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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAM JOHNSON, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

JENNIFER SHAFFER, et al.,

Defendants.

No. 2:12-cv-1059 KJM AC P

ORDER

The parties to this action move jointly for final approval of class action settlement. (ECF No. 158.) The court held a hearing on the matter on December 18, 2015, at which Keith Wattley appeared for the plaintiff class and Jessica Blonien and Heather Heckler appeared for defendants. As explained below, the court GRANTS the parties' motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This class action lawsuit challenges the constitutionality of the protocol adopted by California's Board of Parole Hearings' (Board) Forensic Assessment Division (FAD) for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. The class consists of California state prisoners who are serving life sentences and are eligible for parole consideration after having served their minimum terms. (ECF No. 40 at 14; ECF No. 44 at 2.)

1 This action was filed on April 20, 2012. (ECF No. 1.) Following service of
2 process, defendants moved dismiss. (ECF Nos. 10, 11.) By order filed October 18, 2012,
3 defendants' amended motion to dismiss was granted with leave to file an amended complaint.
4 (ECF No. 17.) On November 15, 2012, plaintiff filed an amended complaint containing sixteen
5 causes of action, (ECF No. 18), which defendants answered on December 6, 2012. (ECF No. 21.)
6 Thereafter, discovery commenced, plaintiff moved for class certification, (ECF No. 29), and
7 defendants moved for summary judgment. (ECF No. 30.) On November 1, 2013, the magistrate
8 judge issued findings and recommendations recommending that the motion for class certification
9 be granted and defendants' motion for summary judgment be granted in part and denied in part.
10 (ECF No. 40.) Specifically, the magistrate judge recommended that the motion be granted as to
11 plaintiff's equal protection and pendent state law claims, denied as to plaintiff's due process
12 claims insofar as defendants relied on *Swarthout v. Cooke*, 562 U.S. 216 (2011) to support the
13 motion, and denied in all other respects without prejudice to renewal after completion of
14 discovery. (ECF No. 40 at 21-22.) The findings and recommendations were adopted in full by
15 this court on March 31, 2014, (ECF No. 44), leaving only plaintiff's due process claims. (ECF
16 No. 62 at 3.)

17 On April 14, 2014, defendants filed a petition for permission to appeal the order
18 granting class certification. (*See* ECF No. 47.) On June 12, 2014, the United States Court of
19 Appeals for the Ninth Circuit denied the petition. (ECF No. 53.)

20 On September 26, 2014, defendants filed a motion for judgment on the pleadings.
21 (ECF No. 55.) On December 3, 2014, the magistrate judge issued findings and recommendations
22 recommending that the motion be granted as to four of the six claims remaining in the action and
23 denied as to two claims. (ECF No. 62.) The two surviving claims were characterized as "(1) a
24 Due Process violation predicated upon the denial of a fair and unbiased parole procedure (the
25 'systemic bias' claim), as principally embodied in the First and Eleventh Claims; and (2) a Due
26 Process violation predicated upon the denial of fair and unbiased parole panels, as principally
27 embodied in the Tenth Claims." (ECF No. 62 at 26.) Five of the claims were "construed not as
28 independent causes of action but as additional factual predicates for the overarching bias claims."

1 (ECF No. 62 at 26.) On May 15, 2015, this court adopted the findings and recommendations and
2 set a status conference for August 13, 2015. (ECF No. 68.)

3 Thereafter, on July 17, 2015, the parties filed a joint status report informing the
4 court of substantial progress in settlement negotiations. (ECF No. 73.) The court directed the
5 parties to file a further status report on their settlement efforts by August 11, 2015. (ECF No. 76.)
6 The parties filed a joint statement on August 11, 2015, indicating that settlement negotiations had
7 been productive and they anticipated filing final settlement documents with the court by
8 September 10, 2015. (ECF No. 77.) The court continued the status conference, (ECF No. 78),
9 and on September 10, 2015, the parties filed a joint motion for preliminary approval of their
10 settlement agreement. (ECF No. 79.)

