in monitoring and validating Defendants’ compliance with the
16 settlement agreement also preliminarily appears to be reasonable.

17 Having reviewed the Settlement Agreement, the Court preliminarily approves the
18 Settlement Agreement as being fair, reasonable, and adequate within the meaning of Rule
19 23 of the Federal Rules of Civil Procedure.

20 **II. Notice and Final Fairness Hearing**

21 The Court finds that the proposed notice plan and the form of the proposed Notice
22 of Class Action Settlement, Doc. 529-6 (the “Notice”) fully satisfy the requirements of
23 Rule 23 of the Federal Rules of Civil Procedure and due process, and provide the best
24 notice practicable under the circumstances to members of the class. The specifics of the

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26 ⁴ Mr. Nomkin, Mr. Swindle, Mr. Ryerson, and Ms. Nyberg received higher rates in
27 February 2020 in the Superior Court of the State of Arizona, where the judge found their
28 “skill, experience and background” were “far, far above average” and they were “at or near
the top of the bar.” See Doc. 529-4 at 5; State of Arizona, ex rel. Mark Brnovich, Attorney
General vs. Arizona Board of Regents, et al., No. TX2019-000011 (Ariz. Tax Ct. Feb. 5,
2020), available at
<http://www.courtminutes.maricopa.gov/viewerME.asp?fn=Tax/022020/m9032088.pdf>.

1 notice plan require DCS to prominently post a copy of this Order and the Notice on the
2 website and to post physical copies of the Notice in conspicuous places in DCS offices.
3 The notice plan also requires DCS to email or mail copies of the Notice to DCS staff,
4 grantees, and contractors who provide case management services to class members; to the
5 last known address of the parents of class members who retain parental rights; to all
6 placement providers for children in DCS custody; to all class members in an independent
7 or transitional living arrangement or who are currently in an independent living program;
8 and to each person who serves as a Guardian ad Litem with respect to any class member.
9 Finally, the notice plan requires DCS to email or mail the Notice to the presiding judge of
10 each Arizona Superior Court or, if the county has a Juvenile Court, the presiding judge of
11 the Juvenile Court, as well as to each congregate care placement, group home, behavioral
12 health inpatient facility, and behavioral health residential facility utilized by DCS, and ask
13 that the Notice be disseminated to staff and posted in locations most likely to be seen by
14 class members and their legal representatives.

15 The schedule for notice to the Class, and final approval of the settlement agreement,
16 shall be as follows:

Event	Date
Completion of Notice Plan	November 23, 2020
Motion for Final Approval of the Parties' Settlement Agreement	December 21, 2020
Deadline to Submit Objections and Statements in Support	January 11, 2021
Deadline to Provide Notice of Intent to Appear at the Final Approval Hearing	January 11, 2021
Plaintiffs to Submit to the Court All Objections and Statements in Support	January 25, 2021
Parties' Responses to Objections and Statements in Support (if any)	January 25, 2021
Final Approval Hearing	2 p.m., February 12, 2021

27 Public seating in the courtroom gallery is currently limited to no more than ten
28 individuals due to the ongoing COVID-19 pandemic, and class members will therefore be

1 given the option to speak at the hearing by phone as well as in person. The Notice shall be
2 amended to indicate to class members and their legal representatives that, if they wish to
3 speak at the hearing, their letter to Class Counsel must state whether they wish to speak in
4 person or by phone. By **January 15, 2021**, Class Counsel shall file a notice with the
5 number of individuals who have provided notice of their intent to appear at the final
6 approval hearing. Class members or their legal representatives who wish to listen to the
7 hearing over the phone rather than in person should contact Class Counsel. Class Counsel,
8 in coordination with courthouse staff, will provide a phone number for the class members
9 or their legal representatives to call to listen to the hearing.

10 Accordingly,

11 **IT IS ORDERED** the Joint Motion for Preliminary Approval of the Parties'
12 Settlement Agreement (Doc. 529) is **GRANTED**.

13 **IT IS FURTHER ORDERED:**

14 1. The parties have executed the settlement agreement to settle and resolve this
15 action on a class-wide basis, subject to final approval by the Court.