11 On October 1, 2015, the court held a telephonic status conference on the motion
12 for preliminary approval. (ECF No. 82.) Following the status conference, the court granted the
13 motion, directed the parties to file a final version of the proposed settlement agreement removing
14 paragraph 15 and incorporating deadlines for posting notice in prison housing units, postmarking
15 comments to the court, filing final briefing, and setting a date for the final fairness hearing. (ECF
16 No. 84.)

17 The court received numerous comments from prison inmates. (ECF Nos. 91-114,
18 116-132, 134-153, 155-157, 160.) On December 18, 2015, the court held a final fairness hearing.
19 (ECF No. 161.) During the hearing, the court discussed with the parties issues raised in the
20 objections, including (1) whether risk assessment interviews can be recorded; (2) whether the risk
21 assessment tools have been validated or found reliable or proper for use in predicting potential
22 recidivism among life inmates; and (3) whether there is a procedure for objecting to factual errors
23 and/or conclusions in risk assessments. (ECF No. 163.) The court directed the parties to file
24 further briefing concerning the validity of the risk assessment tools at issue. *Id.* at 8-9. The
25 parties filed a joint brief and exhibits on January 8, 2016, (ECF Nos. 165, 166), which the court
26 has now considered.

1 II. THE KEY TERMS OF THE SETTLEMENT AGREEMENT

2 Under the settlement agreement, defendants have agreed to the following changes
3 in evaluating class members' eligibility for parole:

4 1. The Board agreed to, and did, submit a Budget Change Proposal to obtain
5 additional funding in order to administer Comprehensive Risk Assessments (CRAs) every three
6 years. (ECF No. 83 at 3.) The Board obtained the additional funding, and will now begin
7 preparing new CRAs every three years for parole hearings scheduled on or after June 1, 2016,
8 where the existing CRA is more than three years old. (*Id.*) Similarly, a new CRA will be
9 prepared for hearings "advanced as a result of a petition to advance or the Board's administrative
10 review process under California Penal Code § 3041.5(b)(4) or (d)(1)" where the existing CRA is
11 more than three years old. These changes will be reflected in revised regulations. (*Id.*) Class
12 counsel will be given multiple opportunities to comment to the Board and the Office of
13 Administrative Law (OAL) on the proposed regulations. (*Id.* at 4.) As a result of these changes,
14 the Board will no longer conduct Subsequent Risk Assessments. (*Id.*)

15 2. The agreement provides for class counsel to present an expert to the Board if,
16 before December 31, 2016, the Board proposes any changes in how or whether the CRA will be
17 administered, including any changes in the three risk assessment tools called into question by this
18 action: the HCR-20 Version 3, PCL-R, and Static 99-R. The same expert presentation
19 opportunity arises if the Board proposes using a risk-assessment tool other than the foregoing
20 three tools. (*Id.*) The expert, who "must have experience with use of risk assessments in a
21 correctional setting", will be allowed to speak and answer questions for up to two hours. (*Id.*)

22 3. The agreement provides for two presentations by the Board's Chief
23 Psychologist to the Board's commissioners in open session, one regarding recidivism rates for
24 long-term offenders and one regarding use of the Static 99-R, "a risk assessment tool used to
25 predict an offender's risk of sexual recidivism." (*Id.* at 4.) The information presented to the
26 Board will be put in text documents "and made available to class members through class counsel,
27 on the Board's website . . . and . . . emailed to all attorneys on file with the Board who are
28 currently representing life prisoners." (*Id.* at 4-5.) In addition, when the Static 99-R is used for a

1 risk assessment, the CRA “will inform the reader that the Static 99-R score alone generally does
2 not assess dynamic characteristics that may mitigate or elevate a prisoner’s risk.” (*Id.* at 5.)
3 Going forward, “CRAs will clarify that the Overall Risk Rating is relative to other life prisoners”
4 and inform the report reader that “generally speaking, the current recidivism rates for long term
5 offenders are lower than those of other prisoners released from shorter sentences.” (*Id.*)

6 4. The Board will develop a formal process for inmates or their attorneys “to
7 lodge timely written objections asserting factual errors in a CRA (to be defined in the regulations)
8 before their parole consideration hearing occurs.” (*Id.*) The Board will provide a written
9 response to timely objections. (*Id.*) These changes will be incorporated in proposed regulations
10 to be submitted to the OAL by July 1, 2016. (*Id.*) Class counsel will be given multiple
11 opportunities to comment to the Board and the OAL on the proposed regulations. (*Id.*)

12 5. All defendants will be dismissed except defendant Shaffer, the Executive
13 Officer of the Board. (*Id.*) The court will retain jurisdiction over this action until January 1,
14 2017. (*Id.*) Plaintiffs may seek an extension of the court’s supervision based on evidence of
15 material non-compliance with the agreement. (*Id.*)

16 III. THE SETTLEMENT AND FAIRNESS

17 A. Legal Framework

18 When parties settle a class action, a court cannot simply accept the parties'
19 resolution; rather it must also satisfy itself the proposed settlement is “fundamentally fair,
20 adequate, and reasonable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). After
21 the initial certification and notice to the class, a court conducts a fairness hearing before finally
22 approving any proposed settlement. *Narouz v. Charter Commc'ns, Inc.*, 591 F.3d 1261, 1267 (9th
23 Cir.2010); Fed. R. Civ. P. 23(e)(2) (“If the proposal would bind class members, the court may
24 approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”). A court
25 must balance a number of factors in determining whether a proposed settlement is in fact fair,
26 adequate and reasonable:

27 [(1)] the strength of the plaintiffs’ case; [(2)] the risk, expense,
28 complexity, and likely duration of further litigation; [(3)] the risk of
maintaining class action status throughout the trial; [(4)] the amount

1 offered in settlement; [(5)] the extent of discovery completed and
2 the stage of the proceedings; [(6)] the experience and views of
3 counsel; [(7)] the presence of a governmental participant; and [(8)]
4 the reaction of the class members to the proposed settlement.

5 *Hanlon*, 150 F.3d at 1026; *Adoma v. Univ. of Phx.*, 913 F.Supp.2d 964, 974–75 (E.D.Cal.2012).
6 The list is not exhaustive, and the factors may be applied differently in different circumstances.
7 *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th
8 Cir.1982).

9 The court must consider the settlement as a whole, rather than its component parts,
10 in evaluating fairness; the settlement “must stand or fall in its entirety.” *Hanlon*, 150 F.3d at
11 1026. Ultimately, the court must reach “a reasoned judgment that the agreement is not the
12 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
13 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for*
Justice, 688 F.2d at 625.

14 B. The Strength of Plaintiff’s Case

15 When assessing the strength of plaintiff’s case, the court does not reach “any
16 ultimate conclusions regarding the contested issues of fact and law that underlie the merits of
17 [the] litigation.” *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 720 F.Supp. 1379, 1388
18 (D.Ariz.1989). The court cannot reach such a conclusion because evidence has not been fully
19 presented and the “settlements were induced in large part by the very uncertainty as to what the
20 outcome would be, had litigation continued.” *Id.* Instead, the court is to “evaluate objectively the
21 strengths and weaknesses inherent in the litigation and the impact of those considerations on the
22 parties’ decisions to reach these agreements.” *Id.*

23 A central issue in this action is the reliability of the three risk assessment tools
24 referred to in the settlement agreement when used to evaluate the suitability of life inmates for
25 parole. The parties disagree about the reliability of the instruments for use with California’s life
26 inmate population. (ECF No. 165 at 2-5.) The parties agree, however, that despite “extensive
27 discovery” no evidence was presented “to support the claim that the Board intentionally chose
28 flawed risk instruments.” (ECF No. 158 at 11.)