16 2. The terms of the settlement agreement are preliminarily approved as fair,
17 reasonable, and adequate for the classes, subject to further consideration in connection with
18 the hearing for final approval.

19 3. The form of the parties' proposed Notice of Class Action Settlement, Doc.
20 529-6 (the "Notice") is approved.

21 4. The following plan for providing notice of the settlement is approved: On or
22 before **November 23, 2020**, Defendants shall, at their sole expense, take the following
23 steps to notify class members and their legal representatives of the proposed settlement
24 agreement:

25 a. The Department of Child Safety ("DCS") shall prominently post a copy of
26 this order and the Notice on the DCS website and shall maintain the posting
27 until **February 12, 2021**.

- 1 b. DCS shall post the Notice in a conspicuous place in the DCS main offices,
2 and in each field office.
- 3 c. DCS shall transmit a copy of the Notice and may transmit one or more
4 accompanying letters signed by authorized representatives of DCS and
5 approved as to content by Class Counsel to the persons and locations listed
6 below. Where appropriate, DCS shall request in any letter that recipients
7 share information with class members in their care, leaving it to recipients to
8 determine what communication is warranted in light of the child's age, the
9 child's development, or other circumstances:
- 10 i. DCS will e-mail a copy of the Notice, along with a link to the settlement
11 agreement, to all DCS staff providing case management services to
12 class members.
- 13 ii. DCS will e-mail (or mail, if only a mailing address is available) the
14 Notice and any accompanying letter to each grantee or contractor
15 providing case management services to class members. DCS will direct
16 their grantees and contractors to provide a copy of the Notice and any
17 accompanying letter to all of their case management staff and to post a
18 copy of the Notice in their offices in a conspicuous place.
- 19 iii. DCS will e-mail (or mail, if only a mailing address is available) the
20 Notice and any accompanying letter to each Home Recruitment Study
21 and Supervision grantee or contractor. DCS will direct their grantees
22 and contractors to provide a copy of the Notice and any accompanying
23 letter to their staff and to post a copy of the Notice in their offices in a
24 conspicuous place.
- 25 iv. DCS will e-mail (or mail, if only a mailing address is available) the
26 Notice and any accompanying letter to the last known address for the
27 parent(s) of each class member for whom parental rights have not been
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- 1 terminated and to the last known address of any relative placement of
2 any class member.
- 3 v. DCS will e-mail (or mail, if only a mailing address is available) the
4 Notice and any accompanying letter to all placement providers for
5 children in DCS custody. This includes but is not limited to kinship,
6 family foster care, therapeutic foster care, and congregate care
7 placement providers.
- 8 vi. DCS will e-mail (or mail, if only a mailing address is available) the
9 Notice and any accompanying letter to all class members in an
10 independent or transitional living arrangement or who are currently in
11 an independent living program.
- 12 vii. DCS will e-mail (or mail, if only a mailing address is available) the
13 Notice and any accompanying letter to each person who serves as a
14 Guardian ad Litem with respect to any Class Member.
- 15 d. As to the following, DCS shall e-mail (or mail, if only a mailing address is
16 available) the Notice and any accompanying letter to the following entities,
17 ask that the Notice be disseminated to their staff or members and posted in
18 locations most likely to be seen by class members and their legal
19 representatives, and ask that the information remain posted until **February**
20 **12, 2021.**
- 21 i. The presiding judge of each Arizona Superior Court or, if the county
22 has a Juvenile Court, the presiding judge of the Juvenile Court; and
- 23 ii. Each congregate care placement, group home, behavioral health
24 inpatient facility, and behavioral health residential facility utilized by
25 DCS.
- 26 5. DCS shall file an affidavit with the Court on or before **November 23, 2020**
27 certifying compliance with the notice requirements of this order.
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1 6. The method of notice set forth above protects the interests of the Named
2 Plaintiffs, the classes, and Defendants, is the best notice practicable under the
3 circumstances, and is reasonably calculated to apprise class members of the proposed
4 settlement agreement and give them an opportunity to respond. In addition, the Court finds
5 that the method of notice is reasonable and constitutes due, adequate, and sufficient notice
6 to all persons entitled to receive notice of the proposed settlement and meets all applicable
7 requirements of law, including but not limited to Fed. R. Civ. P. 23 and the Due Process
8 Clause of the Fourteenth Amendment of the United States Constitution.