1 The court agrees that evidence of such intent would be required for named plaintiff
2 to prevail on his remaining claims. In light of the uncertainties of litigating this case in the face of
3 this apparent evidentiary void, an immediate benefit to the purported class members is in their
4 interest. *See Officers for Justice*, 688 F.2d at 625 (noting that “voluntary conciliation and
5 settlement are the preferred means of dispute resolution”).

6 This factor favors approving the settlement.

7 C. The Risk, Expense, Complexity and Likely Duration of Further Litigation

8 “Approval of settlement is ‘preferable to lengthy and expensive litigation with
9 uncertain results.’” *Morales v. Stevco, Inc.*, No. 09–00704, 2011 WL 5511767, at *10 (E.D.Cal.
10 Nov. 10, 2011) (quoting *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc. (DIRECTV)*, 221
11 F.R.D. 523, 529 (C.D.Cal.2004)). The Ninth Circuit has explained “there is a strong judicial
12 policy that favors settlements, particularly where complex class action litigation is concerned.” *In*
13 *re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.2008) (citing *Class Plaintiffs v. City of*
14 *Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992)).

15 Here, the parties agree there are significant risks associated with continued
16 litigation of the claims in this case. The parties’ dispute over the reliability of use of the risk
17 assessment tools combined with the apparent dearth of evidence that defendants intentionally
18 chose flawed risk instruments presents obstacles for plaintiff in pursuing these claims further. In
19 response to the court’s directive at the fairness hearing, the parties have provided an extended list,
20 accompanied by evidence, of “studies and literature validating the risk assessment tools,” which
21 defendants aver “support use of the risk assessment tools on California life inmates.” ECF No.
22 165 at 2-5 and evidence cited therein. This highlights the nature of the dispute, which is not
23 resolved by the court in approving this settlement agreement. The difficulties plaintiff faces in
24 turn would result in expenditure of more time and resources, for all parties. Given the high costs
25 associated with litigating the claims at issue, and the potential lengthy duration of litigation, the
26 court finds this factor too weighs in favor of approval.

27 These factors weigh in favor of approving the settlement.

1 D. The Settlement Agreement

2 As discussed above, the settlement negotiated by the parties provides for new risk
3 assessments for class members every three years, and defendants have agreed to develop a
4 process by which inmates can submit formal written objections to factual findings in the risk
5 assessments. These changes will be formalized in new regulations and class counsel will have
6 opportunities to comment on the proposed regulations before they are adopted. The agreement
7 also provides for two presentations to the Board, one on recidivism rates of long-term offenders,
8 and one on use of one of the risk assessment tools at issue. In addition, the agreement provides
9 that class counsel will be given an opportunity to present expert testimony to the Board if by the
10 end of calendar year 2016 the Board proposes any changes in administration of the risk
11 assessments, including the tools used. Finally, the agreement provides for this court’s continuing
12 supervision until January 1, 2017, or longer if it is demonstrated that material compliance with the
13 agreement has not been achieved.

14 Although the settlement does not require use of different risk assessment tools for
15 use with California’s life inmate population, it does incorporate several mechanisms that address
16 concerns of possible bias in the risk assessment process and parole decisions based on such risk
17 assessments. The parties have jointly moved the court to approve the settlement agreement,
18 which was reached after “extensive arms-length negotiation.” ECF No. 158 at 11. The nature of
19 the settlement agreement weighs in favor of approval.

20 E. The Extent of Discovery and the Stage of the Proceedings

21 This action has been pending for almost four years. The class was certified in
22 March 2014, (ECF No. 44), and the parties have engaged in “extensive discovery”, ECF No. 158
23 at 9. In addition, the claims have been narrowed through resolution of a motion for summary
24 judgment and a motion for judgment on the pleadings. (ECF Nos. 44, 68.) The court is satisfied
25 that the proceedings in this matter have provided the parties with sufficient information to enable
26 them to reach a meaningful settlement agreement.

1 F. The Experience and Views of Counsel

2 Class counsel is the founder and managing attorney of a non-profit organization
3 that “provides advocacy and representation on behalf of individual prisoners and parolees,
4 educates the public about the rights of life-term prisoners and parolees, and provides legal
5 trainings to attorneys and law students across the state.” (ECF No. 86-1 ¶¶ 1-2.) He has
6 “litigated hundreds of prisoner and parolee cases over the last 15 years,” including *In re*
7 *Rutherford*, No. SC13599A (Superior Court for Marin County), a class action lawsuit that
8 preceded this one and whose class had interests “closely aligned” with the present class. (*Id.* ¶ 2;
9 ECF No. 40 at 19.) Defendants are represented by two attorneys with the California Office of the
10 Attorney General, one of whom is a supervising deputy attorney general. The court has already
11 found that counsel for both sides are “experienced and knowledgeable.” (ECF No. 84 at 2.)
12 Counsel agree that the settlement is fair and “benefits class members while eliminating the risk of
13 trial for both sides.” ECF No. 158 at 11. Accordingly, given the experience of counsel and their
14 views, this factor favors approving the settlement. *See Barbosa v. Cargill Meat Solutions Corp.*,
15 297 F.R.D. 431, 447 (E.D.Cal.2013).

16 G. The Presence of a Governmental Participant

17 Here, defendants are state officials sued in their official capacities. (ECF No. 18 at
18 3-4.) There is no separate governmental participant involved in the issues presented by this
19 litigation. *Cf. Hanlon, supra* (class action litigation against Chrysler Corporation seeking
20 replacement of defective latches on minivans and damages paralleled National Highway Traffic
21 Safety Administration investigation resulting in a voluntary resolution under which Chrysler
22 agreed to, *inter alia*, replace the latches.) This factor is neutral.

23 H. The Reaction of the Class Members to the Proposed Settlement

24 As noted above, the court received numerous comments from prison inmates.
25 (ECF Nos. 91-114, 116-132, 134-153, 155-157, 160.)¹ The number of objections and the content

26 _____
27 ¹ On February 8, 2016, inmate Avon Davies filed a document styled “Ex Parte Request for
28 Subclass Certification, for Permission to Reply to Amended Stipulated Settlements ‘Proposed Findings,’ and for issuance of Findings and Orders related to these matters.” The court construes this document as a request for leave to file late objections to the proposed settlement and, so

1 of those objections raised concerns about the settlement that were discussed with the parties at the
2 final fairness hearing. One of those objections, the validity of the risk assessment tools, was the
3 subject of further briefing required by the court. The court is satisfied that the objections have
4 been addressed by counsel and do not outweigh the other factors favoring approval of the
5 settlement agreement.

6 IV. FINAL APPROVAL OF THE CLASS SETTLEMENT IS APPROPRIATE

7 In conclusion, after considering the parties' submissions and oral argument at the
8 final fairness hearing, and after considering the relevant factors, the court finds final approval of
9 the class settlement to be appropriate. The court is mindful that “voluntary conciliation and
10 settlement are the preferred means of dispute resolution” and that “[t]his is especially true in
11 complex class action litigation. . . .” *Officers for Justice*, 688 F.2d at 625. The court concludes
12 that the parties have reached a fair and adequate settlement and have satisfactorily addressed the
13 questions raised by class members’ objections.

14 Accordingly, IT IS HEREBY ORDERED that:

15 1. The Clerk of the Court is directed to file the comments received from inmate
16 Avon Davies nunc pro tunc to February 8, 2016; and

17 2. The joint motion of the parties for final approval of the settlement agreement
18 (ECF No. 158) is GRANTED.

19 DATED: May 26, 2016.

20
21 
22 UNITED STATES DISTRICT JUDGE
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27 construed, the request will be granted. The Clerk of the Court will be directed to file inmate
28 Davies’ comments nunc pro tunc to February 8, 2016.