9 7. The parties may make non-material changes to the method and form of notice
10 so long as class counsel and Defendants counsel agree and one of the parties notifies the
11 Court of the change before the Final Approval Hearing. Neither the insertion of dates nor
12 the correction of typographical or grammatical errors will be deemed a change to the Notice
13 Plan.

14 8. Nothing in this Order requires Defendants to respond or provide legal advice
15 to any member of the classes, any Guardian ad Litem or advocate, or any other person or
16 entity in connection with the settlement agreement. Defendants should refer any outside
17 inquiries to the method of acquiring additional information stated in the notice or a class
18 member's legal representative.

19 9. The parties' motion for Final Approval of the Settlement Plan and Attorney's
20 Fees shall be filed on or before **December 21, 2020**.

21 10. Objections to, statements in support of, or other comments concerning the
22 proposed settlement by class members or their legal representatives will be considered if
23 they are received on or before **January 11, 2021** at either of the following:

- 24 a. Arizona Center for Law in the Public Interest, Attention: Anne C. Ronan,
25 514 West Roosevelt Street, Phoenix, Arizona 8503, aronan@aclpi.org; or
- 26 b. Children's Rights, Attention: Harry Frischer, 88 Pine Street, Suite 800, New
27 York, New York 10005, hfrischer@childrensrights.org.

1 11. Class members, or their legal representatives, who wish to be heard orally in
2 support of or in opposition to the proposed settlement at the Final Approval Hearing must
3 submit with their objections, support, or comments a written notification of their desire to
4 appear personally or by telephone, and briefly indicate (if in opposition to the settlement)
5 the nature of the opposition on or before **January 11, 2021**. Class Counsel shall file a
6 notice by **January 15, 2021** with the number of individuals who have provided notice of
7 their intent to be heard at the final approval hearing.

8 12. Unless otherwise ordered by the Court, no untimely objection to or other
9 comment concerning the proposed settlement will be heard.

10 13. Any class member who does not make his or her objection in the manner
11 provided in this Order will be deemed to have waived any such objection and will forever
12 be barred from making any objection to the settlement agreement.

13 14. Class Counsel shall provide Defendants' Counsel with a copy of any
14 objections, support, or comments received from class members, their legal representatives,
15 or any other person, entity, or interested party regarding the agreement and any information
16 received concerning paragraph 11 no later than 5 days following receipt.


17 15. Class Counsel shall file, under seal if appropriate, all written submissions
18 received from class members, their legal representatives, or other interested parties, along
19 with any written responses to such submissions, on or before **January 25, 2021**.

20 16. A hearing concerning final approval of the settlement will be held in
21 **Courtroom 605** at the Sandra Day O'Connor U.S. Courthouse, 401 W. Washington St.,
22 Phoenix, AZ 85003 at **2 p.m. on February 12, 2021**. Due to the ongoing COVID-19
23 pandemic the Court is making the following provisions to allow for remote participation in
24 the hearing: those class members, or their legal representatives, who wish to listen to the
25 hearing telephonically should contact Class Counsel. Class Counsel will provide the phone
26 number those class members or their legal representatives should call. Class Counsel will
27 also serve as the point of contact for those class members or their legal representatives who
28 timely provided notice of their intent to be heard at the final approval hearing by phone.

1 17. At the Final Approval Hearing, the Court will consider the fairness,
2 reasonableness, and adequacy of the Settlement and award of attorney's fees and costs, the
3 entry of a final Order or Judgment with respect to the Class, and any other related matters.

4 18. Class Counsel and counsel for Defendants shall be prepared at the Final
5 Approval Hearing to respond to objections filed by class members or their legal
6 representatives and to provide other information, as appropriate, on why the proposed
7 settlement should be approved.

8 Dated this 9th day of October, 2020.

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12 Honorable Roslyn O. Silver
13 Senior United States District Judge
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